POWERS TO APPOINT WITH CONSENT AND JOINT POWERS OF APPOINTMENT

Much of the law relating to powers of appointment has grown up around the distinction between general and special powers. The solution of almost any problem involving a power of appointment will be affected by the classification of the power as general or special.

Classification itself may be a problem of some difficulty. I have attempted elsewhere to determine the character of certain powers which are not obviously general or special according to traditional definitions.[1] There is another power which is not immediately classifiable. This is the power which is not limited as to objects but which can be exercised only if the donee secures the consent of some person or persons designated by the donor.

A general power is often described as one which confers on the donee complete freedom in the disposition of the property subject to the power. If the donee can appoint only with the consent of some other person, it is at least arguable that the donee does not have complete freedom in the disposition of the property and that his power is not general.

Two questions have arisen where a power, unlimited as to the donee's choice of appointees, is yet exercisable only with the consent of X. The first is as to the nature of the consent. To what is X required to consent? The second is the effect of the necessity for the consent, once its nature is elucidated, on the character of the power.

The Nature of the Consent

Where a power is given to A to be exercised with the consent of X, it may be that X is required to concur in or veto A's choice of appointees, or it may be that X's only function is to approve the occasion or motives for, or to lend solemnity to, A's exercise of the power. The function which X must perform depends upon the intention of the donor of the power.

There are only a few cases in which the donor's intention has been examined. There are, however, four fairly recent English cases in which the court undertook this investigation.

In *Re Dilke*[2] the settlor conferred a power of appointment, freely exercisable as to objects, on a person who was of unsound

[1] *The Classification of Some Powers of Appointment* (1942), 40 Michigan Law Review 337–377.

[2] [1921] 1 Ch. 34.

mind at the date of the settlement which created the power. Any appointment by the donee was to be with "the consent and concurrence in the deed of the said trustees or trustee (not being less than three) or of the majority of three of four trustees". After the donee recovered, by a deed made between himself of the one part and three of the four trustees of the other, with their consent and concurrence therein given, he appointed that after his death they should stand possessed of the trust funds in trust for such person or persons and purposes as he should appoint by deed or will. By a codicil subsequently executed, the donee appointed the settled fund to specified objects. His executors raised the question whether the purported exercise of the power was valid. It was valid only if the trustees' duty was merely to consent to the fact of the exercise of the power. It was obviously invalid if they were required to give their approval to the appointees chosen by the donee.

The Court of Appeal decided that it must seek the donor's intention. It was found that the donor had not intended that the trustees should be able to control the donee's selection of appointees.

This decision is perhaps indicative of a reluctance to hamper a donee in his choice of appointees. It would not have been unreasonable if the court had decided that since the donee was not of lucid mind when the settlement was made, there was at least a presumption that the donor wished to invest the trustees with a broad discretion, in the exercise of which they would assist the donee, once he recovered, to select appointees.[3] Even greater weight could have been given to the circumstance that on default of appointment in the manner prescribed the donee was to be able to appoint less than one-third of the trust funds.

In *Re Phillips*[4] property was settled on trust for such persons after the donee's death as he should appoint by deed with the consent of trustees. The power was exercised with the consent of the trustees. It was argued that the appointed property had become available for the satisfaction of the donee's debts. To establish this proposition it was necessary to prove that the power was general. Since there was no other limitations on the selection of appointees, only the requirement of consent could convert an apparently general power into a special one. Led in this way to examine the requirement of consent, Maugham J. held that

[3] In this connection, the Court held that the donor required the consent of trustees so that they could satisfy themselves that the donee was of sound mind when he exercised the power.

[4] [1931] 1 Ch. 347.

the trustees had no more than the right to veto the exercise of the power. The donor had reposed in them no discretion to veto appointees.

Re Dilke and *Re Phillips* were followed in *Re Joicey*.[5] The testatrix in that case directed, in the event which happened, that her residuary estate was to be held in trust for such persons, for such estates and in such manner as her son should appoint and, in default of appointment in trust for such charities as her trustees should select, provided that no appointment by her son should take effect unless either before his death or within three months thereafter the trustees should consent to the appointment. By his will the son, in exercise of his power, appointed a valuable collection of butterflies, which were part of his mother's residuary estate, to the British Museum and appointed the rest of the residuary estate to another appointee. The trustees, who had not yet consented, issued this summons to discover whether they could sever their consent. They wished to approve the appointment to the British Museum but not to the other appointee. Eve J., after construing the mother's will, decided that the trustees had no right to veto the son's nomination of appointees.

In *Re Watts*[5A] a marriage settlement, after creating certain trusts, provided that the settlor, at any time in the lifetime of her mother and with her mother's consent in writing, might revoke any of the trusts and, with the like consent, by deed appoint new trusts, powers or provisions concerning the property to which the revocation should extend. The settlor, with her mother's consent, exercised the powers of revocation and new settlement. Bennett J. held that there were features of this case which distinguished it from *Re Dilke* and *Re Phillips*. The settlement was made in contemplation of marriage; the power was exercisable only during the lifetime of the donee's mother; the mother's consent was required for both the powers of revocation and new appointment.[6] On the basis of these facts, Bennett J. held that the mother was required to consent to her daughter's choice of appointees.[7]

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[5] (1932), 76 Sol. Jo. 459.

[5A] [1931] 2 Ch. 302.

[6] In *Re Barker's Settlement*, [1920] 1 Ch. 527, the donor provided that the donee, with the written consent of trustees, should be able to revoke certain trusts and appoint as she might think fit. It was held that the necessity for consent related only to the revocation and not to the new appointment. See also 76 Sol. Jo. pp. 4–5 (1932), and Glover, *Powers to appoint with trustees' consent: whether general or special*, [1933] Conveyancer 93.

[7] *Eland* v. *Baker* (1867), 29 Beav. 137 has been fully discussed in the more recent cases and is interesting because of certain similarities to *Re Watts*. A marriage settlement provided that it should be lawful for

In *Charles J. Hepburn, Ex'r.*[8] the United States Board of Tax Appeals[9] interpreted a provision requiring consent for the exercise of a power. The testator gave his daughters what appeared to be unlimited testamentary powers to appoint shares of the residue of his estate. The will provided that "with a view of securing for the benefit of my children the advice and counsel of personal friends who can exercise discretion in family affairs more satisfactorily than a Board of Trustees of a corporation can do", he thereby appointed certain of his friends trustees jointly with a trust corporation, and directed that they were to be empowered to decide how much of the income should be paid to his children, and how it should be applied:

> I also direct that the power of appointment herein given to my said daughters over one-half of their original share of my residuary estate . . . shall be subject to the approval in writing of my said individual trustees or such of them as will accept the trust, or the survivors or survivor of them, such approval to be indicated by endorsement on any such will, signed by such individual trustees or the survivors of them, or by separate paper approving a particular testamentary disposition or dispositions made or to be made by either of my said daughters.

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the wife's father, the husband, and the wife, with the written consent of the trustee or trustees for the time being, and after the death of the wife's father, for the husband and wife for their joint lives, with the like consent, to revoke any or all of the trusts of the settlement and to declare new trusts in lieu of those revoked. After the marriage, the husband contracted with a trustee for a loan of £1,000 on a mortgage of the trust property. By a deed made between the wife's father, the husband, and the wife of the first part, the trustees (including Baker, who was advancing the money) of the second, and Baker of the third part, the parties of the first part revoked the settlement so far as was necessary to give effect to the security thereinafter contained, the parties of the second part consenting thereto; and they then appointed the property to Baker in fee to secure the repayment of the loan and interest. The mortgage contained a power of sale, and the property was sold subsequently under this power. The question was raised whether a good title could be made under it.

It will be seen that the facts resemble those in *Re Watts* to the extent that the power of appointment was contained in a marriage settlement, and consent was apparently required for both revocation of the old trusts and appointment of the new.

Sir John Romilly M.R. held that the purchaser could not be made to accept the title he was offered. He construed the settlement to mean that revocation of the old trusts was authorized only for the purpose of relimiting the estate for the benefit of the beneficiaries of the marriage settlement, and the trustees could give their consent for this purpose only. The effect of the loan transaction was to deprive the children of the marriage of their beneficial interest, and the trustees could not validly consent to this. Moreover, the consent was invalid because the mortgagee was a trustee, and there was, therefore, a conflict between his duty and his interest.

It is obvious that *Eland* v. *Baker* does not really resemble the later cases. In the later cases the powers were unlimited as to objects, whereas in *Eland* v. *Baker* the power was interpreted to be a special power limited to the beneficiaries of the original settlement.

[8] (1938), 37 B.T.A. 459.

[9] Since 1942 the Board of Tax Appeals is known as the Tax Court of the United States.

The Board of Tax Appeals decided that the donor had not intended that the trustees were to perform a mere administrative act. They were to supervise the daughters' selection of persons or purposes. In reaching this conclusion the Board was influenced by certain expressions by the testator that the property should remain in the family, the form in which the trustees were to manifest their consent and the circumstance that only the individual trustees were required to consent. Furthermore, it was considered significant that the trustees and the decedent daughter whose estate was the subject of the proceedings before the Board had themselves recognized that the trustees' consent was to refer to the daughter's appointees.

In the five cases considered so far, such discussion as there was of the requirement of consent assumed that the donor had intended one of two alternatives. He may have required consent, broadly speaking, for the mere exercise of the power or he may have intended that the consent should refer to the appointees. It appears, however, that there is a third possibility.

In *Harry J. Brown et al., Ex'rs.*[10] the decedent was given a power of appointment, unlimited as to objects, over certain interests in a trust estate which was divided into eight parts. This power was coupled with "spendthrift" trust provisions. The settlor provided that whenever, in the judgment of the trustees, there was danger that any part of the trust property coming to a beneficiary under the trust would be dissipated or handled improvidently by him, the trustees were empowered to withhold that property from him and pay him only so much as they deemed advisable. Instead of paying anything to an unworthy beneficiary, the trustees could expend it themselves for his welfare and support. Whatever the trustees withheld from and did not pay for the welfare and support of an unworthy beneficiary was to be paid to those who would have been entitled to the property withheld if the unworthy beneficiary had died intestate at the time of the withholding. If there was no such issue, the trustees were to transfer and distribute the property withheld to and among those entitled to the existing remaining parts.

The Board of Tax Appeals refused to accept the argument that the trustees were required to consent to the donee's choice of appointees and thus had as much control of the disposition of the property subject to the power as the donee. The trustees could not affect the destination of the appointed property. They "are concerned only with the method of payment of income and

[10] (1938) 38 B.T.A. 290, *aff'd. sub-nom. Skidmore* v. *Commissioner of Internal Revenue*, 112 F. (2d) 575 (C.C.A. 7th, 1940).

principal, and do not withdraw or alter in substance the beneficial enjoyment of the income or principal by the person or persons designated pursuant to the power of appointment."[11]

The Circuit Court of Appeals of the Seventh Circuit took the same view in interpreting similar trusts of another share of the same settlor's estate.[12]

There can be no quarrel with this view. It is possible that there may occur such a combination of circumstances as would enable the trustees to prevent the property from reaching an appointee or his issue. If the appointee is intemperate and threatens to dissipate the property so that the trustees are induced to refuse to permit any direct payments to him, if the settlor's directions can be construed to enable the trustees to pay nothing for the welfare and support of the appointee and if he has no issue at the date of the withholding who would be entitled on intestacy, then in effect the trustees are able to exercise a complete veto of the donee's choice. The trustees' ability to impede the donee's purposes in such unlikely circumstances is very different from a right to veto the choice of appointees. There is no doubt that the trustees' only right in the *Brown* case was to control the enjoyment of the appointed property once an appointee had been selected by the donee.

It is obviously dangerous to base any broad generalizations on the present very meagre authority on the nature of consents. The few cases decided so far indicate that where a power, unlimited as to objects, is exercisable with the consent of some person other than the donee, that consent, in the absence of evidence of a different intention on the part of the donor, will be taken to refer to the occasion for the exercise of the power and not to the choice of appointees. It should require strong evidence that the donor intended the consent to relate to the choice of appointees, because it is likely that in most cases he would give expression to such an intention by creating an obviously joint power. Such consents as are required under spendthrift trusts will be taken to refer neither to the fact of the exercise of the power nor to the appointees. They will be interpreted to give the trustees only the right to regulate the enjoyment of appointed property by the persons selected by the donee.

The Effect of the Necessity for Consent to the Choice of Appointees

If the generality of a power of appointment depends on the scope of the donee's discretion to nominate appointees, it is clear

[11] 38 B.T.A. 290, at p. 301.

[12] *Morgan* v. *Commissioner of Internal Revenue*, 103 F. (2d) 636 (1939). See also 36 B.T.A. 588.

that the necessity for the concurrence of some third person in the mere fact of the exercise of a power cannot affect the character of that power. Nor will the generality of the power be affected by the right of some third person to control the enjoyment of the appointed property. The only requirement of consent which has the appearance of affecting the donee's discretion is the consent to the selection of appointees.

In *Re Dilke* Peterson J. seems to have thought that if the consent had been of this kind, the power would not have been general and the donee would not have been able to appoint as he or some other person should later appoint. On appeal it was again argued that the requirement of the trustees' consent was such a limitation on the donee's freedom of action as made it impossible to consider the power general. There are *dicta* in the opinions of the members of the Court of Appeal which may be interpreted to mean that the power would not have been general if the trustees had been given the right to control the selection of appointees. In the course of argument, Warrington L. J. remarked that "the point really is, is this a general power or not". Again, in his opinion, he said, "The question we have to determine is whether the power which has been exercised by the deed of April 18, 1918, is a general or a special power".[13] Lord Sterndale M. R. said, "I have no doubt that this was, but for the words I have already read,[14] a general power of appointment under what was done would be perfectly properly done".[15]

Since the Court of Appeal decided that the trustees were not required to consent to the choice of appointees, any inference as to the effect of such a requirement which may be drawn from these remarks is of little authority.

In *Re Phillips* Maugham J. merely decided that "once the conclusion is arrived at that the trustees are not bound to exercise their own discretion as to the persons to be benefited by the exercise of the power . . . . . it necessarily follows that the equity of the creditors is as strong as if it were an unfettered general power which the testator could exercise without consent".[16] He expressed no opinion on what the rights of the donee's creditors would have been if the trustees had been required to supervise the selection of appointees.

Re Watts, however, goes further. In that case, the powers of revocation and resettlement were exercised so that new trusts

[13] [1921] 1 Ch. at p. 41.
[14] These words referred to the necessity for consent.
[15] [1921] 1 Ch. at p. 40.
[16] [1931] 1 Ch. at p. 356.

were created in favour of the children of the only child of the marriage, who at the date of the exercise of the power was only eight years old. For the child it was argued that the donee did not possess a general power of appointment because she did not have an unrestrained power of selection. Since the power was special, the interests given to the grandchildren were void for remoteness. Bennett J. accepted this argument:

> It seems to me that it would not be right to hold that (the donee) . . . was in substance the owner of the property and consequently free to deal with it in any way she pleased.[17]

In *Charles J. Hepburn, Ex'r.*, the question before the Board of Tax Appeals was whether property, over which the decedent had exercised an unlimited power with the necessary consent of the surviving trustee, constituted part of the decedent's gross estate and was, therefore, subject to the federal estate tax. American law at that time imposed the estate tax on property passing under a general but not a special power. The Board held that the requirement of consent limited the decedent's freedom to select appointees, so that the power must be considered special.

It is possible, however, that in no event could the power be considered general in the *Hepburn* case. Although in its creation it was coupled with no restrictions, except the necessity for consent, the donor added this codicil to his will:

> My purpose in making this change is to carry out more effectually than I could do as a citizen of New York, my general purpose to keep my estate in my own family so far as I may do so lawfully and consistently with the power which I have given my daughters to dispose by will subject to the approval of the co-trustees named in or appointed conformably to my will, of one-half of their original shares in my residuary estate.

Did this convert the power into a special power to appoint among the limited class of members of the donor's family? The Board did not discuss this question, but it did say that:

> The will of . . . (the donor) is replete with provisions clearly indicating his desire that his property, after his death, should, so far as it was within his power, remain within his own family.[18]

It may be that the clause in the codicil, to the effect that the donor's purpose was to keep the property in his family so far as he could "consistently with the power" given to his daughters, makes it impossible to hold that the codicil had converted the power

[17] [1931] 2 Ch. at p. 306.
[18] (1938), 37 B.T.A. at pp. 465–6.

into a special one, in the exercise of which the daughters could nominate only members of the donor's family. However, even if this is conceded, the Board's decision need not be accepted without qualification.

The Board relied upon expressions of the donor's wish that the property was to remain in his family as indicative of an intention on his part that the trustees should consent to the choice of appointees. It follows that the donor must be taken to have intended that the trustees should consent only to appointees who were members of the donor's family. Now, a power to be exercised by A with the consent of X, where X is directed to consent only to certain specified appointees, is very different from a power to be exercised by A with the consent of X where X receives no directions as to the exercise of his discretion.[19] The former power cannot be considered otherwise than as special, and it is really immaterial whether the power which the donor purports to confer on the donee is framed as general or special. It by no means follows that the latter power also must be considered special.

However, in *Farmers Loan & Trust Co.* v. *Bowers*[20] an unlimited power, exercisable with consent to the choice of appointees, where no rule was prescribed for the giving or withholding of consent, was treated by the U.S. Circuit Court of Appeals of the Second Circuit as a special power for the purposes of the estate tax. The settlor, in creating a trust, reserved to himself a power, with the consent of the trustee, to revoke or modify wholly or in part the trusts of the settlement. The Court pointed out that, on the authority of *Bullen* v. *Wisconsin*,[21] an absolute and unconditional power to revoke a trust is equivalent to a general power of appointment, but held that in this case there was no such absolute and unconditional power:

> Congress intended only to tax the general power, which the settlor might have exercised himself or (*sic*) treated the property as part of his estate. It is apparent Congress made such a distinction between a general power exercised by a decedent and a limited power requiring more than the act or will of the settlor. In the instant case, if the settlor had appointed himself as beneficiary, it might well be that the trustee could have lawfully refused consent to such a proposal in the interest of the beneficiaries. Therefore we hold that 'a general power of appointment exercised by the decedent' refers to a power exercised solely by him and that s. 402 (e) of the Act does not justify a tax on the power of appointment reserved by the settlor. A general power of appointment contemplates a power of no restrictions as to who may be appointees, and the exercise of that general power referred

[19] See n. 7.
[20] 29 F. (2d) 14 (C.C.A. 2d, 1928).
[21] 240 U.S. 625 (1916).

> to in the statute, which is subject to the tax, is the normal power of appointment or one actually expressed, and not something merely analogous to a power of appointment.[22]

It is possible that *Farmers Loan & Trust Co.* v. *Bowers* and the *Hepburn* case were overruled by the Supreme Court in *Morgan* v. *Commissioner of Internal Revenue*.[23] The trusts in the *Morgan* case were the same as those in the *Brown* case but the courts were called upon to interpret their application to another share of the settlor's estate. The Circuit Court of Appeals held that the provision empowering the trustees to withhold the property applied only to the beneficiaries named in the settlor's will and not to the appointees designated by the donee.[24] This was sufficient to dispose of the argument that the power was not general. However, the Court went on to hold that the effect of the provision was only to enable the trustees to control the enjoyment of the appointed property by the appointees and gave the trustees no right to veto the selection of appointees.

In delivering the opinion of the Supreme Court, Mr. Justice Roberts said:

> The distinction usually made between a general and a special power lies in the circumstance that, under the former, 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; whereas, under the latter, the donee may appoint only amongst a restricted or designated class of persons other than himself.[25]

He then went on, or appears to have gone on, to apply these definitions to an unlimited power to appoint with the consent of one who may veto the donee's choice of appointees:

> The petitioner's second position is that, inasmuch as the trustees had an unfettered discretion to withhold principal or income from any beneficiary, they could exercise their discretion as respects any appointee of the decedent. This fact, they say, renders the power a special one. Assuming that the trustees could withhold the appointed property from an appointee, we think the power must still be held general.[26]

If Mr. Justice Roberts had said no more, it would seem that the *Hepburn* and *Bowers* cases must be considered overruled so far as they decided that the necessity of consent to the donee's choice of appointees renders an otherwise unlimited power special. However, his further remarks indicate that he was dealing, not

[22] 29 F. (2d) at p. 18.
[23] 309 U.S. 78 (1940).
[24] 103 F. (2d) 636 (1939).
[25] 309 U.S. at p. 81.
[26] 309 U.S. at p. 82.

with a requirement of consent which permits the person who must consent to veto appointees, but with one which merely enables him to control the scope or mode of enjoyment of the appointed property by the appointees:

> The quantum or character of the interest appointed, or the conditions imposed by the terms of the trust upon its enjoyment, do not render the powers in question special within the purpose of s. 302 (f). The important consideration is the breadth of the control the decedent could exercise over the property, whatever the nature or extent of the appointee's interest.[27]

The exact effect of the *Morgan* case will not be clarified now that the Revenue Act has been amended to provide that the estate tax shall apply to property subject to any power of appointment, whether general or special, with the exception of a few specified special powers. Moreover, for the purposes of the tax, a power of appointment means any power exercisable by the decedent "either alone or in conjunction with any other person".

It has been seen that there is some authority for the view that an unlimited power to appoint with consent to the choice of appointees is a special power. However, if, as is sometimes said, a general power is one which gives the donee as "full dominion" over the property subject to the power as if he owned it,[28] then, where A may appoint with the consent of X to the choice of appointees, it is true that neither A nor X has full dominion, but A and X *together* have as much dominion as the sole donee of a general power ever enjoys. If, on the other hand, it is the unlimited choice of appointees which determines the generality of a power, then, if the donor has not limited the possible appointees, A and X together have that complete freedom to choose appointees which is characteristic of a general power. In short, A and X are the joint donees of a general power.

Two propositions are here advanced, and the authority for them will be examined:

(*a*) Where A can select appointees only with the consent of X, A and X are joint donees of the power;

(*b*) A and X, having complete freedom of choice between them, possess a power which, for some purposes and perhaps for most purposes, should be considered general.

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[27] 309 U.S. at pp. 82–3.

[28] See *General Testamentary Powers and the Rule against Perpetuities* (1942), 58 Law Quarterly Review at p. 404 and n. 19.

A Power to Appoint with the Consent of Another to the Choice of Appointees is a Joint Power.

One of the earliest authors on the subject of powers of appointment, Chance, noted that where the consent of particular persons is required to the execution of a power "for many purposes at least such parties may be considered as donees of the power".[29]

In *Mansell* v. *Mansell*[30] a power was conferred on A and B and their heirs to consent to the creation of a jointure in favour of the wife of the testator's son. Speaking of this power, Lord Commissioner Wilmot said:

> It must be considered as a tenancy in common . . . It is equivalent to saying with the consent of both while they live, but when one die, that consent shall devolve upon his heir: the heir of the dead trustee shall consent as well as the surviving trustee.

There are at least two cases in which joint powers have been treated as powers exercisable by one donee with the consent of the other. In *Acraman* v. *Corbett*[31] there was an ante-nuptial settlement by which the wife's property was settled according to the joint appointment of husband and wife, and subject thereto to the husband in fee. The husband agreed to purchase a colliery, and the spouses appointed the property in order to raise the purchase-money. The conveyance of the colliery was taken to such uses as they should by deed jointly appoint and in default of appointment to the husband and wife for their lives, with remainder to the husband. Some time later, husband and wife settled this property and on the husband's bankruptcy it was sought to set aside this settlement, except in so far as it conferred an estate in fee on the husband, on the ground that it was in fraud of his creditors.

It was argued that the husband had absolute dominion over the property subject to the marriage settlement. Any conveyance by him would prevent any subsequent inconsistent exercise of the power and thus, in effect, would extinguish the power. It followed that the wife contributed nothing when she joined in the exercise of the power by which the purchase-money was raised. Therefore, the subsequent settlement was voluntary, and void against the husband's creditors.

Sir W. Page Wood V.C. recognized that the husband undoubtedly had a power to dispose of the property subject to the marriage settlement, because a conveyance by him would prevent

[29] TREATISE ON POWERS (1831), i, at p. 264.
[30] (1757), Wilm. 36.
[31] (1861), 1 J. & H. 410.

any subsequent appointment which was inconsistent with his conveyance. At the same time, the wife possessed a right to join in any appointment and it might be advantageous to the husband to get her to join. This would have been true under the old law of dower and was still true with respect to judgments. It would be an advantage to the husband to get his wife to join in an exercise of the power if there were judgments against him,[32] and the mortgagee in whose favour the power was exercised when the purchase-money was raised might have insisted that the wife join in the mortgage. Since she could legitimately refuse to do this unless she received some benefit for herself, there was ample consideration for giving her an interest under the subsequent settlement and that settlement could not be considered voluntary or fraudulent.

This is somewhat cryptic reasoning unless reference is made to section 110 of the Judgments Act, 1838. This section provided that a judgment entered against any person should operate as a charge upon all lands, tenements, hereditaments, etc. over which such person, at the time of the judgment or thereafter, had any disposing power which he might exercise, without the assent of any other person, for his own benefit. It is clear, therefore, that the Vice-Chancellor treated the joint power as one exercisable by the husband with the assent of his wife so as to take the property subject to the power out of s. 110 of the Judgments Act.

In *Goatley* v. *Jones*,[33] a more recent case, husband and wife again had a joint unlimited power to appoint certain property. A writ of *elegit* was issued against the property under an order for payment of costs by the husband and wife. Section 2 of the Married Woman's Property Act, 1882, provided that a married woman might be sued and any damages or costs recovered against her might be satisfied from her separate estate. Neville J. held that, since it was well settled that property subject to a general power was not part of a married woman's separate estate,[34] the judgment was not against husband and wife jointly, but against the husband and the separate property of the wife. But even if the judgment had been against the wife personally, it could not be satisfied out of the property subject to the power, because the power was not one which she could exercise without the assent of any other person within

[32] See on this point: 30 L.J. Ch. at p. 644; 7 Jur. N.S. at p. 625, 9 W.R. at p. 410; 4 L.T. at p. 204.

[33] [1909] 1 Ch. 557.

[34] *Ex p. Gilchrist* (1886), 17 Q.B.D. 521.

the meaning of section 110 of the Judgments Act, 1838. It is clear, therefore, that Neville J. interpreted the joint power as equivalent to a power exercisable by one spouse with the assent of the other.

An Unlimited Joint Power may be a General Power

There are four decisions of the House of Lords—*Braybrooke* v. *A. G.*,[35] *A. G.* v. *Floyer*,[36] *A. G.* v. *Smythe*[37] and *Charlton* v. *A. G.*[38] — on the effect of sections 2 and 4 of the Succession Duty Act, 1853, which have some bearing on the question of the nature of joint powers unlimited as to possible objects.

Section 2 provides that every disposition of property by reason whereof any person becomes beneficially entitled to any property, or the income thereof, on the death of any person shall be deemed to have conferred a "succession" on the person entitled by reason of the disposition. The term "successor" shall denote the person entitled, and the term "predecessor" shall denote the settlor, disponer, testator or any other person from whom the interest of the successor is derived.

Section 4 provides that :

> Where any person shall have a general power of appointment, under any disposition of property, taking effect upon the death of any person dying after the time appointed for the commencement of this Act, over property, he shall in the event of making any appointment thereunder, be deemed to be entitled at the time of his exercising such power to the property or interest thereby appointed as a succession derived from the donor of the power; and where any person shall have a limited power of appointment, under a disposition taking effect upon such death, over property, any person taking any property by the exercise of such power shall be deemed to take the same as a succession derived from the person creating the power as predecessor.

In the four cases considered by the House of Lords the facts are extremely complicated, but in essence they are reducible to the following form :

> A, a father and tenant for life, and B, his eldest son and tenant in tail, disentail and resettle the property so that B becomes tenant for life and A and B have a joint unlimited power of appointment which they then proceed to exercise.[39]

[35] (1861), 9 H.L.C. 150.
[36] (1862), 9 H.L.C. 477.
[37] (1862), 9 H.L.C. 497.
[38] (1879), 4 App. Cas. 426. See also *A.G.* v. *Glyn Mills*, [1939] 1 All E.R. 236.

The question is then whether the appointees derive their succession from A and B by virtue of the first part of section 4 or whether they derive it from B alone under section 2. The House of Lords decided in all four cases that the appointees derive their succession from B only, because only he had an estate of inheritance from which their interests could be carved.[40] In other words B, and B only, must be considered the settlor.[41]

It might be inferred from these cases that a joint power cannot be considered a general power. There are *dicta* in the opinions which, if taken from their context, would support this interpretation. Thus, according to James L.J. :

> A joint general power is . . . . an entirely different thing in intention and practical operation from a general and absolute power in one individual. In the latter case it is really and practically the equivalent of property — when exercised the property becomes assets.[42]

However, notwithstanding *dicta* such as this, it is clear that the decision must be taken to refer only to the interpretation of "general power of appointment" in section 4 of the Succession Duty Act. The following passage from the judgment of Lord Selborne in the *Charlton* case confirms the view that the decisions should not be interpreted more broadly:

> It is true that the distinction between general and limited powers in the common language of English law relates, not to conditions affecting the donee of a power, or otherwise antecedent to an appoint-

[39] In *Charlton* v. *A.G.* the joint power, in default of appointment by A and B, was conferred on A and C (the second son, who became tenant for life on B's death). A and C exercised the power. This case differs from the others in that neither A nor C, the donees who exercised the power, had an estate of inheritance before or after the resettlement. See Lord Cairns at 4 App. Cas. p. 444. Nevertheless, the House of Lords refused to distinguish the case.

[40] There was some difference of opinion on the question of the estate from which the interests of the appointees are carved. Lord Wensleydale in the *Floyer* and *Smythe* cases and Kelly L.C.B. in *A.G.* v. *Cecil* (1870), 5 Ex. D. 263 thought that they were derived from the new estate of B under the resettlement. Lord Cairns and Lord Selborne in the *Charlton* case and Lord Cranworth in the *Floyer* case held that they were derived from the estate of B before the resettlement.

[41] "It cannot be argued that a person, whose consent is necessary to a disposition of property, makes that disposition" (Lord Campbell in the *Braybrooke* case). This *dictum* was approved by Hawkins J. in *A.G* v. *Dowling* (1880), 5 Ex. D. 139 at p. 152, which, however, involved no power of appointment. Bramwell B. in his dissenting opinion in *Re Peyton* (1861), 7 H. & N. 265, at p. 300, disagreed with the view that a person whose consent is necessary to the exercise of a power has no part in making the disposition when the power is exercised. "The petitioner and his father have jointly a power of dealing with the property and creating a fee simple on it; but neither can do it without the other. Each may withhold his consent; each may charge a price for giving it (*Acraman* v. *Corbett*); and it is hard to say, that one contributes more than the other to the fee they created; for the father's life estate may continue for many years, and the son's estate tail never attach."

[42] (1877), 2 Ex. D. 398 at p. 412.

> ment, but to the nature of the appointment which may be made under the power, and for that reason, if the present case had been untouched by authority, I might have felt embarrassed by the use of that phraseology in the fourth section of this act. . . . . If, however, the substance of the first branch of the section is regarded, it certainly points to that kind of absolute power which is practically equivalent to property, and which may reasonably be treated as property, for the purpose of taxation. That is the case with a general purpose power exercisable by a single person in any way which he may think fit. But it is not the case where a power cannot be exercised without the concurrence of two minds; the one donee having and the other not having an interest to be displaced by its exercise. Nothing could well be conceived more unreasonable, in a practical point of view, than to treat a joint power like that now in question, in a family settlement, as equivalent in substance to joint property in the two donees; and I am convinced that the decisions which have refused to give that effect to the fourth section are in accordance with the true intention of the legislature, whatever difficulty there may be in the words 'general' as they occur.[43]

Or, in the words of Lord Justice James:

> In this Act of Parliament, I am not aware of any clause where it is necessary to read a singular word for plural, and I am of opinion that in this case the context requires us to confine the singular to the singular.[44]

It is not difficult to understand why the courts adopted so strict an interpretation of the Act. There was some reference to the unfairness of compelling the father to pay succession duty in circumstances in which it was intended that he should act only as a check on his son and not receive any beneficial interest. If the joint power was "general" within the meaning of section 4, both father and son would have had to pay succession duty on the exercise of the power.[45] Moreover, treatment of the power as general would have been unfortunate for the Treasury and it is probable that this was of greater concern to the courts than the effect of such an interpretation on the father. If section 4 applied, the son would have been able to reduce the amount of duty which he was required to pay as an appointee by arranging that his succession should be derived from his father. As the father was a person more closely related to the son than the original settlor, a lower rate of duty would have been payable.

> One who, under the disposition from which he derives an estate, is liable to a given amount of duty, cannot be permitted by a subse-

[43] 4 App. Cas. at p. 446.
[44] (1877), 2 Ex. D. at p. 412.
[45] 4 App. Cas. at pp. 438–9.

quent disposition of it by himself, to take by the appointment, under a power created by himself, of a person nearer in relationship than the original disponer, and so diminish the duty.[46]

The decisions of the House of Lords, then, must be considered as no more than interpretations of section 4 of the Succession Duty Act. It is possible, however, that those decisions are of even narrower scope and must be taken to refer only to the particular kind of power which was involved in all four cases. It is true that Lord Selborne, in the passage quoted from his opinion in the *Charlton* case, said that section 4 was not intended to apply to the case "where a power cannot be exercised without the concurrence of two minds". But he qualifies the generality of this statement by adding "the one donee having and the other not having an interest to be displaced by its exercise". Thus, it is possible that a joint power conferred on two donees, with a limitation to them as joint tenants on default of appointment, or a joint power conferred on themselves by joint tenants, or even a joint power not contained in a family settlement or re-settlement, would require different treatment.[47]

If further evidence were required of the limited effect of the decisions, it is to be found in the fact that unless the joint power was general for the purposes of the rule against perpetuities, the appointed interests in the *Charlton* case would have been void for remoteness. There was no discussion of this aspect of the case, although it was mentioned by Baron Amphlett in the Exchequer Division,[48] but it must be assumed that the validity of the appointed interests was tacitly affirmed by the House of Lords. If they were not valid, no question of succession duty could have arisen in connection with them.

The limitations and appointments in the *Charlton* case were these:

> J, the tenant for life of an estate, and W, his eldest son and tenant in tail, entered into a deed of resettlement by which W became the tenant for life, with remainder in tail.

[46] *Charlton* v. *A.G.* (1877), 5 Ex. D. 398, at p. 415, *per* Cockburn, C.J. S. 12 of the Succession Duty Act is specifically designed to prevent the reduction of succession duty by conveyancing devices. In the *Braybrooke* case Lord Campbell and Lord Kingsdown thought that s. 12 applied to the facts of that case. 4 App. Cas. at pp. 168, 182.

[47] S. 13 may be designed to apply to these powers. ". . . . Where the successor shall derive his succession from more predecessors than one, and the proportional interest derived from each of them shall not be distinguishable, it shall be lawful for the Commissioners to agree with the successor as to the duty payable."

[48] (1876), 1 Ex. D. 204, at pp. 214–5.

They reserved to themselves an unlimited power of appointment. In default of appointment by J and W, the power was conferred on J and T, the second son, who, on W's death, became tenant for life, with remainder in tail.

W died unmarried without any appointment having been made and J and T exercised the power. The appointed interests were these: Subject to certain rentcharges, until a certain estate tail should be barred either in the lifetime of T and his eldest son F, or the survivor of them, or within twenty-one years after the death of the survivor of them and J, or until the same estate tail during the same period should cease, and so long as D (T's daughter) or any son or daughter of her, or any daughter or daughters of T, or any son or daughter of any such last mentioned daughter or daughters should be living from time to time during the period, then to the use of D and her assigns during so much of the period as she should live, with remainder to the use of her first and other sons successively during so much of the period as each son should live, remainder to the use of the first and other daughters successively during so much of the period as each of them should live, with divers remainders over during the period.

It is clear that the appointments were made on the assumption that the perpetuity period would be calculated from the date of the exercise and not the date of the creation of the joint power. In other words, it was assumed that the power was general. If the power was special, so that the perpetuity period ran from the date of the resettlement, all the appointed interests after D's life interest would be void for remoteness because D was not a life in being at the date of the resettlement. Nor would their invalidity be cured by restriction of the appointed interests to the period mentioned, since it might last for twenty-one years from the death of F, who was not a life in being at the date of the resettlement.

It would seem, therefore, that the House of Lords, in affirming, albeit tacitly, the validity of the appointed interests in the *Charlton* case, must be taken to have decided that a joint unlimited power is a general power for the purposes of the rule against perpetuities. It is submitted, therefore, that *Re Watts* is wrongly decided.

To what extent is the following statement by Farwell inconsistent with the *Charlton* case?

> A general power of appointment which, under the circumstances of its creation, is to be exercisable both within or without the period allowed by the rule against perpetuities, but only with the consent of another, or fettered by other like condition, is bad unless the necessity for the consent or fulfilment of the condition is confined to the perpetuity period. (*Webb* v. *Sadler*, 8 Ch. 419). So long as the consent must be obtained, or the condition fulfilled, the donee may never be able to dispose of the property, and this inability must be confined to the perpetuity period. Upon the same principle, a joint power exercisable outside the period appears to be bad: no one of the donees can dispose of the whole or any part of the property without the concurrence of the other or others of them, and they cannot, as joint tenants in fee simple can, sever or dispose of a share in the property.[49]

Now, Farwell in this passage deals with the application of the rule against perpetuities to powers of appointment, whereas the *Charlton* case involves the application of the rule to the interests appointed under a power. However, it would seem that a power must be general for both purposes or for neither. The rule against perpetuities provides that no interest is valid if its vesting is made subject to a condition precedent which may be fulfilled at some time later than that permitted by the rule. The vesting of an interest appointed under a power is subject to the condition precedent of the power being exercised and, if the power may be exercised at a remote date, the appointed interest likewise must be void for remoteness.[50]

This principle has been modified for general powers of appointment. Such a power will be valid if it necessarily becomes exercisable within the period prescribed by the rule against perpetuities even though it is also exercisable beyond that period.[51] The reason for this, according to Lord St. Leonards, is that "a general power is, in regard to the interests which may be created by force of it tantamount to a limitation in fee . . . . because it enables [the donee] to give the fee to whom he pleases; he has an absolute disposing power over the estate, and may bring it into the market whenever his necessities or wishes may lead him to do so."[52]

However, if the donor requires the fulfilment of some condition precedent in addition to that implied in the exercise of the power, the fulfilment of that condition must be confined to

[49] POWERS (3rd ed.) at p. 346.

[50] *Morgan* v. *Gronow* (1873), L.R. 16 Eq. 1 at pp. 9–10, *per* Lord Selborne.

[51] *Bray* v. *Hammersley* (1830), 3 Sim. 513, aff'd. *sub. nom. Bray* v. *Bree* (1834), 8 Bli. N.S. 568, 2 Cl. & F. 453; GRAY, RULE AGAINST PERPETUITIES (3rd. ed., 1915), s. 477; LEWIS, PERPETUITY (1843) at pp. 483–4; MARSDEN, THE RULE AGAINST PERPETUITIES (1883) at p. 236; SUGDEN, POWERS (8th ed., 1861), at pp. 394 *et seq.*

[52] POWERS (8th ed., 1861), at pp. 394–5.

the perpetuity period, since otherwise it cannot be said that the donee can bring the property into the market whenever he sees fit. If, therefore, an unlimited power is exercisable with the consent of X to the exercise of the power, and X is not compelled to give his consent within the perpetuity period, it cannot be said that the donee will necessarily be able to bring the property into the market within the perpetuity period, and the power is invalid.

It does not follow, as Farwell argues, that this is equally true of a joint unlimited power. If such a power is exercisable within the perpetuity period, it should be considered valid even though it is also exercisable beyond the perpetuity period. The joint donees may bring the property subject to the power into the market whenever they so decide. Although in a sense the assent of each donee may be considered a condition of the exercise of the power, this is not such a condition as is contemplated by the rule that a power subject to a condition is invalid unless the fulfilment of the condition is confined to the perpetuity period. A condition for the purposes of this rule is one that does not depend for its fulfilment on the will of tne donee —or donees. This, it is submitted, is implied in the passage quoted above from Lord St. Leonards' text. Thus, the agreement of joint donees on the selection of appointees is not a condition the fulfilment of which must necessarily be confined to the perpetuity period. Such agreement is no more a condition than the decision of a sole donee to appoint. If the decision of a sole donee of a general power need not be confined to the perpetuity period, it should not be required of joint donees that they must reach their decision within the perpetuity period.

The only authority cited by Farwell in support of his views is *Webb* v. *Sadler*.[53] This is also the case upon which Gray relies for the statement that "a general power exercisable by deed, but only by consent of third persons, is not equivalent to ownership in fee, and is therefore treated like a special power."[54]

Webb v. *Sadler* does not establish these views. A marriage settlement conferred on the spouses a joint power to appoint among their children. Husband and wife appointed to trustees upon such trusts as a son should appoint by deed with the consent in writing of his father during his life "and after his decease with the like consent of the persons or person who for the time being should be the acting trustees or trustee under

[53] (1873), L.R. 8 Ch. App. 419.
[54] *Op. cit.*, at p. 436.

any last will and testament of [the father], and whether therein named, or to be appointed under any power therein, or by the Court of Chancery or other competent authority". Lord Selborne L.C. held that "no power of appointment whatever is given . . . . excepting the power to be exercised, with the consent in writing, after the death of the parents, of the acting trustees or trustee, who were persons to whom no such authority could be delegated, independently of any question of remoteness."[55]

It will be noted that Lord Selborne held that the power was invalid as an improper delegation and not because of remoteness. A special power may not be exercised by the creation of another power.[56] The donor is deemed to have reposed a special discretion in the original donee and this discretion cannot be delegated.[57] There is some authority for the proposition that a special power may be exercised by appointing a life interest and coupling it with a general power exercisable by the life tenant by deed or will[58] or even by will.[59] The life interest and the power together are taken to be the somewhat elaborate description of an appointed interest and not a delegation of the original power. In *Webb* v. *Sadler* the son was given a life interest on default of appointment, but it could hardly be argued that the life interest and the power exercisable with the consent of trustees were no more than the description of an interest appointed to the son or, to quote Lord Cairns, the description of "a mode of enjoyment which was carved out of the absolute interest."[60]

Even if *Webb* v. *Sadler* is interpreted as a decision on the effect of the rule against perpetuities, there is nothing to indicate that it is a decision on the application of the rule to joint powers of appointment. There is no discussion of the nature of the requirement of consent and it cannot be presumed that the trustees were really joint donees. But let it be assumed that the trustees were able to veto the son's choice of appointees. Even then it cannot be argued that the court really held that

[55] L.R. 8 Ch. App. at p. 426.

[56] *White* v. *Wilson* (1852), Drew. 298; *Lloyd* v. *Lloyd* (1858), 26 Beav. 96; *Williamson* v. *Farwell* (1887), 35 Ch. D. 128; *Re Greenslade*, [1915] 1 Ch. 155; *Re May's Settlement*, [1926] Ch. 136; *Re Boulton's Settlement Trust*, [1928] Ch. 703; *Re Mewburn's Settlement*, [1934] Ch. 112; FARWELL, *op. cit.*, at p. 505; SUGDEN, *op. cit.*, at pp. 180–1. See also 3 PROPERTY RESTATEMENT, ss. 357–59. Note, 50 Harvard Law Review 938 (1937).

[57] FARWELL, *op. cit.*, at p. 499; CHANCE, *op. cit.*, i, at pp. 255–63.

[58] *Slark* v. *Dakyns* (1874), L.R. 10 Ch. App. 35. See also *Bray* v. *Bree* (1834), 2 Cl. & F. 453; *Hanbury* v. *Tyrrell* (1856), 21 Beav. 322; *Thayer* v. *Rivers*, 179 Mass. 280 at p. 289, 60 N.E. 96 (1901).

[59] *Phipson* v. *Turner* (1838), 9 Sim. 227. See also *Morse* v. *Martin* (1865), 34 Beav. 500.

[60] *Slark* v. *Dakyns* (1874), L.R. 10 Ch. App. at p. 40, *per* Lord Cairns.

all possible exercises of a joint unlimited power must be restricted to the perpetuity period. Even a general power must necessarily become exercisable within the perpetuity period. Since the original power in *Webb* v. *Sadler* was special, the power conferred on the son and the trustees of the father's will, even if considered general, would have to become exercisable within twenty-one years from the father's death. However, the power was exercisable not solely by the trustees named in the father's will, and presumably alive at his death, but by those trustees jointly with others appointed in accordance with the will or by the Court of Chancery.[61]

On the whole, therefore, it would seem that there is nothing in *Webb* v. *Sadler* which is inconsistent with the *Charlton* case or which supports the proposition that a joint unlimited power is not a general power for all purposes involving the rule against perpetuities.

Not many of the incidents of joint unlimited powers have been worked out yet by the courts. Most joint powers are conferred by marriage settlements on husband and wife and are limited to the issue of the marriage. In most cases where joint unlimited powers have been before the courts no problem arose as to the nature of the power.[62] There is, however, one case[63] in which it was clearly implied that such a power was general for the purposes of delegation. Father and son suffered a recovery of a settled estate to such uses as they should jointly appoint. They exercised the power by settling the estate to uses in strict settlement and reserved a power of revocation to themselves, and to the son if he survived the father. He did survive his father and appointed the estate to himself, later devising it. A bill was filed to have charges on the estate raised. The estate was sold under a decree in this proceeding, but the purchasers objected that the power of revocation exercisable by the son alone was not well reserved. The Master reported in favour of the title and Lord Chancellor Manners confirmed his report. The joint power, said Lord Manners was tantamount to the fee. It was not like a power to appoint to limited objects, for under such a joint power a power of revocation reserved to one of the donees or the survivor of them would not be valid.

[61] *Cf. Attenborough* v. *Attenborough*, 1 K. & J. 296.

[62] For example: *Pritchard* v. *Quinchant* (1752), 1 Amb. 147; *Cox* v. *Chamberlain* (1799), 4 Ves. 631; *Irwin* v. *Farrer* (1812), 19 Ves. 86; *Wynne* v. *Griffith* (1825), 3 Bing. 179; *Tunstall* v. *Trappes* (1829), 3 Sim. 286; *Re Barker's Settlement*, [1920] 1 Ch. 527; *Duddell* v. *Duddell*, [1932] 1 Ch. 585.

[63] *Ponsonby* v. *Ponsonby* (Lord Manners L.C., 1821, MS.), cited by SUGDEN, *op. cit.*, at p. 365.

Conclusion

Where A has a power of appointment which is exercisable with the consent of X, the donor may have intended that X shall consent to the exercise of the power, or that X shall control the enjoyment of the appointed property by the appointees or that X shall consent to the donee's selection of appointees. Where the consent is of this last kind, some courts have been disposed to hold that it converts an otherwise unlimited power into a special power because the necessity for the consent of X fetters A's choice of appointees.

It is suggested that if X can control A's choice of appointees, X is as much a donee of the power as A. The donor may have employed the form of conferring the power on A and requiring the consent of X because he expected or intended that A should take the initiative in nominating appointees. The practical effect, however, is that A and X have equal authority. Indeed, there is the likelihood that in many cases X will take as much initiative in proposing appointees as A. If A proposes M, who is unacceptable to X, it would be natural for X to couple his veto of M with the suggestion that N would be a more worthy object.

A and X, then, are joint donees. If their power is unlimited, there is no reason why that power should necessarily be special. It has been held that some joint powers are not general for the purposes of section 4 of the Succession Duty Act,[64] but it does not follow that this would be true of all joint powers. It was never made clear whether an unlimited power to appoint with consent was a general power for the American estate tax, although the Supreme Court seemed to think that it was.

Although there is a decision of a court of first instance to the effect that a power to appoint with consent to appointees is not general for the purposes of the rule against perpetuities, this is inconsistent with a decision of the House of Lords.

Whether these powers are general for the purpose of other rules of law must depend on the policy or rationale of those rules. Thus, there are certain rules which apply 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 objects. For example, in English law, there is no remedy for breach or threatened breach of a covenant to exercise a testamentary special power, because the donee has fiduciary duties which he may not compromise by a premature judgment as to the destination of the property subject to the power. Damages are recover-

[64] 9 H.L.C. at p. 488.

able for the breach of a covenant to exercise a general power in a particular way.[65] Again, in the United States, there is a conflict of opinion as to which special powers may be released by the donee,[66] but there is agreement that all general powers are releasable.[67] The donee of a general power is not a fiduciary.[68]

If there are no designated objects of a power, it is not possible to impose fiduciary duties on the donee. A power exercisable by joint donees is no less general for this purpose than a power exercisable by a sole donee. This explains why it has been held that a joint unlimited power may be delegated.

Section 27 of the English Wills Act provides that a general devise or bequest or any general description of the testator's real or personal property, in the absence of a contrary intention appearing in the will, shall operate as the execution of any general power exercisable by the testator. The purpose of this is to give effect to the intention of the ordinary man, who considers that property subject to a general power belongs to him.[69] Where the power is joint, the ordinary man is likely to consider that the property subject to the power belongs to him and the other donee jointly.

One of the most striking differences between a general power and a special power is the rule that on the exercise of a general power, but not a special power, the appointed property becomes available for the satisfaction of the donee's debts.[70] There would be practical difficulties in applying this rule to a joint unlimited power. If both donees are insolvent, the appointed property might be divided equally between them or in proportion to the total indebtedness of each.[71] If only one donee is insolvent, should all the property go in satisfaction of his debts?[72] It is

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

[66] Gray, *Release and Discharge of Powers* (1911), 24 Harvard Law Review 511; 1 SIMES, FUTURE INTERESTS (1936), ss. 277–85; 3 PROPERTY RESTATEMENT, ss. 334–8.

[67] *Johnson* v. *Harris*, 202 Ky. 193, 259 S.W. 35 (1924); *Lyon* v. *Alexander*, 304 Pa. 288, 156 A. 84 (1931).

[68] Simes, *Powers in Trust and the Termination of Powers by the Donee* (1927), 37 Yale Law Journal 63, 211, at pp. 217–8.

[69] *Re Jacob*, [1907] 1 Ch. 445 at p. 449. See also: *Eccles* v. *Cheyne* (1856), 2 K. & J. 676 at p. 682; *Re Wilkinson* (1869), L.R. 4 Ch. App. 587 at pp. 589–90; Re *Wallinger's Estate*, [1898] 1 I.R. 139 at p. 148; Re *Doherty-Waterhouse*, [1918] 2 Ch. 269 at pp. 271–2.

[70] See 40 Michigan Law Review at pp. 365–9 (1942).

[71] For an application of the maxim "equality is equity" in the field of the administration of estates, see *Estate of Hanreddy*, 176 Wis. 570, 186 N.W. 744 (1922).

[72] *Boyce* v. *Waller*, 9 Dana (Ky.) 478 (1840) does not decide this question of the availability of the property as assets, because (a) the power was in fact conferred on the survivor of husband and wife, although the

possible that these difficulties would deter the courts from holding that the appointed property constitutes assets of the donees, or of one of them, but it should be remembered that the intervention of equity on behalf of the donee's creditors on the exercise of a general power is "with a strong arm" and not with a logical principle.[73]

JOSEPH GOLD

Washington, D.C.

husband thought it joint and executed it jointly with his wife; (b) the court held that an appointment to those entitled on default of appointment does not make the property the assets of the donee.

In some early cases where a power of appointment was given to a married woman to be exercised with the consent or concurrence of her husband or some other person, the problem might have arisen whether on the exercise of the power the property was subject to her general engagements. Although the problem of her liability for general engagements was much discussed, the question of the effect of the necessity for consent to the exercise of a general power does not appear to have been considered. See *Grigby* v. *Cox* (1750), 1 Ves. sr. 517, 518; *Pybus* v. *Smith* (1790), 1 Ves. 189; *Essex* v. *Atkins* (1808), 14 Ves. 543, 547. Perhaps the reason for this was that if personalty was given to her separate use coupled with a power of appointing it, equity gave her a power of disposition as an incident of the separate estate. She could exercise this power of disposition, ignoring the power of appointment and all conditions to which its exercise was subject. See *Peacock* v. *Monk* (1751), 2 Ves. sr. 190; *Elton* v. *Shepherd* (1781), 1 Bro. C.C. 532; *Fettiplace* v. *Gorges* (1789), 3 Bro. C.C. 8; *Rich* v. *Cockell* (1804), 9 Ves. 369; *Sturgis* v. *Corp* (1806), 13 Ves. 190. *Whistler* v. *Newman* (1798), 4 Ves. 129 and *Mores* v. *Huish* (1800), 5 Ves. 692 to the contrary must be considered wrongly decided. See ROPER, HUSBAND AND WIFE (1st ed.), ii, pp. 189, 204–222.

[73] See *Holmes* v. *Coghill* (1802), 7 Ves. 499, 507, *per* Sir William Grant M.R.: "The rule is perfectly settled, and though perhaps with some violation of principle, with no practical inconvenience." *Re Harvey's Estate* (1879), 13 Ch. D. 216, 221–222, *per* Hall V.C.: "The Court held, with a strong arm, that inasmuch as he (the donee) might make it liable to the payment of his debts, he should be deemed to have done so." See also *O'Grady* v. *Wilmot*, [1916] 2 A.C. 231, *per* Lord Sumner, particularly at pp. 270–273; *Hill* v. *Treasurer*, 229 Mass. 474, 476 (1918).