Michigan Law Review

Volume 40 | Issue 3

1942

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MICHIGAN LAW REVIEW

VOL. 40 JANUARY, 1942 No. 3

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MANY problems involving powers of appointment depend for their solution on the classification of the power in question as general or special. It is now clearly established in English law and in most American jurisdictions that this classification depends on the persons to whom an appointment may be made. The fact that the power is exercisable on a contingency[1] or in a specified manner[2] does not affect the character of the power. Nor is it relevant for the purpose of classification that the power permits the appointment of a limited interest only.[3] A general power is usually said to be one which enables

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[1] Wandesford v. Carrick, I. R. 5 Eq. 486 (1871); Charlton v. Attorney General, 4 App. Cas. 427 at 446 (1879); Forney's Estate, 280 Pa. 282, 124 A. 424 (1924); In re Twitchell's Estate, 284 Pa. 135, 130 A. 324 (1925); Cowman v. Classen, 156 Md. 428, 144 A. 367 (1929); J. Gilmore Fletcher, Exr., 29 B. T. A. 503 (1933); Johnstone v. Commissioner, (C. C. A. 9th, 1935) 76 F. (2d) 55. See, however, Fidelity Trust Co. v. McCaughn, (D. C. Pa. 1924) 1 F. (2d) 987.

[2] Johnson v. Cushing, 15 N. H. 298 (1844); Webb v. McCracken, 3 Comm. L. R. (Aust. High Ct.) 1018 at 1024 (1906); Greenway v. White, 196 Ky. 745, 246 S. W. 137 (1922); Whitlock-Rose v. McCaughn, (D. C. Pa. 1926) 15 F. (2d) 591 at 592, affd. (C. C. A. 3d, 1927) 21 F. (2d) 164; Lee v. Commissioner, (App. D. C. 1932) 57 F. (2d) 399 at 401, cert. den., Lee v. Burnet, 286 U. S. 563, 52 S. Ct. 645 (1932).

[3] Farmers' Loan & Trust Co. v. Kip, 192 N. Y. 266 at 285, 85 N. E. 59 (1908); Fidelity-Philadelphia Trust Co. v. McCaughn, (C. C. A. 3d, 1929) 34 F. (2d) 600, cert. den., 280 U. S. 602, 50 S. Ct. 85 (1929); Camden Safe Deposit & Trust Co., Exrs., 30 B. T. A. 287 at 290 (1934); Harry J. Brown, 38 B. T. A. 298 (1938); Morgan v. Commissioner, 309 U. S. 78 at 83, 60 S. Ct. 424 (1940).

In the New York statutory system of powers, a power is not considered general unless it enables the donee to appoint the whole fee. N. Y. Real Property Law, 49 Consol. Laws (McKinney, 1937), §§ 134, 135. Some other states have adopted this rule, e.g., Mich. Comp. Laws (1929), §§ 12999, 13000, Stat. Ann. (Henderson, 1936), §§ 26.95, 26.96; Minn. Stat. (Mason, 1927), §§ 8111, 8112; Wis. Stat. (1939), §§ 232.05, 232.06. See also 3 PROPERTY RESTATEMENT, § 320 (1940), and the cryptic remark in 1 CHANCE, TREATISE ON POWERS 431 (1841): "Sometimes a

the donee of the power to appoint to anyone he pleases, including himself.[4] A special power is usually defined as one which the donee may exercise in favor of certain specified persons or classes.[5] Sometimes it is said that these specified persons or classes do not include the donee.[6]

The courts have had considerable difficulty in determining the nature of certain powers which do not fall squarely within the above categories. Thus, a power to appoint to anybody except certain named persons is not obviously general since it does not confer on the donee complete freedom of choice in the selection of appointees, but it would be absurd to hold that the possible appointees are specified individuals or classes. A power to appoint to anybody except the donee raises a similar problem. It does not comply with the traditional definition of a general power since the donee cannot appoint to himself. On the other hand, it cannot be said that exclusion of the donee makes the possible appointees a limited or defined class. A power to appoint to a limited class which includes the donee is yet another example of the weakness of the commonly accepted definitions.

I

ANALYSIS OF THE CASE LAW

A. *A Power to Appoint to a Limited Class which Includes the Donee*

Where the donor creates a power of appointment exercisable in favor of a limited class, and the donee falls within the description of the class, the problem at once arises whether the donee may appoint to himself. If he cannot, there is no question as to the nature of the power. It is obviously special.

power, though general in its objects, is expressly confined to the lives of the appointees; various questions may arise on such a power."

[4] 2 COKE ON LITTLETON, INSTITUTES, 17th ed., 271b, Butler's note VII.2 (1817); FARWELL, POWERS, 3d ed., 8 (1916): KALES, ESTATES, FUTURE INTERESTS, 2d ed., § 609 (1920); SUGDEN, POWERS, 8th ed., 394 (1861); 1 SIMES, FUTURE INTERESTS, § 246 (1936); Re Dilke, [1921] 1 Ch. 34 at 41-42; Morgan v. Commissioner, 309 U. S. 78 at 81, 60 S. Ct. 424 (1940).

[5] See note 4, supra, and Greenway v. White, 196 Ky. 745, 246 S. W. 137 (1922); Lyon v. Alexander, 304 Pa. 288, 156 A. 84 (1931); Johnstone v. Commissioner, (C. C. A. 9th, 1935) 76 F. (2d) 55.

[6] Morgan v. Commissioner, 309 U. S. 78 at 81, 60 S. Ct. 424 (1940); Gray, "Release and Discharge of Powers," 24 HARV. L. REV. 511 at 512 (1911); Leach, "Powers of Appointment," 24 A. B. A. J. 807 at 808 (1938); 1 SIMES, FUTURE INTERESTS, § 246 (1936).

In *Wetmore v. Henry*,[7] an Illinois case, the testatrix devised and bequeathed her residuary real and personal estate to her nephew, *W*, on trust to distribute it among her heirs, of whom he was one, in such shares as he should deem each of them worthy. *W* appointed part only of the property before his death. The Supreme Court of Illinois held that the power was in trust, and that it would, therefore, distribute the property unappointed in equal shares among the objects, including *W*. The will contained a provision that any property not distributed by *W* within two years from the probate of the testatrix's will should be deemed the proportion retained by *W* for himself, "as I have full faith that he will not reserve more than his equitable share." The court ordered the distribution because *W* had died within the two-year period.

Wetmore v. Henry suggests that the donee, *W*, was able to appoint to himself. A different view was taken in *Re Lawler's Will*,[8] a New York case. The residue of the testator's estate was given to the executor to be distributed among certain named persons, of whom the executor was one. The New York Supreme Court held that the donee must either waive all right to take under the residuary clause or else refuse to act as executor. The court followed *Rogers v. Rogers*,[9] another New York decision, in which case the testator left property to five executors, or to such of them as should qualify, in trust for the maintenance of certain beneficiaries, one of whom was the testator's wife. She was also one of the executors, and she was, in fact, the only executor to qualify. The court decided that it would itself administer the trust, and that the wife could not act without its authorization.

In English law, the question whether the donee can appoint to himself is clearly settled. In an early case, *Warburton v. Warburton*,[10] the residue of the testator's personalty and £400 to be raised out of the realty were given to two daughters of the testator, "to be disposed of by them to the use of themselves, their brothers and sisters, or to such of them and in such proportion, as they should judge most fit and convenient, according to their needs and necessities." The two daughters argued that the power was wholly discretionary, and that they could, therefore, appoint to themselves to the exclusion of their brothers and sisters. The Lord Keeper, Sir Nathan Wright, rejected this argument, and decreed that a double share should be appointed to the eldest son,

[7] 259 Ill. 80, 102 N. E. 189 (1913).
[8] 215 App. Div. 506, 213 N. Y. S. 723 (1926).
[9] 111 N. Y. 228, 18 N. E. 636 (1888).
[10] 2 Vern. 420, 23 Eng. Rep. 869, affd. 4 Bro. P. C. 1, 2 Eng. Rep. 1 (1702).

the heir, "as looking upon him to stand most in need thereof." The House of Lords confirmed this decree, but a century later Lord Alvanley[11] referred to *Warburton v. Warburton* as a "very extraordinary" case.

> ". . . There the Lord Keeper Wright and the House of Lords seem to have thought that the trust devolved upon the Court. The reason is a very odd one. I hope they did not lay much stress upon his being bred to the law. It is hardly to be collected, what construction they put upon it. It seems, as if they exercised the power themselves: a power, which of late the Court has disclaimed; and I hope, that will always be followed. If the power is not executed properly, the rule now is to set aside the execution, and give the fund equally. But I suppose, the construction there was, that it was a general trust, to be exercised for their own benefit; and therefore the Court was very jealous; and completely controlled it."[12]

It is not clear upon what ground Lord Alvanley disapproved the *Warburton* case. It does not appear to be open to objection on the ground that there was no rule laid down for the execution of the trust. Where trustees are given a discretion which is to be exercised on matters of opinion and judgment, the court will not "substitute the master." But if the discretion is to be exercised on matters of fact, the court will itself exercise the discretion if the trustees fail to exercise it or exercise it improperly.[13] There is a decision of Lord Hardwicke's[14] which shows that in *Warburton v. Warburton* there was that which could be construed as a rule laid down for the execution of the trust, or, in other words, the daughters were to exercise a discretion based on matters of fact. Lord Hardwicke held that where there was a discretion given to trustees to distribute a fund among the settlor's relatives where the trustees should see most necessity and as they should think most equitable and just, in such case there was a rule laid down for the exercise of the trustees' discretion which the court could itself apply on the failure of the trustees to execute the trust.

> ". . . here is a rule laid down. . . . The trustees are to judge on the necessity and occasions of the family. . . . That is a judgment to be made on facts existing; so that the court can make the judgment

[11] Kemp v. Kemp, 5 Ves. Jun. 849, 31 Eng. Rep. 891 (1801).

[12] Id. at 859.

[13] Walker v. Walker, 5 Madd. 424 at 426-427, 56 Eng. Rep. 957 (1820); LEWIN, TRUSTS, 14th ed., 723-724 (1939).

[14] Gower v. Mainwaring, 2 Ves. Sen. 87, 28 Eng. Rep. 57 (1750). But see SUGDEN, POWERS, 8th ed., 601 (1861).

as well as the trustees; and when informed by evidence of the necessity, can judge what is equitable and just on this necessity."[15]

In another case[16] of the same year as the one from which this statement is quoted, Lord Hardwicke said of *Warburton v. Warburton* that "there was a rule prescribed by the testator for the exercise of the discretion of the trustees, viz. according to their need and necessity."

Lord Alvanley's strictures may, however, be based upon another ground. It can hardly be objected that in the *Warburton* case the power was not in trust so that there was no ground for the intervention by the court and its exercise of the power. Lord Alvanley seems to think that there was a power coupled with a trust in that case. But he may have objected to the case on the ground that the trustees had not shown any intention to exercise their discretion improperly. The court's action, therefore, unwarrantably deprived them of all discretion whatsoever.

The significance of *Warburton v. Warburton* is this: It is sometimes said that the characteristic feature of a general power is the donee's ability to appoint to himself. In the *Warburton* case, the daughters were empowered, prima facie at least, to appoint to themselves. That case, however, shows the weakness of any such inflexible criterion. The court, by finding a trust and a rule laid down for its execution, limited, and perhaps completely destroyed, the ability of the trustees to appoint to themselves. In fact, if Lord Alvanley's suggestion is correct, the court was eager to control the donees precisely because they were empowered to appoint to themselves. There are evidences of this tendency in other English cases[17] as well as in the two New York decisions already cited.

Warburton v. Warburton does not decide that the donees were unable to make *any* appointment to themselves. This was, however, argued in *Supple v. Lowson.*[18] The testatrix gave the residue of her personal estate to her brother in trust to apply and dispose of it among her relations in such shares as he in his discretion should judge proper. It was argued that the donee should be deprived of his discretion because he was one of the relations, and, as a trustee, should have no part of the property. Sir Thomas Sewell, M.R., refused to take this view, holding that all relations were intended, and that the power was wholly discretionary.

[15] Id., 2 Ves. Sen. at 89.
[16] Potter v. Chapman, Amb. 98 at 100, 27 Eng. Rep. 61 (1750).
[17] E.g., Read v. Snell, 2 Atk. 642, 26 Eng. Rep. 785 (1743).
[18] Amb. 729, 27 Eng. Rep. 471 (1773).

In the next two cases, however, the right of the donee to appoint to himself was considered doubtful. It should be noted that in the earlier of them the power was held to be one coupled with a trust. In this case, *Reid v. Reid*,[19] the trustees of a deed had a discretionary power of distribution of a fund among a class of children who in default of appointment took equally. Originally there were five trustees, one of whom was a member of the designated class. After the death of the last survivor of the five trustees, three new trustees were appointed, one of whom again, *L*, was a member of the class. These three trustees appointed the fund, except for a minute part, among the surviving children, including *L*, in equal shares. It was claimed that the appointment of the new trustees and the disposition of the property by them were invalid. Sir John Romilly, M.R., inclined to the view that the appointment by the donee to himself might constitute a fraud on the power. In the course of argument he remarked:

> ". . . I have great difficulty in regard to the trustees. Is it a fraud on a discretionary power to appoint the fund to yourself? If £10,000 were settled on a class of children, in such portions as the trustees or the survivor of them, or the executors or administrators of such survivor, should think fit, and the executors of the surviving trustee thought fit to appoint two of the children trustees, who thereupon appointed the whole fund to themselves, could that be supported?"[20]

The technique suggested by Romilly for limiting or eliminating the right of a donee to appoint to himself is not the same as that adopted in *Warburton v. Warburton*. In the earlier case the power was treated as one coupled with a trust, for the execution of which, moreover, the donor had provided a rule. The doctrine of fraud upon a power, however, applies to all special powers, whether imperative (i.e., in trust) or not. There is a fraud upon a power where the power "has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power."[21] In the words of Farwell,[22] "A person having a limited power, must exercise it bona fide for the end designed; otherwise the execution is corrupt and void." The test of bona fide exercise "for the end designed" obviously gives the court more scope for controlling the donee than the approach adopted in the *Warburton* case, which requires a finding of both a trust

[19] 30 Beav. 388, 54 Eng. Rep. 939 (1862).
[20] Id. at 392.
[21] Vatcher v. Paull, [1915] A. C. 372 at 378 (P. C.), per Lord Parker.
[22] FARWELL, POWERS, 3d ed., 457 (1916).

and a rule laid down for its execution. In *Reid v. Reid* the Master of the Rolls finally decided that both the appointment of the new trustees and the appointment of the property were valid, but as to the latter he confessed "I have more doubt."[23]

In *Re Sinclaire's Estate*,[24] an Irish case decided a few years after *Reid v. Reid*, the testator devised and bequeathed his real and personal property to his wife, her heirs, executors, and administrators and assigns, "in trust for her, my said wife, and the children of our marriage, in such shares and proportions, and in such manner and form to all intents and purposes, as she shall by any deed or instrument in her lifetime, or by her last will and testament, or any codicil or codicils thereto, direct, limit or appoint." The wife appointed the whole property to *N*, his heirs and assigns, to hold it in trust for her, her heirs and assigns. Lynch, J., stated that the question whether the wife could appoint to herself was one of construction, but indicated that he would be reluctant to find that she was so empowered.

> ". . . whether, assuming a parent to be at once the donee, and one of the objects of such a power as this, that power could be well executed by the donee giving to himself the whole fund with a nominal exception, raises a question on which I do not express an opinion, but which I should hesitate to decide in the affirmative."[25]

He held that it was not a natural construction in the case before him that the widow was empowered to appoint to herself to the total exclusion of the children. This conclusion was in part based upon the doubtful ground that she was empowered to appoint by deed or will. This was taken to indicate that the appointees must be persons to whom an appointment could be made both by deed and will. She could not appoint to herself by will. This reasoning ignores the fact that if the power were general she could appoint by will to her estate.[26] Moreover, the assumption that the appointees must be persons to whom an appointment could be made by both will and deed seems to be an obvious disregard of the testator's true intention. Finally, this assump-

[23] 30 Beav. 388 at 393, 54 Eng. Rep. 415 (1860).

[24] I. R. 2 Eq. 45 (1868).

[25] Id. at 47.

[26] Daniel v. Dudley, 1 Ph. 1, 41 Eng. Rep. 531 (1841); Attorney General v. Malkin, 2 Ph. 64, 41 Eng. Rep. 866 (1845); Mackenzie v. Mackenzie, 3 Mac. & G. 559, 42 Eng. Rep. 376 (1851); Page v. Soper, 11 Hare 321, 68 Eng. Rep. 1298 (1853); Brickenden v. Williams, L. R. 7 Eq. 310 (1869); Bristow v. Skirrow, L. R. 10 Eq. 1 at 4 (1870). Cf. Lincoln Trust Co. v. Adams, 107 Misc. 639, 177 N. Y. S. 889 (1919).

tion would disentitle the widow to any part of the property; its effect is more than simply to secure part of the property to the other designated objects. If this is correct, one might well ask what the testator had in mind in including the wife among the objects.

Re Sinclaire's Estate illustrates a third technique which courts may employ to exercise control over donees who are included among designated objects. In *Warburton v. Warburton* this was done by finding a trust and a rule for its execution. In *Reid v. Reid* it was suggested that an appointment by the donee to himself might amount to a fraud on the power. In the *Sinclaire* case the court limited the donee's power to appoint to herself by an "interpretation" of the power.

The next case in the chronological consideration of the present problem was the first which clearly and unequivocally laid it down that the solution depends on no more than an interpretation of the donor's intention. In *Taylor v. Allhusen*[27] it was provided that trust funds should in certain events be held in trust for such persons and in such manner as the donee should by deed appoint, so only that any appointment should be made to a grandchild or grandchildren of the donee's paternal grandfather. The issue in this case was whether it was competent for the donee to appoint to herself. Kekewich, J., stressed the fact that this question must always depend on the interpretation of the particular instrument involved. He agreed with Farwell[28] that there is no rule of law disabling a donee from appointing to himself when he falls within the description of those designated by the donor as objects. In deciding that the donee was here able to appoint to herself, he devoted much attention to the fact that there was a gift over to her on default of appointment. Notwithstanding this obviously sensible approach, it was again argued a few years later[29] that the donee of a limited power who is included within the description of the objects is absolutely debarred from appointing to himself. It was, however, unnecessary to pass upon this question because the power itself was void.

Re Penrose[30] involves the most recent statement on the question. Luxmoore, J., accepted the view of Farwell and Kekewich, J., that the donee's power to appoint to himself must always depend on the donor's intention, and this, of course, depends on the interpretation of the in-

[27] [1905] 1 Ch. 529. Cf. Re Skidmore's Estate, 148 Misc. 569, 266 N. Y. S. 312 (1933).

[28] FARWELL, POWERS, 2d ed., 492 (1893), 3d ed., 556 (1916).

[29] Tharp v. Tharp, [1916] 1 Ch. 142.

[30] [1933] Ch. 793.

strument by which the power was conferred. Any inference to the contrary deducible from dicta in *Re Sinclaire's Estate* must be considered incorrect.

> "... Quite apart from the decision in *Taylor v. Allhusen*, I should have come to the conclusion that there is nothing illegal per se in an appointment by a donee of a power in favour of a limited class of persons appointing to himself if on the true construction of the instrument creating the power the donee is himself a member of the class and not excluded from it." [31]

He also rejected the argument, upon which much reliance was placed in *Re Sinclaire's Estate*, that because the power was exercisable by deed or will, therefore it must be predicated of each appointee that an appointment could be made to him by both deed and will. Luxmoore, J., held that the donee really had two powers, one exercisable by deed and the other by will, and he could exercise whichever he considered appropriate to the occasion.

Once it is decided that the donee may appoint to himself, the question then arises whether this makes the power general. There is very little authority on this matter. In *Thayer v. Rivers* [32] the testatrix gave to her children life estates and testamentary powers to appoint the property in which they had life estates among her "lineal heirs," which description covered the children themselves. A daughter, in attempted exercise of the power, gave life estates to such of her two nieces and a nephew as should survive her, with power after their respective deaths to appoint by will. The nephew survived his aunt and appointed to his wife for life and after her death to his children in equal shares. The Supreme Court of Massachusetts held that the appointment of life interests to the nephew and nieces was good, but the rest was bad because it authorized appointments other than those contemplated in the original testatrix's will. In other words, the powers conferred by the daughter were void because there was no limitation of the objects to the lineal heirs. This decision implies that the power conferred by the original testatrix on her children was special, since if it were general it would have permitted the donees to confer another power thereunder.[33]

[31] Id. at 805.

[32] 179 Mass. 280, 60 N. E. 796 (1901).

[33] See FARWELL, POWERS, 3d ed., 505 (1916); 1 SIMES, FUTURE INTERESTS, § 264 (1936); SUGDEN, POWERS, 8th ed., 180-181 (1861); 3 PROPERTY RESTATEMENT, §§ 357-359 (1940); 50 HARV. L. REV. 938 (1937); White v. Wilson, 1 Drew. 298, 61 Eng. Rep. 466 (1852); Lloyd v. Lloyd, 26 Beav. 96, 53 Eng. Rep.

In *Taylor v. Allhusen*, Kekewich, J., frequently refers to the power there involved as general, but he does not discuss the problem of the nature of the power, the only question before him being one of interpretation. *Re Penrose* has some bearing on the problem of classifying powers of the kind here discussed. In this case, the testatrix devised and bequeathed all her residuary real and personal estate to trustees upon trust to pay the income to her husband for life and from and after his death upon trust for any of the issue of her father or her husband's father, immediate or remote, or any charitable purpose, as her husband should by deed or will appoint. After the husband's death, the Commissioners of Inland Revenue claimed that estate duty was payable on the property subject to the power under both the wife's will and the husband's will on the ground that by means of the power the husband was "competent to dispose" of the property within the meaning of section 5 (2) of the Finance Act, 1894.[34] Section 22 (2) of that act provides that

> ". . . A person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were sui juris, enable him to dispose of the property . . . and the expression 'general power' includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exercisable by instrument inter vivos or by will, or both. . . ."

It was argued on behalf of one of the appointees, a son, that the power of appointment was special and not within the above provisions. The donee had not been authorized to appoint as he thought fit, it was contended, and if he appointed to himself, he was thereby acquiring the property and not disposing of it. The power to dispose of it as he thinks fit arises not under the power of appointment, but after it has been exercised by the donee in his own favor. It was held that this was too narrow a construction to put upon section 22 (2). The donee of

833 (1858); Carr v. Atkinson, L. R. 14 Eq. 397 (1872); Webb v. Sadler, L. R. 8 Ch. 419 (1873); Williamson v. Farwell, 35 Ch. D. 128 (1887); Frear v. Pugsley, 9 Misc. 316, 30 N. Y. S. 149 (1894); Mays v. Beech, 114 Tenn. 544, 86 S. W. 713 (1905); Re Greenslade, [1915] 1 Ch. 155; Cheever v. Cheever, 172 App. Div. 353, 157 N. Y. S. 428 (1916); Lehman v. Spicer, 108 Misc. 721, 176 N. Y. S. 445 (1919), affd., 188 App. Div. 931, 176 N. Y. S. 445 (1919); Bucknell's Estate, 29 Pa. D. 631 (1920); Re Dilke, [1921] 1 Ch. 34; Re May's Settlement, [1926] Ch. 136; Re Boulton's Settlement Trust, [1928] Ch. 703; Re Mewburn's Settlement, [1934] Ch. 112. Cf. De Charette v. De Charette, 264 Ky. 525, 94 S. W. (2d) 1018 (1936).

[34] 57 & 58 Vict., c. 30 (1894).

a power who can freely appoint the whole of the property to himself must be deemed competent to dispose of that property as he thinks fit. It makes no difference that this freedom of disposition arises only after the preliminary stage of an appointment by the donee to himself. But Luxmoore, J., also went on to indicate that his view rested on an interpretation of the language of the section. The word "power" in the phrase "a power to appoint or dispose of as he thinks fit" is not used in the strict legal meaning attaching to it when used with reference to a power of appointment. This is made clear, said Luxmoore, J., by the use of the words "or dispose of" in addition to the words "to appoint," because otherwise the former phrase would be mere surplusage.

It would be unsafe to generalize too freely from the meagre case law involving powers to appoint to a limited class which includes the donee. The question whether a donee may appoint to himself in such a case seems quite clearly, in England at least, to be one of construction. Some of the cases, however, do indicate a reluctance on the part of the courts to find that the donee is empowered to appoint to himself. If the donee is able to appoint to himself, the question which may then arise, i.e., whether the power is general or special, is more doubtful. It is sometimes said that a power is general if it permits the donee to appoint to himself. There is much to be said for the view that it is artificial to hold that the donee has not the complete freedom of disposition which he would certainly have if his choice were originally unrestricted merely because he must adopt the formality of an appointment to himself first. To insist that the power is special because his choice of objects is limited does appear to stress the form rather than the substance of the power. *Re Penrose* supports the view that substantially the donee has complete freedom of disposition, although Luxmoore, J., is careful to restrict his decision to the relevant sections of the English Finance Act. Moreover, the *Restatement of the Law of Property* defines a power as general if, being exercisable before the death of the donee, it can be exercised wholly in favor of the donee, or, being testamentary, it can be exercised wholly in favor of his estate.[35]

Nevertheless, it would be unsound to hold that wherever the donee is one of the objects the power is general because there is an indirect freedom of disposition. The courts have not been reluctant to find that powers to appoint to limited classes including the donees are powers in trust. In these cases the donee's freedom is hampered not merely formally but also substantially. If a rule is prescribed by the donor for

[35] 3 PROPERTY RESTATEMENT, § 320 (1940).

the exercise of the donee's discretion, the donee must observe that rule. But even if the donor gives the donee an unregulated discretion, the court may still exercise a measure of control over the donee. In exercising his unfettered discretion the donee need not give reasons for the appointments he makes, but if he does, and they appear improper, the court will intervene.[36] Even where there is no trust, it may be possible to restrain the donee's freedom of disposition by means of the doctrine of fraud upon a power. This possibility exists by reason of the fact that specific objects are designated. The court, therefore, may find that the donor contemplated dispositions of a particular kind for the benefit of these objects, and that the dispositions actually made by the donee do not comply with the end designed by the donor. It is submitted that this may be done even where the court is unable to find a trust. Nor do the two doctrines of imperative powers and fraud upon a power involve the same consequences. If an imperative power is not exercised, the court will itself distribute the property on the theory of a constructive trust or implied gift.[37] If there is fraud upon a power, the court will set aside the improper appointment as void,[38] but it will not order the distribution of the property if the power is not in trust. A further limitation on the donee's freedom of disposition must be noted. In some jurisdictions the doctrines of non-exclusive powers and illusory appointments still prevail.[39] Thus, if the court chooses to find that the

[36] Rex v. Archbishop of Canterbury, 15 East 117, 104 Eng. Rep. 789 (1912); Re Beloved Wilkes's Charity, 3 Mac. & G. 440, 42 Eng. Rep. 330 (1851); LEWIN, TRUSTS, 14th ed., 347 (1939).

[37] Brown v. Higgs, 4 Ves. Jun. (Ch.) 708, 31 Eng. Rep. 366 (1799), affd. on rehearing, 5 Ves. Jun. 495, 31 Eng. Rep. 700 (1800), affd. by Lord Chancellor, 8 Ves. Jun. 561, 32 Eng. Rep. 473 (1801), affd. 18 Ves. Jun. (H. L.) 192, 34 Eng. Rep. 290 (1813). For the constructive trust theory, see 1 SIMES, FUTURE INTERESTS, §§ 287-288 (1936); Simes, "Powers in Trust and the Termination of Powers by the Donee," 37 YALE L. J. 63, 211 (1927); Dominick v. Sayre, 3 Sandf. (N. Y. Super.) 555 (1850); Milhollen's Admr. v. Rice, 13 W. Va. 510 (1878). For the implied gift theory, see: Gray, "Powers in Trust and Gifts Implied in Default of Appointment," 25 HARV. L. REV. 1 (1911); McGaughey's Admr. v. Henry, 15 B. Mon. (54 Ky.) 383 (1854); Rogers v. Rogers, 2 Head. (39 Tenn.) 660 (1859); Moore v. Ffolliot, L. R. Ir. 19 Ch. D. 499 (1887); Loosing v. Loosing, 85 Neb. 66, 122 N. W. 707 (1909).

[38] 2 CHANCE, TREATISE ON POWERS, c. XXI, § ii (1841); FARWELL, POWERS, 3d ed., 457-497 (1916); KALES, ESTATES, FUTURE INTERESTS, 2d ed., § 612 (1920); 1 SIMES, FUTURE INTERESTS, § 290 (1936); 3 PROPERTY RESTATEMENT, §§ 352-354 (1940); 14 SOL. J. 832 (1870); 34 SOL. J. 598 (1890); 76 SOL. J. 506 (1932); 86 L. J. 57 (1938); 82 SOL. J. 722 (1938).

[39] Melvin v. Melvin, 6 Md. 541 (1854); Portsmouth v. Shackford, 46 N. H. 423 (1866); New v. Potts, 55 Ga. 420 (1875); McCamant v. Nuckolls, 85 Va. 331, 12 S. E. 160 (1888); Thrasher v. Ballard, 35 W. Va. 524, 14 S. E. 232 (1891);

donor intended that all the objects were to have some share of the property, the donee must appoint to each object a share of the property which is fair, having regard to the size of the property, the number of objects, and the general circumstances of the case.[40] In those jurisdictions which retain the principle of illusory appointments, recourse need not be had to the doctrine of fraud upon a power in order to ensure the realization of the donor's design.

It has been shown that even though, upon the interpretation of a power, the donee is found to be an object, it does not follow by any means that he enjoys an unrestrained freedom of disposition. There are doctrines which the courts may employ to control the donee, and it has been seen from some of the cases that the courts are eager to exercise this control. These considerations may be responsible for the fact that a power is not general, according to the *Restatement*, unless the donee is able to appoint *wholly* in his own favor.[41] Some statutes have avoided the problem of classification by abandoning the term "general power" for some other terminology. Some statutes speak of powers which the donee may exercise for his own benefit,[42] and it has been seen that the English Finance Act of 1894 refers to competency to dispose of property as the donee thinks fit. Provisions of this kind, it seems, are based on the general idea that indirect freedom of disposition, which arises after an appointment by the donee to himself, is equivalent, for the particular purpose envisaged by the statute, to direct freedom of disposition.

B. *A Power to Appoint to Anyone Except Certain Named Persons*

There are very few American cases dealing with the classification of this type of power. There are four decisions which consider it in relation to the federal estate tax. *Fidelity Trust Co. v. McCaughn*[43]

Hatchett v. Hatchett, 103 Ala. 556, 16 So. 550 (1894); Herrick v. Fowler, 108 Tenn. 410, 67 S. W. 861 (1902); Barrett's Exr. v. Barrett, 166 Ky. 411, 179 S. W. 396 (1915); In re Sloan's Estate, 7 Cal. App. (2d) 319, 46 P. (2d) 1007 (1935); 3 PROPERTY RESTATEMENT, § 361 (1940).

[40] SUGDEN, POWERS, 8th ed., 938 et seq. (1861); Butcher v. Butcher, 1 V. & B, 79 at 102, 35 Eng. Rep. 31 (1812); Barrett's Exr. v. Barrett, 166 Ky. 411, 179 S. W. 396 (1915).

[41] But this may refer to the fact that, according to the RESTATEMENT, a power is not general unless it enables the donee to appoint the whole fee. See note 3, supra.

[42] E.g., English Bankruptcy Act, 4 & 5 Geo. 5, c. 59, § 38 (1914); English Law of Property Act, 15 Geo. 5., c. 20, § 195 (1925); Federal Bankruptcy Act, 52 Stat. L. 879, § 1 (1938), 11 U. S. C. (Supp. 1939), § 110 (a).

[43] (D. C. Pa. 1924) 1 F. (2d) 987.

does not really involve a power of this kind, but it was decided as if it did. The decedent had a testamentary power exercisable only while she remained unmarried. She died without having married. The court held that as she could not appoint to any husband she might marry or children she might have the power was not general. This decision is obviously absurd, and has since been disapproved on several occasions.[44] As long as the donee remained unmarried she had an unlimited power of disposition. Once she married, that power did not become limited; it ceased. What is of interest, however, is the assumption that if the donee is unable to appoint to husband or children, the power is special, even though the power is otherwise unlimited as to objects. Again, in *W. R. Helmholz*,[45] the Board of Tax Appeals held that a power to appoint to natural persons and charitable organizations was not general for the purposes of the federal estate tax. In *Christine Smith Kendrick, Ex'x*,[46] the decedent was the donee of powers which she could exercise in favor of anyone except her brother Walter and his descendants. The board decided that these powers were general only if Walter died before the decedent and left no descendants. If he survived her, or if he predeceased her but left descendants who survived the decedent, the powers would be special, because a general power confers on the donee complete freedom in the choice of objects. The board was, however, willing to assume, in the absence of proof to the contrary, that Walter had died before the decedent and had left no descendants. In *Leser v. Burnet*[47] property was conveyed to trustees, and the settlor directed that his daughter should have power to appoint part of the property to "such persons as she, by her last will . . . shall have named, limited and appointed to take and have the same." The Circuit Court of Appeals for the Fourth Circuit held that a general power permits the donee to appoint to himself and his creditors, as well as to all others. In this case the property was situated in Maryland, and the law of that state determined the effect of the instrument creating the power. The language would in most jurisdictions create a general power, but in Maryland it did not permit the donee to appoint to herself or her creditors. The power, therefore, was special for the purpose of the estate tax.

[44] J. Gilmore Fletcher, Exr., 29 B. T. A. 503 (1933); Johnstone v. Commissioner, (C. C. A. 9th, 1935) 76 F. (2d) 55; Christine Smith Kendrick, Ex'x, 34 B. T. A. 1040 (1936). But it was approved in Minis v. United States, 66 Ct. Cl. 58 at 62 (1928).

[45] 28 B. T. A. 165 (1933).

[46] 34 B. T. A. 1040 (1936).

[47] (C. C. A. 4th, 1931) 46 F. (2d) 756.

Platt v. Routh[48] is an interesting English case which was elaborately argued before all the courts on its way up to the House of Lords. The testator, Ramsden, devised and bequeathed his residuary estate to trustees in trust for his daughter Judith for life, with remainder to such persons, other than three named individuals and their relatives, as she should by will appoint, with remainder over in default of appointment. He also provided that if she married or received visits from, or resided with, or visited one of the named persons or his relatives, she was to forfeit her power and all gifts under the will. By her will, Judith appointed her father's residuary estate to various persons. Questions arose in connection with the payment of legacy and probate duties under the wills of Ramsden and his daughter.

Section 2 of the Legacy Duty Act[49] imposes various duties on legacies given out of the personal estate and on the residue of the personal estate of a testator. Section 7 provides that any testamentary gift out of any personal estate which the testator has power "to dispose of as he or she shall think fit" shall be deemed to be a legacy within the meaning and intent of the act. Section 18 regulates the manner of charging legacy duty where there is a power of appointment. That section speaks of two kinds of powers: powers to appoint "to or for the benefit of any person or persons specially named or described as objects of such power" and "general and absolute" powers. Legacy duty in the case of powers of the first type is imposed on the theory that the appointees derive their interests from the donor, and in the case of powers of the second type on the theory that the appointees derive their interests from the donee.

Before the Court of Exchequer, the Solicitor-General argued that the power conferred on Judith was very different from one to appoint to particular persons. If that were not so, section 7 could be made a dead letter. Nothing could be easier than the exclusion of some such person as the Commissioner of Stamps, in whose favor the donee would in no event contemplate an appointment.

> "... To prevent the parties from having the power to dispose of the property as they think fit, within the meaning of the act, there must be not only an exception and exclusion, but also some control and direction."[50]

[48] 6 M. & W. Exch. 756, 151 Eng. Rep. 618 (1840); 3 Beav. (Ch.) 257, 49 Eng. Rep. 100 (1841), affd. sub. nom. Drake v. Attorney General, 10 Cl. & F. (H. L.) 257, 8 Eng. Rep. 739 (1843).

[49] 36 Geo. 3, c. 52 (1756).

[50] 6 M. & W. 756 at 771, 151 Eng. Rep. 618 (1840).

As to section 18, he argued that

> ". . . The words 'general power' are there used in the sense of and as applicable to a party not being restrained as to the persons to whom they shall give the property; where they are not compelled to give it to certain specified persons, and only restrained as to a few persons or classes of persons." [51]

The appointees, who were contesting this view, relied upon the definition of a general power as one which a party may exercise "in favour of any person he pleases, and by the exercise of which he may give to himself, in his own lifetime, absolute property." [52] The donees were thus arguing that the power was special, not only because certain persons were excluded from the possible appointees, but also because the power was testamentary and did not permit an appointment by the donee to herself. Hence it was impossible to hold that Judith had "the entire and absolute control over this estate, or that she could do any thing more than appoint to the exclusion of the persons named." [53] The appointees reinforced their argument by asserting that the excluded families consisted of persons who were the most likely to be the objects of Judith's bounty.

> ". . . as the question is whether this is an absolute power or not, it is not immaterial to show that the persons named in the case, stand in a relationship that would make them the objects of Mrs. [Judith] Platt's kindness, and that she was prohibited from giving the property to them. There are restraints imposed upon her, and yet it is contended that she is bound to pay the same duty as she would have done if there had been no restraint upon her. The question is, whether, in a case like this, where there are restraints that are real and not illusory, there would, as it is insisted on the other side, be a trust for creditors if the testatrix had any." [54]

Lord Abinger, C.B., delivering the judgment of the Court of Exchequer, pointed out that the question of the incidence of legacy duty depended on the interpretation of section 18. That section referred to only two kinds of powers, but this classification was intended to comprehend all powers. The power conferred on Judith did not literally come within either description. It followed that some violence

[51] Id. 772.
[52] Id. 784.
[53] Id. 784.
[54] Id. 786.

must be done to the language of the section. There was less difficulty in treating the power as general and absolute than as a power to appoint for the benefit of persons specially named. The power might have been exercised by the donee wholly for her own benefit. She could have contracted debts in her lifetime and then by her will have directed that the fund be applied in payment of them. In fact, if she exercised the power, the rights of the appointees would have been subordinate to those of her creditors,

> ". . . for the rule of equity, which subjects a fund so appointed to the debts of the appointor, does not appear to be affected by the circumstance, that there are certain persons to whom the fund could not have been given. The question in such cases is, not whether there are persons to whom the fund could not have been given, but whether the party executing the power might have executed it for his own benefit, i.e., in payment of his own debts. . . ."[55]

Inasmuch as the donee could have exercised the power for her own benefit, and as it was impossible without manifest absurdity to treat the possible appointees as persons specially named or described, the Court of Exchequer held that the power was general and absolute within section 18, and that legacy duty was payable under section 7, since the donee had power to appoint as she thought fit.

The parties were dissatisfied with the findings of the Exchequer and presented a petition to the Rolls Court. Substantially the same arguments were relied upon by the parties, and Lord Langdale, M.R., "after some hesitation, and contrary to [his] first impression,"[56] affirmed the decision of the court below. The case was then taken to the House of Lords, which refused, however, to reverse the decision of the lower courts. The problem of legacy duty was not extensively discussed, but it is interesting to note that the Lord Chancellor, in the course of argument and in reply to the contention that the power was limited, objected that the donee could exercise the power for her own advantage by contracting debts and then appointing to creditors.

It will be obvious from this statement of the case that no general conclusion was reached on the nature of the power involved. The decision is based upon an interpretation of the implied scope of the Legacy Duty Act. The courts assumed that section 18 was meant to embrace all powers, and since the power in question could not be said

[55] Id. 789.
[56] 3 Beav. 257 at 280, 49 Eng. Rep. 100 (1841).

to be for the benefit of persons specially named, it had necessarily to be general and absolute within the meaning of the act. But certain aspects of the case are of wider interest. Thus, Lord Abinger stressed the fact that the donee was able to appoint for her own benefit, and he seems to imply, without categorically asserting it, that this is the characteristic feature of a general power. He treats as important the fact that the appointed property would have to be made available for the payment of the donee's creditors, a point strongly urged by counsel for the Crown, who also assumed in argument that the power would be general for the purposes of the rule against perpetuities. These views appear to be based on the fact that the donee could have appointed to her creditors. The difficulty with this theory, however, is that the excluded persons may be creditors of the donee. This fact may have induced the donor to exclude them from the possible objects. A converse case, although one less likely to arise, would also show the weakness of Abinger's theory. The donor may have conferred a power exercisable in favor of named objects, some or all of whom are creditors of the donee. If the donee exercises the power in favor of some of the objects, could it be argued that because he could have appointed to all of them the property must go in satisfaction of the claims of all?

In *Edie v. Babington*[57] the Irish Master of the Rolls was required to decide whether property subject to a testamentary power to appoint to anyone other than a single named person was an asset for the payment of the donee's creditors where the donee exercised the power and his own property was insufficient to satisfy his debts. Much of the argument in the case was addressed to the question whether the fact that the power was testamentary only prevented recourse to the property in favor of the donee's creditors. It was decided that the property could be devoted to the payment of the donee's debts. It was, however, also argued that the power was not general because of the exclusion of the named person. The Master of the Rolls did not discuss this point, but purported to agree with the observations of Lords Langdale and Abinger in *Platt v. Routh*, which, in his opinion, were "a complete answer to the objection which has been raised."[58] He did not state which were the observations he relied upon, and it would indeed be difficult to find any which gave unequivocal support to his decision.

There are two other English cases which deal with the classification of powers to appoint to all except a specified person or persons. Both involve the application of section 27 of the Wills Act. By that section

[57] 3 Ir. Ch. 568 (1854).

[58] Id. 576.

a general devise or bequest or any general description of the testator's real or personal property, in the absence of any contrary intention appearing in the will, shall operate as the execution of any general power of which the testator may be the donee. In *Re Byron's Settlement*[59] there was a settlement by which freeholds vested in *A* were conveyed by her to trustees upon trust to permit her daughter *M* to receive the rents for her sole and separate use, and upon further trust for such person or persons, not being her present husband or any friend or relative of his, for such estate or estates as *M* should by deed or other instrument in writing or by will appoint. *M* made a will which contained a general devise and bequest of all her real and personal property. There was real estate other than that which had been settled by *A*. There was no specific exercise of the power. It was argued for those taking on default of appointment that the power was not general because the donee had no power "to appoint in any manner she may think proper" within the meaning of section 27. *Platt v. Routh*, it was protested, was a decision on the interpretation of the Legacy Duty Act. It had been necessary to do some violence to the wording of that act, but no such necessity existed in the case of the Wills Act. For those taking under the will, it was argued that *Platt v. Routh* and *Edie v. Babington* had established that the power was general. "Friend" and "relative," they further insisted, were too vague and must be struck out, and since the husband was dead at the date when the will took effect, all the exclusions were inoperative. The power, therefore, was perfectly general at the only date which was decisive.

Kekewich, J., thought that the purpose of section 27, although not altering the distinction between power and property, was to recognize that a general power is in substance so similar to property that injustice may be done by insisting on the technical distinction. A man who has a general power of appointment has the power of disposition which he would possess if he had ownership. But anything less than a power "to appoint in any manner he may think proper"—the phrase employed by section 27—is not equivalent to ownership, and a power to appoint freely except to certain named persons is less than ownership.

> ". . . A man is not any more the proprietor of land or money if he had power to appoint to all the world except to the children of *A*, than he is if he has power to appoint to the children of *B*. It is, in either case, a power of selection, not ownership; the appointor cannot deal with the property as he pleases."[60]

[59] [1891] 3 Ch. 474.

[60] Id. 479.

Platt v. Routh and *Edie v. Babington* deal with aspects of powers not involved in this case. He refused to decide whether the exclusion of friends and relatives of the donee's husband was too vague until the question arose in connection with an appointment to a particular person. His refusal to consider this question is remarkable, inasmuch as he was disposed to accept the argument that a power originally limited by reason of exceptions might become general by the death of the excepted persons before the exercise of the power. As the husband was dead, the power would have been general if the exclusion of his friends and relatives was too vague.

In *Re Wilkinson*[61] the question of the effect of the death of an excluded person before the exercise of the power actually arose for decision. The testator provided that his wife should have absolute power to dispose by will of a stated amount of the income of his estate, but she was to be able to appoint this income to his son James only if James did not call in question the provisions of his father's will or institute any litigation relative thereto. James died in his mother's lifetime. Parker, J., held that in the circumstances the donee had a power to appoint as she thought fit within the meaning of section 27 of the Wills Act.

From the above cases it will be seen that no general inference can be drawn as to the nature of a power to appoint freely except in favor of named individuals. Such a power has been held general for the purposes of the English Legacy Duty Act and for the payment of the donee's creditors. But it has been held special for the purposes of the federal estate tax and for section 27 of the English Wills Act. To hold that the power is special for taxation purposes, as the Board of Tax Appeals and a circuit court of appeals have done, is a boon for tax-evaders. By the exclusion from the objects of a single name chosen at random from the telephone directory, a power which really gives the donee complete freedom of selection is converted into a special power, so as to take the property subject to it out of the ambit of the estate tax. On the other hand, it is almost impossible to formulate a test by which to decide whether the exclusion is bona fide or merely for the purpose of evading the tax. One cannot, as a rule, tell what hidden grudges the donor nursed against the excluded person or institution. Nor does it simplify matters to suggest that the test should be whether the exclusion will in fact operate to limit the donee's discretion. A testator's relatives and friends are often shocked by the nature of his

[61] [1910] 2 Ch. 216.

benefactions. A workable solution might be the adoption of a rule that the power remains general if the exclusion is not bona fide or does not in fact hamper the donee's discretion, coupled with the further rule that in cases of doubt the benefit of that doubt should be given to the government.

At least one matter appears to be reasonably clear with respect to these powers. If the excluded persons die before the exercise of the power, the power becomes general for all purposes. In *Christine Smith Kendrick, Ex'x*, the Board of Tax Appeals was willing to assume, in the absence of proof to the contrary, that the excluded person had predeceased the exercise of the power. It seems, however, that English courts require those who rely upon the death of excluded persons to prove that fact.

C. *A Power to Appoint to Anyone Except the Donee*

In *Re Park*[62] the testator devised and bequeathed his residuary estate to trustees on trust to pay the income of the balance after certain dispositions to such person, other than herself, or persons, or charitable institution or institutions, as the donee should from time to time during her lifetime in writing direct. The trustees took out a summons to discover whether this power was valid. It was argued that it was invalid since it was neither a general nor a special power. It was not general, because the donee could not appoint to herself, and it was not special, because the objects were not designated. The purported power, it was claimed, was merely an attempt by the testator to delegate to another the making of his will, and, as such, it was invalid. Clauson, J., rejected this argument, holding that the division of valid powers into general and special is not exhaustive. *Platt v. Routh* and *Re Byron's Settlement* establish the validity of powers to appoint to anyone except named persons, and there is no reason why the excluded person cannot be the donee.

There was no question in this case of the incidents to be attached to the power. A common example of the power here considered, for which the incidents have been worked out, is the power to appoint generally but exercisable by will only. In effect, this is a power to appoint to anyone except the donee. Notwithstanding this, it has been held that such a power is exercised by a general bequest or devise, in the absence of a contrary intention appearing in the will.[63] It is general

[62] [1932] 1 Ch. 580.

[63] Hawthorn v. Shedden, 3 Sm. & G. 293, 65 Eng. Rep. 665 (1856); Re Powell's Trusts, 39 L. J. (Ch.) 188 (1869); Re Jones, 34 Ch. D. 65 (1886); Re Wilkinson, [1910] 2 Ch. 216.

for the federal estate tax.[64] If the power is exercised, the appointed property may be made available for the satisfaction of the donee's debts where his own property is inadequate for the purpose.[65] The power may be exercised by conferring on the appointee another power.[66] If the appointment lapses, the property appointed may go under the donee's will or as on his intestacy.[67] These are all characteristics of general powers. There has, however, been a difference of opinion in connection with the rule against perpetuities. In the United States an unlimited testamentary power is not treated as a general power for the purposes of the rule against perpetuities.[68] The reason usually given is that the donee does not enjoy complete freedom of disposition, inasmuch as he cannot appoint to himself. In England this question is not yet conclusively settled, but the little authority which does exist inclines in favor of treating the power as general.[69]

Although a testamentary power is, in effect, a power to appoint

[64] Whitlock-Rose v. McCaughn, (D. C. Pa. 1926) 15 F. (2d) 591 at 592, affd. (C. C. A. 3d, 1927) 21 F. (2d) 164; Emily Annette Agnus Leser, Ex'x, 17 B. T. A. 266 (1929); Edward J. Hancy, Exr., 17 B. T. A. 464 (1929); Mary M. Lee, Ex'x, 18 B. T. A. 251 (1929); Fidelity-Philadelphia Trust Co. v. McCaughn, (C. C. A. 3d, 1929) 34 F. (2d) 600 at 603; Blackburne v. Brown, (D. C. Pa. 1929) 35 F. (2d) 963; Cortlandt F. Bishop, Exr., 23 B. T. A. 920 (1931); Lee v. Commissioner, (App. D. C. 1932) 57 F. (2d) 399, cert. den. Lee v. Burnet, 286 U. S. 563, 52 S. Ct. 645 (1932); J. Earl Morgan, Exr., 36 B. T. A. 588 (1937). See also Webb v. McCracken, 3 Comm. L. R. (Aust. High Ct.) 1018 (1906).

[65] Thompson v. Towne, 2 Vern. 319, 23 Eng. Rep. 806 (1694); Jenney v. Andrews, 6 Madd. 264, 56 Eng. Rep. 1091 (1822); Johnson v. Cushing, 15 N. H. 298 (1844); Williams v. Lomas, 16 Beav. 1, 51 Eng. Rep. 675 (1852); Re Davies' Trusts, L. R. 13 Eq. 163 (1871); Clapp v. Ingraham, 126 Mass. 200 (1879); Re Guedalla, [1905] 2 Ch. 331; Re Hadley, [1909] 1 Ch. 20; Re Benzon, [1914] 2 Ch. 68. *Contra*: St. Matthews Bank v. De Charette, 259 Ky. 802, 83 S. W. (2d) 471 (1935).

[66] White v. Wilson, 1 Drew. 298, 61 Eng. Rep. 466 (1852); Frear v. Pugsley, 9 Misc. 316, 30 N. Y. S. 149 (1894); Mays v. Beech, 114 Tenn. 544, 86 S. W. 713 (1905); Cheever v. Cheever, 172 App. Div. 353, 157 N. Y. S. 428 (1916); Lehman v. Spicer, 108 Misc. 721, 176 N. Y. S. 445 (1919), affd. 188 App. Div. 931, 176 N. Y. S. 445 (1919); Bucknell's Estate, 29 Pa. D. 631 (1920). *Contra*: Boston Safe Deposit & Trust Co. v. Prindle, 290 Mass. 577, 195 N. E. 793 (1935) (semble); De Charette v. De Charette, 264 Ky. 525, 94 S. W. (2d) 1018 (1936). See 50 HARV. L. REV. 938 (1937).

[67] Re Hadley, [1909] 1 Ch. 20 at 35, per Farwell, L. J.

[68] Smith's Appeal, 88 Pa. 492 (1879); Genet v. Hunt, 113 N. Y. 158, 21 N. E. 91 (1889); Graham v. Whitridge, 99 Md. 248, 57 A. 609, 58 A. 36 (1904); Minot v. Paine, 230 Mass. 514, 120 N. E. 167 (1918); Northern Trust Co. v. Porter, 368 Ill. 256, 13 N. E. (2d) 487 (1938).

[69] Rous v. Jackson, 29 Ch. D. 521 (1885); Re Flower, 55 L. J. (Ch.) 200 (1885); Stuart v. Babington, L. R. Ir. 27 Ch. D. 551 (1891). *Contra*: Re Powell's Trusts, 39 L. J. (Ch.) 188 (1869).

to anybody except the donee himself, it does not necessarily follow that the incidents of such a power will attach to a power to appoint to anybody except the donee but exercisable by deed. Where the power is testamentary only, the donee is dead when the exercise of the power takes effect, so that for most purposes his non-existence at that date is as irrelevant for the question of the nature of the power as the predecease of any other person. By means of his will the donee has complete freedom of disposition at the date when the power becomes exercisable. But if the power is exercisable by deed, the donee is still in existence at the date of exercise of the power. One of the characteristics of a general power, as distinguished from a special power, is that where an appointment lapses the appointed property may go under the donee's will or as on his intestacy, or may result to the donee.[70] This depends on the donee's intention in making the appointment. "The question . . . is . . . whether the donee of the power meant by the exercise of it to take the property dealt with out of the instrument creating the power for all purposes, or only for the limited purpose of giving effect to the particular disposition expressed."[71] It could hardly be argued that where an appointment lapses under a power to appoint by deed to anyone except the donee, the donee intended to make the property his own for all purposes, so that it results to him. This must be so if for no other reason than that what has been said here with respect to lapsed appointments is equally true of invalid appointments. If the property results to the donee under the power here considered, the donee could always defeat the donor's intention by making an invalid appointment. It would also seem that the donee does not possess that freedom of disposition which would justify the application of the

[70] Wilkinson v. Schneider, L. R. 9 Eq. 423 (1870); Harker v. Reilly, 4 Del. Ch. 72 (1872); Re Horton, 51 L. T. R. 420 (1884); Re Scott, [1891] 1 Ch. 298; Lyndall's Estate, 2 Pa. D. & C. 476, 32 W. N. C. 325 (1893); Re Marten, [1902] 1 Ch. 314; Re Pryce, [1911] 2 Ch. 286; Dunbar v. Hammond, 234 Mass. 554, 125 N. E. 686 (1920); Bradford v. Andrew, 308 Ill. 458, 139 N. E. 922 (1923); Bundy v. United States Trust Co., 257 Mass. 72, 153 N. E. 337 (1926); Re Vander Byl, [1931] 1 Ch. 216; Talbot v. Riggs, 287 Mass. 144, 191 N. E. 360 (1934); Northern Trust Co. v. Porter, 368 Ill. 256, 13 N. E. (2d) 487 (1938); 3 PROPERTY RESTATEMENT, § 365 (1940); 2 TRUSTS RESTATEMENT, § 426 (1935); 82 SOL. J. 227 (1938).

[71] Chatterton, V. C., in Re De Lusi's Trusts, L. R. Ir. 3 Ch. D. 232 at 237 (1879). See also: Re Pinède's Settlement, 12 Ch. D. 667 at 672 (1879); Willoughby-Osborne v. Holyoake, 22 Ch. D. 238 at 239 (1882); Coxen v. Rowland, [1894] 1 Ch. 406. The principle applies to both realty and personalty: Re Van Hagan, 16 Ch. D. 18 (1880); 16 SOL. J. 262 (1872); 159 L. T. 257 (1925); 19 MINN. L. REV. 127 (1934).

rule against perpetuities as if the power were general. No question could arise here of an indirect freedom of disposition such as exists in the case of a power to appoint to a limited class which includes the donee. On the other hand, it is true that the donee can appoint to creditors, and it is possible that if he were insolvent the courts would apply the appointed property in satisfaction of his debts.[72]

If the power is exercisable by deed or will, the position is no less complicated. Would the power be exercised by a general devise or bequest? The purpose of statutes which declare that a general devise or bequest shall operate to exercise a general power is to remove the difference between power and property which a layman would not perceive. It is established that powers exercisable by will only fall within the scope of these statutes,[73] but in the case of such powers the donee at the date when the exercise of the power takes effect has the maximum freedom of disposition which he can enjoy in the circumstances. A layman is less likely to consider that he enjoys property rather than a power where the power, though exercisable by will, is also exercisable by deed but not in his own favor. No problem would arise, however, if the power were construed as incorporating two, one exercisable by deed and a distinct one exercisable by will.

II

THE SOLUTION

A number of powers exist which do not comply with the traditional definitions of general and special powers. The treatment of some of these powers by American and English courts has been considered above. These, however, are not the only powers which are difficult to classify. What shall be said of a power to appoint property to those persons to whom the donee shall dispose of his own property? This may be considered a general power to appoint freely or a special power for the benefit of designated objects. In one English case,[74] a power of this kind was held to be a general power. Again, the courts have been troubled by powers, unlimited as to the choice of objects, but

[72] The general question whether property appointed by deed is assets for the payment of the donee's creditors in an administration action is unsettled. As for bankruptcy, see English Bankruptcy Act, 4 & 5 Geo. 5, c. 59, § 38 (1914), and decisions thereon: Nichols to Nixey, 29 Ch. D. 1005 (1885); Re Rose, [1904] 2 Ch. 348, [1905] 1 Ch. 94; Re Benzon, [1914] 2 Ch. 68; Re Mathieson, [1927] 1 Ch. 283; 48 SOL. J. 760 (1904).

[73] See note 63, supra.

[74] Bristow v. Skirrow (No. 1), 27 Beav. 585, 54 Eng. Rep. 232 (1859).

exercisable only with the consent of some third person to the donee's selection of appointees.[75] The idiosyncracies of donors and the ingenuity of conveyancers will probably produce other "anomalous" powers of appointment in the future.

A. *Possible Treatments of Anomalous Powers— New Principles*

In dealing with these "anomalous" powers there is a choice of several courses of action:

(1) It is possible to hold that only those powers are valid which comply with the generally accepted definitions of general or special powers. This approach was rejected in *Re Park.* There is no reason why these definitions should be allowed to hamper the development of such new powers as settlors deem it useful to employ in order to effect their purposes.

(2) It is possible to abandon the old definitions and seek for new criteria by which to achieve an automatic classification of all powers. There have been a number of attempts to discover such criteria. The following have been suggested:

(a) A general power allows complete freedom of action. Any limitation on this freedom, no matter how unimportant or trivial, makes the power special.[76] This, however, would be a direct invitation to tax-evasion and the defeat of creditors. By the exclusion of a single individual, who would not be an object of the donee's bounty even in his wildest extravagance, the power would have to be treated as special. This would mean that the donee's creditors would have no rights against the appointed property, and that the property would be taken out of the federal estate tax, even though the donee's freedom of action is in substance unimpaired. Moreover, in the case of those powers where the donee is able to appoint to himself, the donee has an indirect freedom of disposition by means of an appointment to himself first.

[75] Eland v. Baker, 29 Beav. 137, 54 Eng. Rep. 579 (1867); Webb v. Sadler, L. R. 8 Ch. 419 (1873); Charlton v. Attorney General, 4 App. Cas. 427 (1879); Goatley v. Jones, [1909] 1 Ch. 557; Re Dilke, [1921] 1 Ch. 34; Re Phillips, [1931] 1 Ch. 347; Re Watts, [1931] 2 Ch. 302; Re Joicey, 76 SOL. J. 459 (1932); Charles J. Hepburn, Exr., 37 B. T. A. 459 (1938); Morgan v. Commissioner, 309 U. S. 78, 60 S. Ct. 424 (1940).

[76] Lord Townshend v. Windham, 2 Ves. Sen. 1 at 9-10, 28 Eng. Rep. 1 (1750), per Lord Hardwicke (semble); Re Byron's Settlement, [1891] 3 Ch. 474, per Kekewich, J.; Whitlock-Rose v. McCaughn, (D. C. Pa. 1926) 15 F. (2d) 591, affd. (C. C. A. 3d, 1927) 21 F. (2d) 164.

(b) A general power is one which permits the donee to appoint to himself.[77]

(c) A general power is one which permits the donee to appoint to his own estate or to his creditors.[78] This test differs from (b) in that it clearly includes unlimited testamentary powers.

(d) The United States Treasury Regulations and the *Property Restatement* combine (b) and (c). The 1937 edition of the regulations[79] states that

> ". . . Ordinarily a general power is one to appoint to any person or persons in the discretion of the donee of the power, or however limited as to the persons or objects in whose favor the appointment may be made, is exercisable in favor of the donee, his estate, or his creditors."

With this it is interesting to compare the earliest regulation[80] on the matter:

> ". . . A general power is one to appoint to any person or persons in the discretion of the donee. Where the donee is required to appoint to a specified person or class of persons, the property should not be included in his gross estate."

The *Restatement*[81] defines a general power as one which can be exercised wholly in favor of the donee if it is exercisable before his death, or wholly in favor of his estate if it is testamentary. A power is special if it can be exercised only in favor of certain persons, not including the donee, who constitute a group not unreasonably large, and the donor has not manifested an intention to create the power primarily for the benefit of the donee. The comment makes it clear that these are approximate tests only, and not inflexible canons, because they will not cover all possible powers. Thus, they do not apply to a power to appoint to anybody except the donee, or to a power to appoint to a group including the donee where the donor has manifested an intention that the donee is not to have all the property.

[77] Farmers' Loan & Trust Co. v. Kip, 192 N. Y. 266 at 276, 85 N. E. 59 (1908); Gray, "Release and Discharge of Powers," 24 HARV. L. REV. 511 (1911); SIMES, FUTURE INTERESTS, § 246 (1936).

[78] Platt v. Routh, 6 M. & W. (Exch.) 756, 151 Eng. Rep. 618 (1840), per Lord Abinger, affd. sub nom. Drake v. Attorney General, 10 Cl. & F. (H. L.) 270, 8 Eng. Rep. 739 (1843), per Lord Chancellor in the course of argument; Leser v. Burnet, (C. C. A. 4th, 1931) 46 F. (2d) 756.

[79] TREAS. REG. 80, art. 24 (1937). See also Morgan v. Commissioner of Internal Revenue, 309 U. S. 78, 60 S. Ct. 424 (1940).

[80] TREAS. REG. 37, art. 30 (1919).

[81] 3 PROPERTY RESTATEMENT, § 320 (1940).

Some statutes dealing with powers appear to favor a somewhat similar test of a general power when they speak of powers which a donee may exercise for his own benefit.[82]

The weakness of (b), (c), and (d) can best be appreciated, as has already been pointed out, by applying them to powers to appoint to a limited class which includes the donee. It has been seen that the courts are eager to control the donee even where the donor intended that the donee should be empowered to appoint to himself. The *Restatement* takes cognizance of this difficulty. One may question the wisdom of holding that a power to appoint to anyone but the donee is special for all purposes.

(e) If the limitation on the donee's freedom of disposition is apparent rather than real, the power is general.[83] This would involve an inquiry into what the donee would have done had there been no limitation imposed. In the vast majority of cases it would be impossible to settle this question.

(f) If the donor of the power indicates that the appointees are to derive title from him and not from the donee, the power is special.[84] It is true that in many problems connected with powers the donor's intention is decisive, but such a test when applied to the classification of powers would be paying undue deference to his wishes. It would permit him to reduce all powers whose classification is uncertain to the single category of special powers wherever that would be for the benefit of his estate or the appointees.

(g) It is sometimes said that a power is special if it is for the benefit of persons specially named.[85] One of the persons specially named, however, may be the donee himself, and the effect of this may be that the donee has all the freedom of disposition which he would enjoy under a general power, provided only he employs the formality of an appointment to himself first.

(3) In view of the unsatisfactory nature of the above tests and

[82] E.g., English Bankruptcy Act, 4 & 5 Geo. 5, c. 59, § 38 (1914); English Law of Property Act, 15 Geo. 5, c. 20, § 195 (1925); Federal Bankruptcy Act, 52 Stat. L. 879, § 1 (1938), 11 U. S. C. (Supp. 1939), § 101(a).

[83] Argument in Platt v. Routh, 6 M. & W. 756 at 771, 151 Eng. Rep. 618 (1840).

[84] Solicitor-General in Platt v. Routh, 6 M. & W. 756 at 771, 151 Eng. Rep. 618 (1840); Re Dunbar-Buller, [1923] 2 I. R. 143 at 150, per Andrews, L. J.

[85] Solicitor-General, arguendo, in Platt v. Routh, 6 M. & W. (Exch.) 756 at 771, 151 Eng. Rep. 618 (1840), affd. sub. nom. Drake v. Attorney General, 10 Cl. & F. (H. L.) 288, 8 Eng. Rep. 739 (1843), per L. C. See also Legacy Duty Act, 36 Geo. 3, c. 52, § 18 (1796); and Lee v. Commissioner, (App. D. C. 1932) 57 F. (2d) 399.

of the definitions hitherto accepted, the courts may adopt a third alternative. This would involve the conclusion that general tests are neither feasible nor necessary. The courts may recognize that the usual definitions are no more than rough descriptions of the most common powers, and are in no sense absolute. Historically this view is perfectly justifiable, for, as Holdsworth points out,[86] the definitions were not adopted at one stroke, but were developed with reference to the interests of creditors, the rule against perpetuities, and delegability. When a new power comes before the courts, it should not be tested by any rigid formula, but should be examined in relation to the purpose for which it is to be classified. In applying a particular rule of law to an "anomalous" power, the court should determine the policy of that rule and be guided by it in dealing with the power. This may result in classifying the same power as general for one purpose and special for another, but it is submitted that this is the only sound technique which can be adopted in the classification of powers.

It cannot be pretended that the courts have always employed the approach here advocated. Cases have been decided by an uncritical deference to other decisions which appear to involve a similar problem but in fact do not because of the different purpose for which the power was being classified. *Re Dunbar-Buller*,[87] an Irish case, is a particularly good example of this thoughtless application of so-called precedents. It has been decided that the words "power to appoint in any manner he may think proper" in section 27 of the English Wills Act exclude from the scope of that section a power which the donor prescribes shall be exercised only by a will expressly referring to the power.[88] Decisions so holding are based upon no more than an interpretation of the section. The words quoted apply not to the choice of objects but to the mode of appointment.[89] Although section 27 refers to general powers, it has been recognized that powers which do not come within the section because of its interpretation may yet be general for other purposes. In *Re Dunbar-Buller* the Irish Court of Appeal was faced with the problem of applying certain provisions of the Finance Acts of 1894,[90] 1900,[91] and 1907,[92] relating to estate duty, to a power, unlimited as to

[86] 7 HOLDSWORTH, A HISTORY OF ENGLISH LAW, 2d ed., 170 (1937).

[87] [1923] 2 I. R. 143.

[88] Phillips v. Cayley, 43 Ch. D. 222 (1889); Re Tarrant's Trusts, 58 L. J. (Ch.) 780 (1889); Re Davies, [1892] 3 Ch. 63; Re Lane, [1908] 2 Ch. 581.

[89] Phillips v. Cayley, 43 Ch. D. 222 (1889).

[90] 57 & 58 Vict., c. 30 (1894).

[91] 63 & 64 Vict., c. 7 (1900).

[92] 7 Edw. 7, c. 13 (1907).

objects, to appoint by a will expressly referring to the power. The policy of these provisions appears to be that a decedent who enjoys an unrestricted freedom of disposition under a power of appointment shall be deemed to be the owner of the property for the purpose of imposing the estate duty. The court decided to follow the decisions on section 27 of the Wills Act, on the assumption that they established a general test for the classification of powers, and held, therefore, that the power in question was not general for estate duty.

Platt v. Routh,[93] in contrast to *Re Dunbar-Buller*, illustrates the approach here advocated. The courts in that case classified the power in the light of the policy of the statute there involved. It is also interesting to note that Lord Abinger, in discussing the rights of the donee's creditors, did not say that because the power was general the creditors could have recourse to the appointed property, but that, inasmuch as the donee could have appointed to her creditors, the power must be considered general in so far as their rights were concerned.[94] *Re Byron's Settlement*,[95] whatever one thinks of the actual decision, also proceeds upon an analysis of the purpose of the rule of law involved. This is clearly true of *Re Penrose*[96] also.

B. *Applications of the Suggested Solution*

It remains to consider the classification of the powers dealt with above for some of the more important purposes for which powers must be classified in the light of the test which has been suggested.

1. *Problems of Liability for Debts of Donee*

A general power has been so far assimilated to property that on its exercise the appointed property is in most jurisdictions considered the assets of the donee for distribution to his creditors where his own property proves to be insufficient for the payment of his debts.[97] Property subject to a special power is never made available for the donee's creditors.

[93] 6 M. & W. 756, 151 Eng. Rep. 618 (1840), discussed supra at note 48.
[94] 6 M. & W. at 789.
[95] [1891] 3 Ch. 474, discussed supra at note 59.
[96] [1933] Ch. 793, discussed supra at note 30 et seq.
[97] Ashfield v. Ashfield, 2 Vern. 287, 23 Eng. Rep. 785 (1693); Thompson v. Towne, 2 Vern. 319, 23 Eng. Rep. 806 (1694); Lassells v. Cornwallis, 2 Vern. 465, 23 Eng. Rep. 898 (1704); Hinton v. Toye, 1 Atk. 465, 26 Eng. Rep. 296 (1739); Pack v. Bathurst, 3 Atk. 269, 26 Eng. Rep. 957 (1745); Lord Townshend v. Windham, 2 Ves. Sen. 1, 28 Eng. Rep. 1 (1750); George v. Milbanke, 9 Ves. 190, 32 Eng. Rep. 575 (1803); Williams v. Lomas, 16 Beav. 1, 51 Eng. Rep. 675 (1852); Fleming v. Buchanan, 3 De G. M. & G. 976, 43 Eng. Rep. 382 (1853); Re Lawley,

There have been many attempts to explain this treatment of general powers:

(a) It has been said that the appointee becomes a trustee for the donee's creditors.[98] But the donee's executor takes the property and pays the creditors, the appointee receiving any residue remaining after payment of the creditors.[99]

(b) A general power confers all the attributes of ownership, and the donee by exercising it accepts them.[100] A general power is not, however, equivalent to ownership. The differences are many.[101]

[1902] 2 Ch. 673, 799, affd. sub nom. Beyfus v. Lawley, [1903] A. C. 411; O'Grady v. Wilmot, [1916] 2 A. C. 231.

Harrison v. Battle, 1 Dev. & B. Eq. (21 N. C.) 213 (1835); Johnson v. Cushing, 15 N. H. 298 (1844); Clapp v. Ingraham, 126 Mass. 200 (1879); Gilman v. Bell, 99 Ill. 144 (1881); Freeman's Admr. v. Butters, 94 Va. 406, 26 S. E. 845 (1897); Arnold v. Southern Pine Lumber Co., 58 Tex. Civ. App. 186, 123 S. W. 1162 (1909); Security Trust & Safe Deposit Co. v. Ward, 10 Del. Ch. 408, 93 A. 385 (1915); Crane v. Fidelity Union Trust Co., 99 N. J. Eq. 164, 133 A. 205 (1926).

Contra: Commonwealth v. Duffield, 12 Pa. St. 277 (1849); Balls v. Dampman, 69 Md. 390, 16 A. 16 (1888); Wales' Admr. v. Bowdish's Exr., 61 Vt. 23, 17 A. 1000 (1888); Adger v. Kirk, 116 S. C. 298, 108 S. E. 97 (1920); Rhode Island Hospital Trust Co. v. Anthony, 49 R. I. 339, 142 A. 531 (1928).

[98] Jenney v. Andrews, 6 Madd. 264, 56 Eng. Rep. 1091 (1822), per Leach, V. C.; Williams v. Lomas, 16 Beav. 1 at 3, 51 Eng. Rep. 675 (1852), per Sir J. Romilly.

[99] Re Hoskin's Trusts, 5 Ch. D. 229 (1877); Re Peacock's Settlement, [1902] 1 Ch. 552.

[100] Johnson v. Cushing, 15 N. H. 298 at 307-308 (1844); Price v. Cherbonnier, 103 Md. 107 at 109, 63 A. 209 (1906); O'Grady v. Wilmot, [1916] 2 A. C. 231 at 271, per Lord Sumner.

[101] See for some significant differences: (1) Ray v. Pung, 5 Madd. 310, 56 Eng. Rep. 914, 5 B. & Ald. 561, 106 Eng. Rep. 1296 (1821); 1 SIMES, FUTURE INTERESTS, § 256 (1936), and Simes, "The Devolution of Title to Appointed Property," 22 ILL. L. REV. 480 at 493 (1928). (2) Holmes v. Coghill, 7 Ves. Jun. (Ch.) 499, 32 Eng. Rep. 201 (1802), affd. by Lord Chancellor, 12 Ves. 206, 33 Eng. Rep. 79 (1806). (3) Ewart v. Ewart, 11 Hare 276, 68 Eng. Rep. 1278 (1853); Bower v. Smith, L. R. 11 Eq. 279 (1871). (4) Re Earl of Devon's Settled Estate, [1896] 2 Ch. 562. (5) Mansell v. Mansell, 2 P. Wms. 678, 24 Eng. Rep. 913, Cas. T. Talbot 252, 25 Eng. Rep. 763 (1732); Montefiore v. Browne, 7 H. L. C. 241, 11 Eng. Rep. 96 (1858); Stamper v. Venable, 117 Tenn. 557, 97 S. W. 812 (1906). (6) Thompson v. Schenck, 16 Ind. 194 (1861); Williams v. White, (C. C. A. 8th, 1914) 218 F. 797. (7) Cole v. Wade, 16 Ves. 27, 33 Eng. Rep. 894 (1806-1807); Jones v. Clifton, 101 U. S. 225 at 230-231 (1879); Phillips v. Wood, 16 R. I. 274, 15 A. 88 (1887). (8) People's Nat. Bank, Admr., 39 B. T. A. 565 (1939). (9) Re Mathieson, [1927] 1 Ch. 283. (10) Badham v. Mee, 1 My. & K. 32, 39 Eng. Rep. 593 (1832). (11) Roach v. Wadham, 6 East 289, 102 Eng. Rep. 1297 (1805). (12) Mainprice v. Pearson, 25 W. R. 768 (1872). (13) Re D'Angibau, 15 Ch. D. 228 (1879). (14) Murphy v. Deichler, [1909] A. C. 446. (15) Re Lewal's Settlement, [1918] 2 Ch. 391.

(c) Any appointment may be considered an appointment by the donee to himself first and then to the appointee.[102] It may be objected to this explanation that the rule applies to testamentary general powers,[103] by the exercise of which the donee cannot confer the property on himself. To this objection it could be replied that the donee of a general testamentary power can confer the property on his estate.[104] There is, however, a further objection to this reasoning. If all appointments were construed as in favor of the donee first, he would always be entitled to the residue where the appointment lapses. In actual fact, the persons entitled on default of appointment are not deprived of any residue where an appointment fails merely because the rest of the appointed property is devoted to the payment of the donee's debts. The residue becomes part of the donee's estate only if he has shown an intention to make it his.[105] This position could be reconciled with the explanation here discussed by asserting that an appointment must be construed as to the donee himself first to the extent necessary to pay his debts or to the extent that the appointment is good. The weakness of this argument is that the donee in making the appointment does not distinguish beween the property necessary to pay his debts or the property effectively appointed and the residue of the property.

(d) It has been said that the donee's failure to appoint to creditors is a fraud upon them.[106] There are two criticisms of this statement. First, the property belongs to the donor and not the donee. Secondly, the implication of this explanation is that there would be an equal fraud where the donee did not appoint at all. It is, however, established that creditors of the donee are entitled to satisfaction from the property subject to the power only where it is appointed.[107]

(e) The donee of a power of appointment, it has sometimes been said, is a trustee for his creditors.[108] In the ordinary case, however, the donor does not intend a trust for the donee's creditors. It has also been said that the donee's executor becomes a trustee for the donee's credi-

[102] Attorney General v. Upton, L. R. 1 Ex. 224 at 228-229 (1866). 2 CHANCE, TREATISE ON POWERS 143 (1841).

[103] See note 65, supra.

[104] See note 26, supra.

[105] See note 71, supra.

[106] Johnson v. Cushing, 15 N. H. 298 at 314 (1844).

[107] Holmes v. Coghill, 7 Ves. Jun. (Ch.) 499, 32 Eng. Rep. 201 (1802), affd. by Lord Chancellor 12 Ves. 206, 33 Eng. Rep. 79 (1806); Duncanson v. Manson, 3 App. D. C. 260 (1894), affd. 166 U. S. 533, 17 S. Ct. 647 (1897); Supreme Colony v. Towne, 87 Conn. 644, 89 A. 264 (1914).

[108] Platt v. Routh, 6 M. & W. 756 at 772, 151 Eng. Rep. 618 (1840), per Wilde, S. C., arguendo; O'Grady v. Wilmot, [1916] 2 A. C. 231 at 264, per Lord Atkinson.

tors.[109] But he is not appointed trustee, and the donee's intention is to pass his creditors by.

It is obvious that there are sufficient inherent weaknesses in the above explanations to make them unacceptable. It is clear that they are ex post facto justifications of a rule based on considerations of policy divorced from strict legal doctrine. The truth of the matter is that equity intervenes arbitrarily and without regard to doctrine because it prefers to see the creditors of the donee satisfied before he indulges his instincts of generosity.[110]

> ". . . It would appear to me that as near the truth as any is the theory that equity and good conscience require that a donee of such a power must be just before he is generous. . . ."[111]

It would seem to follow that where the donee could himself appoint the property to his creditors, equity will intervene to stop the property *in transitu*[112] and award it to creditors to the extent that the donee's own property is insufficient. Thus, a power to appoint to anyone except the donee should be treated as general for the purpose of satisfying the donee's creditors from the appointed property. In the case of a power to appoint to a limited class which includes the donee, in the absence of any restriction on the right of the donee to appoint to himself, equity might well hold that, as the donee could make the property his own, it must be considered a fund for his creditors in the event of an appointment by him. This would involve an extension of the rule as hitherto applied, but one in conformity with the policy of that rule. The power to appoint to anyone except certain named individuals should receive similar treatment where the excluded individuals are not creditors. This was the opinion of Lord Abinger in *Platt v. Routh*[113] and the Irish Court in *Edie v. Babington*.[114] If, however, one or more of the excluded persons are creditors of the donee, it would seem that the equitable rule cannot apply. But it might be argued successfully that equity should intervene on behalf of the creditors who have not been excluded, on the ground that there is no reason why

[109] Re Treasure, [1900] 2 Ch. 648 at 652, per Kekewich, J.

[110] Holmes v. Coghill, 7 Ves. 499 at 507, 32 Eng. Rep. 201 (1802); Re Harvey's Estate, 13 Ch. D. 216 at 221-222 (1879); O'Grady v. Wilmot, [1916] 2 A. C. 231 at 270-273; Hill v. Treasurer, 229 Mass. 474 at 476, 118 N. E. 891 (1917).

[111] Lord Atkinson in O'Grady v. Wilmot, [1916] 2 A. C. 231 at 264.

[112] Lord Hardwicke in Lord Townshend v. Windham, 2 Ves. Sen. 1, 28 Eng. Rep. 1 (1750).

[113] 6 M. & W. 756, 151 Eng. Rep. 618 (1840), discussed supra at note 48.

[114] 3 Ir. Ch. 568 (1854), discussed supra at note 57.

all should be thwarted because some are not possible objects. Furthermore, relief accorded the creditors not excluded would not operate to the detriment of the excluded creditors, since there is no preference given to the former from property *owned* by the donee.

2. *Problems of Taxation*

There are a number of important differences between general and special powers in connection with death or inheritance taxes. In England these differences exist with respect to estate,[115] legacy,[116] and succession[117] duties, and in the United States with respect to the federal estate tax.[118] It is not intended to give the details here of the specific legislative provisions, but these provisions are based on a principle which has been expressed as follows:

> "The purpose of the Revenue Act is to establish a tax upon the transmission of property and not upon the property itself. A logical explanation of the inclusion of property passing under general powers of appointment and the exclusion of property passing under special powers is that where the original testator has limited the right to appoint to certain named beneficiaries or to a limited class of beneficiaries, it is he and not the donee of the power who in the broadest sense transmits the property to the beneficiaries. The donee's exercise of such narrow and limited powers may be taken rather as a mere stage in the original scheme of inheritance than as an independent source of descent. In such case, it is really the death of the original testator which may reasonably be taken as the transmission of the property for the purpose of taxation. Where, however, the donee has full power to direct the property to any beneficiary that he pleases, there is in a real sense a transmission of it from him rather than from the original testator."[119]

[115] Finance Act, 57 & 58 Vict., c. 30, §§ 2(1)(a), 22(2) (1894). See GREEN, DEATH DUTIES 47 (1936).

[116] Legacy Duty Act, 36 Geo. 3, c. 52 (1796); Stamp Act, 55 Geo. 3, c. 184, § 2 and Schedule (1815); Revenue Act, 8 & 9 Vict., c. 76, § 4 (1845).

[117] Succession Duty Act, 16 & 17 Vict., c. 51 (1853); Attorney General v. Upton, L. R. 1 Ex. 224 (1866); Re Wallop's Trust, 1 De G. J. & Sm. 656, 46 Eng. Rep. 259 (1864).

[118] Sec. 402(e) of the Revenue Act of 1918, 40 Stat. L. 1097 (1918), first provided that the taxable gross estate of a decedent shall include property passing under a general power exercised by the decedent. This provision is still in force with the addition of clause (3) introduced by section 803(b) of the 1932 Act, 47 Stat. L. 279 (1932). See Internal Revenue Code of 1939, § 811 (f).

[119] Fidelity-Philadelphia Trust Co. v. McCaughn, (C. C. A. 3d, 1929) 34 F. (2d) 600 at 604, cert. den., 280 U. S. 602, 50 S. Ct. 85 (1929).

The test of a special power for the purpose of taxation, according to this statement, is whether the donor has remained the architect of the scheme of inheritance. If he has abdicated "control and direction"[120] in favor of the donee, the power is general. It follows that if the power enables the donee to appoint to himself, even though the donor has designated a class of objects, the donor has not retained control over the subsequent descent of the property. The donee has but to appoint to himself in order to destroy any appearance of control by the donor. *Re Penrose*[121] is a strong authority for this proposition.

If the power permits an appointment to anyone except certain named individuals or to anyone except the donee himself, it cannot be seriously argued that the donor has retained direction and control of the course of descent. Substantially, direction and control have been invested in the donee. *Platt v. Routh*[122] supports this view, but the cases on the federal estate tax already cited[123] are inconsistent with it. These latter cases, it would seem, ignore the fundamental theory upon which inheritance taxation as applied to powers of appointment is based, and proceed upon a too rigid conceptualism. The decisions of the Board of Tax Appeals here referred to are not very recent and may no longer represent the opinion of that body. They appear, however, to receive some support from dicta in the judgment of Justice Roberts in *Morgan v. Commissioner of Internal Revenue*.[124] The Supreme Court in that case was called upon to decide whether the power of trustees to withhold property from the objects selected by the donee of an otherwise unlimited power of appointment rendered that power of appointment special for the federal estate tax. According to Justice Roberts, the definition of a general power which Congress had in view in framing the provision relating to estate tax in its application to powers was one by which "the donee may appoint to anyone, including his own estate or his creditors, thus having as full dominion over the property as if he owned it."[125] It is submitted that this dictum should not be interpreted as necessarily indicating the opinion of the Supreme Court on powers to appoint to anybody except certain named individuals. Such a power was not before the Court. It is interesting to note in this connection that Justice Roberts' definition of a special power does not

[120] See note 50, supra.
[121] [1891] 3 Ch. 474, discussed supra at note 59.
[122] 6 M. & W. 756, 151 Eng. Rep. 618 (1840), discussed supra at note 48.
[123] See notes 43, 45, 46 and 47, supra.
[124] 309 U. S. 78, 60 S. Ct. 424 (1940).
[125] 309 U. S. at 81.

fit powers of the kind here considered. By means of a special power, he said, "the donee may appoint only amongst a restricted or designated class of persons other than himself."[126] It cannot be argued that there is a restricted or designated class of appointees if the donee can appoint freely except to certain excluded persons. Elsewhere in the judgment it is said that "The important consideration is the breadth of the control the decedent could exercise over the property."[127] This may, perhaps, indicate that a power may be general for the estate tax if the donee has a sufficiently broad control, even though that control is not formally complete. The test, it is repeated, should be, Who, in a practical sense, can be said to be responsible for the devolution of the property on the appointees?

3. *Problems of Rule against Perpetuities*

Both general and special powers must be so conferred as to become exercisable within the period permitted by the rule against perpetuities.[128] If the power is special, every possible exercise must be confined to this period, but if the power is general, it is sufficient if its first exercise is possible within due limits.[129] Again, in determining the validity of interests created by the exercise of a power, the perpetuity period, where the power is special, is computed from the date when the instrument creating the power takes effect.[130] Where the power is general, the period is reckoned from the date when the instrument exercising the power takes effect.[131] These differences in the treatment of the two types of powers have been explained as follows:

[126] 309 U. S. at 81.

[127] 309 U. S. at 83.

[128] Duke of Marlborough v. Godolphin, 1 Eden 404, 28 Eng. Rep. 741 (1759), affd. sub nom. Spencer v. Duke of Marlborough, 3 Bro. P. C. 232, 1 Eng. Rep. 1289 (1763); Wollaston v. King, L. R. 8 Eq. 165 (1869); Morgan v. Gronow, L. R. 16 Eq. 1 (1873); Tredennick v. Tredennick, [1900] 1 I. R. 354; GRAY, THE RULE AGAINST PERPETUITIES, 3d ed., § 473 (1915).

[129] Bray v. Hammersley, 3 Sim. 513, 57 Eng. Rep. 1090 (1830), affd. sub nom. Bray v. Bree, 8 Bli. N. S. 568, 5 Eng. Rep. 1053, 2 Cl. & F. 453, 6 Eng. Rep. 1225 (1834); 2 COKE ON LITTLETON, INSTITUTES, 17th ed., 271b, Butler's note VII, 2 (1817); GRAY, RULE AGAINST PERPETUITIES, 3d ed., § 477 (1915); LEWIS, PERPETUITY 483-484 (1843); MARSDEN, THE RULE AGAINST PERPETUITIES 236 (1883); SUGDEN, POWERS, 8th ed., 394, et seq. (1861); 71 Ir. L. T. 307 (1937). But see Thorndike, "Remoteness of General Powers," 28 HARV. L. REV. 664 (1915).

[130] Re Legh's Settlement Trusts, [1938] Ch. 39; GRAY, THE RULE AGAINST PERPETUITIES, 3d ed., § 525 (1915); FARWELL, POWERS, 3d ed., 325 (1916).

[131] Mifflin's Appeal, 121 Pa. 205 at 213-214, 15 A. 525 (1888); Appleton's Appeal, 136 Pa. 354, 20 A. 521 (1890); Re Earl of Devon's Settled Estates, [1896] 2 Ch. 562 at 567; FARWELL, POWERS, 3d ed., 334 (1916); GRAY, THE RULE AGAINST PERPETUITIES, 3d ed., §§ 524, 526-526c (1915); LEWIS, PERPETUITY, c.

"General powers are exempt from the restrictions of the rule against perpetuities[132] because the existence of a general power leaves the property in a position which for the present purpose does not differ from that in which it would stand if there were an absolute owner. There exists by the existence of the power a present immediate and unrestrained alienability, and there is no necessity to consider in such case how far a perpetuity may be created any more than it is necessary to consider it in the case of of an absolute owner.

"Particular or special powers such as a power to appoint among a named class of persons differ from general powers in that the donee has not an unrestricted power of alienation."[133]

The rationale of the special application of the rule against perpetuities to general powers is thus the unlimited power of disposition which the donee enjoys. Dicta that the donee of a general power is practically the owner are common in cases dealing with this question.[134] This has been interpreted literally, particularly in the treatment of unlimited testamentary powers in the United States. These are held not to be general for the purposes of the rule against perpetuities. It is said that as the donee cannot appoint to himself, it cannot be predicated of him that he is virtually the owner of the property subject to the power.[135] This conclusion is questionable since at the only date which is relevant, the death of the donee, the donee has as unfettered a power of disposition as he has of property which he owns.

In accordance with what has been said of the theory underlying the application of the rule against perpetuities to powers, it must be held that powers to appoint to any one except the donee or to anyone except certain named individuals are not general for the purposes of the rule against perpetuities. This, however, should not apply to unlimited testamentary powers in English law. The problem there is not yet settled, and should be decided, it is submitted, on the ground that at the

xx (1843); MARSDEN, THE RULE AGAINST PERPETUITIES 250 (1883); 101 A. L. R. 1282 (1936); 1 A. L. R. 374 (1919).

[132] This, of course, is not strictly true. See note 128, supra.

[133] Re Fane, [1913] 1 Ch. 404 at 413, per Buckley, L. J.

[134] See, for example: Minot v. Paine, 230 Mass. 514, 120 N. E. 167 (1918); Lyon v. Alexander, 304 Pa. 288, 156 A. 84 (1931); St. Louis Union Trust Co. v. Bassett, 337 Mo. 604, 85 S. W. (2d) 569 (1935); Estate of Warren, 320 Pa. 112, 182 A. 396 (1936); Kales, "General Powers and the Rule Against Perpeutities," 26 HARV. L. REV. 64 (1912); Gray, "General Testamentary Powers and the Rule against Perpetuities," 26 HARV. L. REV. 720 (1915).

[135] See articles by Gray and Kales cited in preceeding note.

date when the exercise of the power takes effect the donee does possess complete freedom of disposition.

Prima facie, a power to appoint to a limited class which includes the donee does not confer on the donee an unrestrained power of disposition. This, however, is too formalistic a view where the donee is able to appoint wholly in his own favor. He need merely take the step of appointing to himself in order to enjoy complete freedom of disposition. Such a power should be considered general for the purposes of the rule against perpetuities.

4. *Problems of Execution by Donee's Will*

Section 27 of the English Wills Act and similar American statutes have already been referred to. This section is important, not only in itself, but also because in combination with other sections of the Wills Act (and corresponding American statutes) it has resulted in a number of rules which apply to general but not to special powers:

(a) A general power is well exercised by a will executed prior to the date at which the instrument creating the power took effect.[136] The reason for this is that the will speaks from the death, and by section 27 property subject to a general power is comprised in the will. This rule applies only where the donor or donee has not manifested an intention that it shall not apply.[137]

(b) In the absence of a contrary intention appearing, a devise or bequest to a child of the testator-donee, who dies in the lifetime of the

[136] Wills Act, 7 W. 4 & 1 Vict., c. 26, § 24 (1837); Cofield v. Pollard, 3 Jur. N. S. 1203 (1857); Patch v. Shore, 2 Drew. & Sm. 589, 62 Eng. Rep. 743 (1862); Boyes v. Cook, 14 Ch. D. 53 (1880); Webb v. Jones, 36 N. J. Eq. 163 (1882); Re Old's Trusts, 54 L. T. R. 677 (1886); Airey v. Bower, 12 App. Cas. 263 (1887); Re Hernando, 27 Ch. D. 284 (1884); Burkett v. Whittemore, 36 S. C. 428, 15 S. E. 616 (1891); In re Pennsylvania Co. for Insurances, 264 Pa. 443, 107 A. 840 (1919); 3 PROPERTY RESTATEMENT, § 344 (1940); 1 SIMES, FUTURE INTERESTS, § 272 (1936). (The power must be in existence at the death of the donee—Re Young, [1920] 2 Ch. 427.)

Contra: Vaux's Estate, 11 Phila. 57 (1875); Dunn and Biddle's Appeal, 85 Pa. 94 (1877); Howard v. Carusi, 11 D. C. 260 (1880), affd. 109 U. S. 260, 3 S. Ct. 575 (1883); Matteson v. Goddard, 17 R. I. 299, 21 A. 914 (1891); Farlow v. Farlow, 83 Md. 118, 34 A. 837 (1896); Hankins v. Columbia Trust Co., 142 Ky. 206, 134 S. W. 498 (1911). But see United States Trust Co. v. Chauncey, 32 Misc. 358, 66 N. Y. S. 563 (1900); Stone v. Forbes, 189 Mass. 163, 75 N. E. 141 (1905).

On special powers, see: Cowper v. Mantell, 22 Beav. 223, 52 Eng. Rep. 1094 (1856); Re Wells' Trusts, 42 Ch. D. 646 (1889); Doyle v. Coyle, [1895] 1 I. R. 205; Re Moses, [1902] 1 Ch. 100, affd. sub nom. Beddington v. Baumann, [1903] A. C. 13; Re Bower, 141 L. T. R. 639 (1929). See also 45 SOL. J. 720 (1901).

[137] Wills Act, 7 W. 4 & 1 Vict., c. 26, § 24 (1837).

latter leaving issue, shall not lapse.[138] This applies to appointments under general powers because section 27 extends the meaning of "devise" and "bequest" to include such appointments.

(c) In the absence of a contrary intention appearing in the will, a residuary devise or bequest includes property appointed under a general power.[139]

It has been seen that the purpose of section 27 is to eliminate as far as that section is concerned, and, it would seem to follow, as far as the sections which in combination with section 27 produce the above rules are concerned, the difference between power and property which a layman would not perceive.[140] The power to appoint to anyone except the donee has already been discussed. In *Re Byron's Settlement*[141] it was held that a power to appoint to anyone except certain named persons is not within the scope of section 27. It is likely, however, that a layman would assume that as long as he can appoint to himself he has something equivalent to property. This is particularly so since there would appear to be no objection to an appointment by the donee to himself coupled with a gift of the appointed property to the excluded person. The only objection to this reasoning is that it permits the evasion of the donor's intention, but he should have been aware of this possibility in permitting an appointment to the donee himself. The objection would seem to have some force only where the donee appoints to himself and then conveys the property to the excluded person by the same instrument. If this transaction is performed by two distinct instruments, the second executed some time after the first, it would be difficult to argue that the conveyance to the excluded person is void because of the evasion of the donor's direction. If the above reasoning is correct, a power to appoint to a limited class which includes the donee, who is empowered to appoint wholly to himself, is clearly within section 27.

[138] Wills Act, 7 W. 4 & 1 Vict., c. 26, § 33 (1837); Eccles v. Cheyne, 2 K. & J. 676, 69 Eng. Rep. 954 (1856); Holyland v. Lewin, 26 Ch. D. 266 (1884); Lyndall's Estate, 2 Pa. D. & C. 476, 32 W. N. C. 325 (1893); Thompson v. Pew, 214 Mass. 520, 102 N. E. 122 (1913); Daniel v. Brown, 156 Va. 563, 159 S. E. 209 (1931); 3 PROPERTY RESTATEMENT, § 350 (1940); 1 SIMES, FUTURE INTERESTS, § 267 (1936). On special powers see: Griffiths v. Gale, 12 Sim. 354, 59 Eng. Rep. 1168 (1844); Freeland v. Pearson, L. R. 3 Eq. 658 (1867).

[139] Wills Act, 7 W. 4 & 1 Vict., c. 26, § 25 (1837); Holyland v. Lewin, 26 Ch. D. 266 (1884).

[140] Eccles v. Cheyne, 2 K. & J. 676 at 682, 69 Eng. Rep. 954 (1856); In re Wilkinson, L. R. 4 Ch. 587 at 589-590 (1869); Re Wallinger's Estate, [1898] 1 I. R. 139 at 148; Re Jacob, [1907] 1 Ch. 445 at 449; Re Doherty-Waterhouse, [1918] 2 Ch. 269 at 271-272.

[141] [1891] 3 Ch. 474, discussed supra at note 59 et seq.

5. *Problems of Fiduciary Duties of Donee*

There are certain doctrines which apply only to special powers because fiduciary duties are owed by the donee to the designated objects or to the donor in connection with the selection among designated objects. If there are no designated objects, i.e., if the power is general, it is not possible to impose these fiduciary duties on the donee. These doctrines are:

(a) Some special powers are powers in the nature of or coupled with a trust, the distinctive feature of which is that their exercise is imperative and not merely in the discretion of the donee.[142] Whether a power is imperative depends on the donor's intention.[143]

(b) In English law all powers are releasable.[144] In the United States there is a conflict of opinion as to which special powers may be released by the donee,[145] but there is agreement as to general powers. They are releasable.[146] "It is true . . . because the donee does not owe any duty to anyone with respect to the power; it is intended for his benefit, and he is not a fiduciary."[147]

(c) There is a difference of opinion on the question whether, and, if so, which, special powers may be delegated,[148] but it is agreed that normally a general power may be exercised by conferring on the donee another power.[149]

(d) In English law, a general power given to the survivor of two persons may be exercised by the will of the survivor executed during their joint lives.[150] A special power cannot be exercised until the sur-

[142] Burrough v. Philcox, 5 Myl. & Cr. 72, 41 Eng. Rep. 299 (1840); Gorin v. Gordon, 38 Miss. 205 (1859); Re Weekes' Settlement, [1897] 1 Ch. 289; Cady v. Lincoln, 100 Miss. 765, 57 So. 213 (1912); Stoughton v. Liscomb, 39 R. I. 489, 98 A. 183 (1916); Re Combe, [1925] Ch. 210.

[143] Milhollen's Admr. v. Rice, 13 W. Va. 510 (1878). See note 37, supra.

[144] Except powers in trust. Law of Property Act, 15 Geo. 5, c. 20 § 155 (1925).

[145] Gray, "Release and Discharge of Powers," 24 HARV. L. REV. 511 (1911); 1 SIMES, FUTURE INTERESTS, §§ 277-285 (1936); 3 PROPERTY RESTATEMENT, §§ 334-338 (1940) [see, in particular, the memorandum appended to Tentative Draft No. 7 (1937)].

[146] Johnson v. Harris, 202 Ky. 193, 259 S. W. 35 (1924); Lyon v. Alexander, 304 Pa. 288, 156 A. 84 (1931); PROPERTY RESTATEMENT, (Tentative Draft No. 7), § 457 (1937).

[147] Simes, "Powers in Trust and the Termination of Powers by the Donee," 37 YALE L. J. 63, 211 at 217-218 (1927).

[148] See note 33, supra.

[149] 3 PROPERTY RESTATEMENT, § 357 (1940), and cases cited in note 33, supra.

[150] Thomas v. Jones, 1 De G. J. & S. 63, 46 Eng. Rep. 25 (1862); FARWELL, POWERS, 3d ed., 177-179 (1916).

vivor is actually ascertained.[151] The donee of a special power is a fiduciary, and, therefore, may not decide upon the appointment until such time as is indicated by the donor.[152]

(e) In the United States the court refuses both specific performance and damages for the breach or threatened breach of a covenant to exercise a testamentary power, whether the power be general or special.[153] In England, if the power is special, there is no remedy for breach or threatened breach of a covenant, but if the power is general, damages are recoverable for breach.[154] The donee of a special power owes fiduciary duties which he may not compromise by a premature judgment on the destination of the property subject to the power.

(f) The doctrines of illusory appointments,[155] fraud upon a power,[156] and excessive appointments[157] apply to special but not to general powers.[158]

[151] MacAdams v. Logan, 3 Bro. C. C. 310, 29 Eng. Rep. 553 (1791); Cave v. Cave, 8 De G. M. & G. 131, 44 Eng. Rep. 339 (1856); Re Twiss's Trust, 15 W. R. 540 (1867); Re Moir's Settlement Trusts, 46 L. T. R. 723 (1882); SUGDEN, POWERS, 8th ed., 124 (1861); FARWELL, POWERS, 3d ed., 183 (1916). Would the distinction be made by an American court? See 3 PROPERTY RESTATEMENT, § 344 (1940).

[152] Re Moir's Settlement Trusts, 46 L. T. R. 723 (1882).

[153] 3 PROPERTY RESTATEMENT, §§ 339, 340 (1940); Northern Trust Co. v. Porter, 368 Ill. 256, 13 N. E. (2d) 487 (1938).

[154] Thacker v. Key, L. R. 8 Eq. 408 (1860); Re Parkin, [1892] 3 Ch. 510; Re Bradshaw, [1902] 1 Ch. 436; Re Lawley, [1902] 2 Ch. 673, 799, affd. sub nom. Beyfus v. Lawley, [1903] A. C. 411.

[155] The doctrine was abolished in England by 11 Geo. 4 & 1 Will. 4, c. 46 (1830), a statute sponsored by Lord St. Leonards. The doctrine is still applied in some states. See note 39, supra.

[156] See note 38, supra. Aleyn v. Belchier, 1 Eden 132, 28 Eng. Rep. 634 (1758); Daubeny v. Cockburn, 1 Mer. 626, 35 Eng. Rep. 801 (1816); Cloutte v. Storey, [1911] 1 Ch. 18; Central Trust Co. v. Dewey, 179 App. Div. 112, 166 N. Y. S. 214 (1917); Taylor v. Phillips, 147 Ga. 761, 95 S. E. 289 (1918); Cochrane v. Cochrane, [1922] 2 Ch. 230; Easley v. Little, 314 Ill. 553, 145 N. E. 625 (1924); Re Nicholson's Settlement, [1939] Ch. 11.

[157] Introductory Note to §§ 474, 478, PROPERTY RESTATEMENT (Proposed Final Draft No. 2), pp. 12, 60, 78 (1938); 2 CHANCE, A TREATISE ON POWERS, c. xii, § vi (1841); FARWELL, POWERS, 3d ed., 343-374 (1916); 1 SIMES, FUTURE INTERESTS, § 274 (1936).

[158] For further differences between general and special powers, see: (1) Judgments. Law of Property Act, 15 Geo. 5, c. 20, § 195 (1925). (2) Vesting in personal representatives. Administration of Estates Act, 15 Geo. 5, c. 23, §§ 1(1), 3(2) (1925). (3) Vesting in trustees. LEWIN, TRUSTS, 14th ed., 468-469 (1939), and cases there cited. (4) Satisfaction of charges on property. Administration of Estates Act, 15 Geo. 5, c. 23, § 35(1) (1925). (5) Conflict of laws. Pouey v. Hordern, [1900] 1 Ch. 492; Re Pryce, [1911] 2 Ch. 286. (6) Limitation of actions. Limitation Act, 3 & 4 Will. 4, c. 27, § 1 (1833); Limitation Act, 37 & 38 Vict., c. 57, §§ 1, 9 (1874); Re Earl of Devon's Settled Estates, [1896] 2 Ch. 562. (7) Appointments

Since the above rules are based on the existence of fiduciary duties, and since these in turn depend on the existence of designated objects, it is clear that these rules can apply to one only of the three "anomalous" powers here discussed. This is the power to appoint to a limited class which includes the donee. In the case of the power to appoint to anyone except the donee or the power to appoint to anyone except certain named individuals there are no designated objects. The rest of humanity cannot be considered to constitute designated objects by reason of the specific exclusions. It is, however, possible to apply the doctrines of fraud upon a power and excessive appointments to these two powers. This is so because these doctrines are intended to prevent, among other improprieties, appointments to non-objects,[159] and the excluded persons, of course, are non-objects.

to personal representatives of deceased persons. Maddison v. Andrew, 1 Ves. Sen. 57 at 59, 27 Eng. Rep. 889 (1747); see note 26, supra. (8) Stamp duty on conveyances. Finance (1909-10) Act, 10 Edw. 7, c. 8, § 74 (1910); Stanyforth v. Commissioners, [1930] A. C. 339; 2 EMMET, NOTES ON PERUSING TITLE, 12th ed., 261-262 (1932).

For a summary of most of the recent developments in English law relating to powers, see 174 L. T. 397, 420, 440, 460, 485, 503 (1932), 175 L. T. 3, 24, 44 (1933).

[159] Carver v. Bowles, 2 Russ. & My. 301, 39 Eng. Rep. 409 (1831); Kampf v. Jones, 2 Keen. 756, 48 Eng. Rep. 821 (1837); Harvey v. Stracey, 1 Drew. 73, 61 Eng. Rep. 379 (1852); Cruse v. McKee, 2 Head. (39 Tenn.) 1 (1858); Horwitz v. Norris, 49 Pa. St. 213 (1865); Re Kerr's Trusts, 4 Ch. D. 600 (1877); In re Farncombe's Trusts, 9 Ch. D. 652 (1878); Re Witty, [1913] 2 Ch. 666; Re Carter's Estate, 254 Pa. 565, 99 A. 79 (1916); Re Boulton's Settlement Trust, [1928] Ch. 703.