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THE NON-GENERAL POWER OF APPOINTMENT — A CREATURE OF THE POWERS OF APPOINTMENT ACT OF 1951*

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In the course of the past fifty years, during which estate planning has become a specialty rather than one of many jobs handled by the general practitioner, the power of appointment has become an increasingly popular form of gift. The two great advantages which have been claimed for the power are the introduction of great flexibility into the estate plan and the reduction of the tax burden on the property as it passes from one generation to another.[1] It was presumably with both of these objectives in mind that Professor William J. Bowe made a suggestion last year as to a form of power[2] which, if widely accepted by estate planners, may make the following provision a familiar sight in wills in the near future:

> I give the rest and residue of my estate, real and personal, to the X Trust Co., to hold in trust and to pay the income to my son, Doe, for his life and on his death to distribute the principal to such person or persons, other than Doe, his estate, his creditors or the creditors of his estate, in such interests or estates as Doe shall create by will or deed attested by two witnesses, and in default of appointment to Doe's issue who survive him per stirpes, and if Doe die without issue him surviving to Vanderbilt University.

Prior to 1918, the donee of a power of appointment was not recognized as the owner of the appointive property for federal estate tax purposes.[3] Rather the donee was considered as merely an agent of the donor, passing the property to other people from the donor himself.[4] Between 1918 and 1951, the federal law varied from taxing only gen-

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1. RESTATEMENT, PROPERTY 1808-09, 1810-11 (1940); Griswold and Leach, *Powers of Appointment and the Federal Estate Tax*, 52 HARV. L. REV. 929, 961 (1939); Schuyler, *Some Problems with Powers*, 45 ILL. L. REV. 57, 58-59 (1950).

2. See Bowe, *Estate Tax Planning under the Powers of Appointment Act of 1951*, 5 VAND. L. REV. 197, 199 (1952). But see Lauritzen, *Drafting Powers of Appointment under the 1951 Act*, 47 N.W.L. REV. 314, 318 (1952); McLucas, *Taxation of Powers of Appointment under the New Law*, 31 TRUST BULL. 26, 35 (1951).

3. United States v. Field, 255 U.S. 257, 41 Sup. Ct. 256, 65 L. Ed. 617 (1921); Note, 18 A.L.R. 1470 (1922).

4. De Charette v. De Charette, 264 Ky. 525, 94 S.W.2d 1018 (1936); Commonwealth v. Duffield, 12 Pa. 277 (1849); see also 3 TIFFANY, REAL PROPERTY §§ 679-680 (3d ed. 1939); RESTATEMENT, PROPERTY § 318, comment b (1940); *id.* at 1811. For a discussion of the nature of powers, see Callahan and Leach, *Powers of Appointment*, 5 AMERICAN LAW OF PROPERTY §§ 23.1-23.5 (Casner ed. 1952).

eral powers of appointment which were exercised[5] to taxing all powers other than a few exempted ones.[6] This latter form of taxation was severely criticized by property lawyers[7] and in 1951 Congress returned the taxation of powers to a position somewhat similar to that existing under the original 1918 act: including in the donee's estate a general power if it is possessed by the donee at his death or if he has exercised it in contemplation of death, and taxing as a gift the exercise of a general power.[8] A "general power" is defined as one which is exercisable in favor of the donee, his estate, his creditors or the creditors of his estate, with specific exceptions for a power to invade principal in accordance with an ascertainable standard or a power held in conjunction with certain other persons.[9]

The power stated in the terms of the Internal Revenue Code seems on its face to satisfy the twin *desiderata* of giving broad flexibility to the donee of the power and at the same time not making either the appointive property nor the exercise of the power taxable to the donee or his estate. But does it raise such problems in the application of the established rules of property law relating to powers of appointment as to make its use undesirable? It is the purpose of this article to view some of the situations which may cause trouble in the use of this power and to consider whether the benefits to be gained outweigh the possible detriments. Specifically the questions to be considered are:[10]

5. Revenue Act of 1918, § 402(e), 40 STAT. 1097 (1919).

6. Revenue Act of 1942, § 403(a), 56 STAT. 942 (1942) (estate tax); *id.* at § 452(a) (gift tax). Prior to this act, the gift tax provisions of the Code had not dealt specifically with the exercise of powers as gifts. The gift tax law of 1932 had only included "transfer . . . in trust or otherwise, whether the gift is direct or indirect. . . ." Revenue Act of 1932, § 501(b), 47 STAT. 245 (1932). Although no particular aid is obtained from the Treasury Regulations with respect to this section, U.S. Treas. Reg. 79, Art. 2 (1933), the Regulations under the 1942 Act indicate that transfers by an exercise of a general power between 1932 and 1942 were considered as taxable under the original gift tax provisions. U.S. Treas. Reg. 108, § 86.2(b) (1943). *See* Commissioner v. Solomon, 124 F.2d 86, 88 (3d Cir. 1941). But see Griswold, *Powers of Appointment and the Federal Estate Tax*, 52 HARV. L. REV. 929, 953 (1939).

7. See, *e.g.*, Browne, *Taxation of Powers of Appointment and the Need to Break the Impasse*, 27 TRUST BULL. 12, 13, 16-17 (1947); Buck, Craven and Shackelford, *Treatment of Powers of Appointment for Estate and Gift Tax Purposes*, 34 VA. L. REV. 255, 259-61 (1948); *Hearings before Committee on Ways and Means on H.R. 3533*, 80th Cong., 1st Sess. 1752 (July 17, 1947) (statement of W. A. Sutherland).

8. INT. REV. CODE §§ 811(f)(2), 1000(c)(2).

9. INT. REV. CODE §§ 811(f)(3), 1000(c)(3). For a more detailed history of the taxation of appointive assets and powers under the federal law, see Craven, *Powers of Appointment Act of 1951*, 65 HARV. L. REV. 55, 55-64 (1951).

10. While this list is not intended to preclude the possibility of other problems arising under this power, these three are the ones most likely to arise and therefore deserve the major consideration. Some problems or questions are rather clearly eliminated by the terms of the power itself: since the power is too broad to indicate any intention on the part of the donor that there be an appointment to every object or any proportioning of appointments, there will be no question of non-exclusive powers or illusory appointments. *Cf.* 5 AMERICAN LAW OF PROPERTY §§ 23.57, 23.58 (Casner ed. 1952). Due to the in-

1) Will the donee be able to exercise the power so as to confer any benefit on himself or his creditors?

2) Will the creditors of the donee be allowed to reach the appointive assets in a court of equity following an appointment by the donee?

3) How is the Rule against Perpetuities to be applied to this power?

I

Before discussing these three questions, however, there are two preliminary questions which should be considered because of the very breadth of the power and its rather unusual terminology. The first of these is whether the courts will recognize this as a proper power. The second is how they will characterize it.

It is an established doctrine that the courts do not uphold trusts which have over-broad or vague definitions of beneficiaries, except where the trust is for charity.[11] While a power to appoint to anyone within the discretion of the donee is certainly recognized, will a court recognize the power quoted above which attempts to limit the discretion of the donee but sets up no specific class of beneficiaries? This same question was raised in England by In re *Park* some 22 years ago.[12] There the power allowed the donee to appoint to anyone in the world except herself. The persons attacking this power argued to the chancery court that, while the testator might have given either a general power or a power to appoint to a restricted class of persons, he could not create this unusual power which in effect allowed the donee to make the testator's will for him. The court held the power valid, saying that the division of powers into "general" and "restricted" powers was not exhaustive.

Although powers to appoint to anyone except named persons are not common, they have been used from time to time and several other

determinate class of objects set up by the power, there can be no implied gift in default of appointment if no specific gift in default is included. *Id.* at §§ 23.62, 23.63. Any argument that an attempted exercise of the power makes the appointive property so much that of the donee that it should pass to his estate in default is precluded by the express exclusion of the estate as a potential taker. *Id.* at § 23.61.

One question which might raise some problems is that of state taxation of the power under inheritance or estate taxes. A few states do not tax the power or appointive property in the hands of the donee nor its transfer as a transfer by him. Many states tax property passing under the exercise of powers without distinguishing the type of power involved. Some states follow the current federal law on this question. A few have their own rule of taxing only general powers, *e.g.*, ARIZ. CODE ANN. § 40-105(5) (1939); CCH INH., EST. & GIFT TAX REP. ¶ 1540 *et seq.* (7th ed. 1950). Under this latter type of statute, the significant factor is whether the power is general or not. The discussion in the main body of the article of the incidence of the federal estate and gift taxes on the power applies equally well to these state laws.

11. See 1 SCOTT, TRUSTS §§ 112, 123 (1939).

12. [1932] 1 Ch. 580 (1931).

courts have dealt with them without questioning their validity.[13] In one state a power to appoint to anyone by will is treated as one which may not be exercised in favor of the donee's creditors or estate.[14] Under this rule the federal courts have held such powers non-taxable.[15] Both the *American Law of Property* and the *Restatement of Property,* while saying that such powers are unusual, see no reason to question their validity.[16]

Many of the rules which have been developed by the courts in dealing with powers distinguish "general" and "special" powers. If, at the outset, we can characterize the Doe power as one or the other, we may have a key to the other problems.

With only slight differences in phraseology, courts and writers make the distinction between general and special powers of appointment in the following terms: a general power is one which may be exercised in favor of anyone including the donee or his estate; a special power is one which may be exercised only in favor of a class of designated persons, not including the donee of his estate.[17] *The Restatement of Property* narrows the latter definition by stating:

> A power is special . . . if (a) it can be exercised only in favor of persons, not including the donee, *who constitute a group not unreasonably large,* and (b) the donor does not manifest an intent to create or reserve the power primarily for the benefit of the donee.[18]

Comment *a* to this Section specifically says that a power exercisable "to any person except the donee" is not considered as either general or special. Rather, the *Restatement* would treat such a power as a hybrid, to be considered general in some situations and special in others.[19]

The authors of Part 23 of the *American Law of Property,* dealing with powers, in commenting on the *Restatement's* exclusion from the class of "special powers" of powers exercisable in favor of "an unreasonably large group" or powers "primarily for the benefit of the donee," say that although such cases are unlikely to arise with con-

13. Christine S. Kendrick, 34 B.T.A. 1040 (1936); *In re* Byron's Settlement, [1891] 3 Ch. 474; Platt v. Routh, 6 M. & W. 756, 151 Eng. Rep. 618 (Ex. 1840), *aff'd sub nom.,* Drake v. Attorney General, 10 Cl. & F. 257, 8 Eng. Rep. 739 (H.L. 1843); Edie v. Babington, 3 Ir. Ch. Rep. 568 (1854).

14. Balls v. Dampman, 69 Md. 390, 16 Atl. 16 (1888); *see* Galard, Prince de Bearn et Chalais v. Winans, 111 Md. 434, 472, 74 Atl. 626, 631 (1909); Prince v. Cherbonnier, 103 Md. 107, 111, 63 Atl. 209, 210 (1906).

15. Leser v. Burnet, 46 F.2d 756 (4th Cir. 1931).

16. 5 AMERICAN LAW OF PROPERTY 491 (Casner ed. 1952); RESTATEMENT, PROPERTY § 323, comment *h* (1940).

17. Morgan v. Commissioner, 309 U.S. 78, 81, 60 Sup. Ct. 424, 84 L. Ed. 585 (1940); Lyon v. Alexander, 304 Pa. 288, 292, 156 Atl. 84, 85 (1931). For statutory definitions, see, *e.g.,* N.Y. REAL PROP. LAW §§ 134, 135; RESTATEMENT, PROPERTY § 320, comment c (1940). FARWELL, POWERS 7 (2d ed. 1893); SUGDEN, POWERS 394 (8th ed. 1861).

18. RESTATEMENT, PROPERTY § 320(2) (1940) (Emphasis added).

19. *Id.* at § 320, comment *a.*

siderable frequency, it "is likely that the exclusions were made because of a belief that should powers of these types appear separate rules might be required for them."[20] In line with the *Restatement* comment, these separate rules might be determined on the basis of the policy underlying the present rules as to general and special powers.

Two writers, one American and one English, have devoted articles to a consideration of the powers which do not fall within the traditional definitions of general or special powers.[21] Both conclude that the hybrid powers cannot be characterized as either general or special for all purposes. Each analyzes the situations in which the courts have laid down rules governing powers to discover the reasons behind these rules and then classifies the hybrid powers for the purpose of each situation.

This same variation in classification of such powers depending upon the exact language of the power and the purpose behind the existing rules is illustrated by the following cases:

In *Platt v. Routh*,[22] the donor gave to his daughter a life estate and the power to appoint at her death to any person or persons (other than J. W. and his relations, M. H. and his relations and the relations of the daughter's late husband). When the daughter appointed, the question of the imposition of a legacy duty under Section 18, Legacy Duty Act, 1796,[23] was raised. This section taxed property passing subject to a general power as having been given to the donee absolutely and property appointable only to specific persons as being transferred directly from the donor to those persons appointed. The court said that since the power fitted neither category, some violence must be done to the words of the statute and it seemed better to treat the power as general. "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."[24] At the same time a probate duty was not levied on the ground that the executor could not claim the property qua executor since it was not property "for or in respect of which the probate is granted." This decision was affirmed in the House of Lords,[25] the Lords saying that the section dealing with general powers subject to the legacy duty was intended to cover all but powers for the benefit of persons specially named.

In *Edie v. Babington*,[26] the testator bequeathed a sum in trust for *E*

20. 5 AMERICAN LAW OF PROPERTY 491 (Casner ed. 1952).
21. Gold, *The Classification of Some Powers of Appointment*, 40 MICH. L. REV. 337 (1942); Fleming, *Hybrid Powers*, 13 CONV. 20 (1948).
22. 6 M. & W. 756, 151 Eng. Rep. 618 (Ex. 1840).
23. 36 Geo. III, c. 52.
24. Platt v. Routh, 6 M. & W. 756, 789, 151 Eng. Rep. 618, 631 (Ex. 1840).
25. Drake v. Attorney-General, 10 Cl. & F. 257, 8 Eng. Rep. 739 (H.L. 1843).
26. 3 Ir. Ch. Rep. 568 (1854).

for life and on her death one third to go as she appointed by her last will, the power so given not to be exercised in favor of "any person named John Bateman." The general creditors of the donee were allowed to reach the assets when an appointment was made in *E*'s will, the court relying on the discussion in *Platt v. Routh,* presumably since there the decision had turned on the possibility of appointing the assets for the benefit of the donee or the payment of his debts.

In In re *Byron's Settlement,*[27] property was conveyed in trust for the life of *R* and on her death to such persons other than her husband and his friends or relations as *R* appointed by deed or will. After her husband's death, *R* died making a general devise of her personal and real property. The question was raised whether there was a general power so as to make the devise an appointment under Section 27 of the Wills Act.[28] The court held that there was no general power, since a donee limited to all the world save *X* lacked the equivalent of ownership necessary for a general devise of owned property to act as an exercise of the power. Although the husband had died, there was a possible limitation on appointment due to the exclusion of his friends and relations, which the court felt was capable of being given effect if the occasion arose.

As is indicated by these cases, the dichotomy of general and special powers is not merely one of form, but is basically the difference between powers which in effect make the donee the owner of the appointive property, and those in which he is not actually in the position of an owner. As Professor W. Barton Leach has phrased it:

> "Where a general power is given, the property is surrendered to the donee to do with as he pleases for the benefit of no one but himself. Where a special power is given the object of the gift is no longer the donee but the class to whom appointment is to be made, and the donee takes the position of one who is to direct the distribution of property for the benefit of the class, not of himself. The practical ownership of the donee of a general power and the quasi-fiduciary position of the donee of a special power lie at the root of many of the distinctions in the law of property."[29]

The real question in the characterization of a power as general or special is what the donor intended.[30] Did he intend to make the donee the true owner of the property or only to use him as a sort of agent in the distribution of the property to the true objects of his bounty?

With this background, how are the courts to characterize the power with which we are concerned? Since there is no special class of bene-

27. [1891] 3 Ch. 474.
28. Wills Act, 1837, 7 WM. IV & 1 VICT., c. 26, § 27.
29. LEACH, CASES AND MATERIALS ON THE LAW OF FUTURE INTERESTS 577-78 (2d ed. 1940).
30. 5 AMERICAN LAW OF PROPERTY § 23.11 (Casner ed. 1952); RESTATEMENT, PROPERTY § 324 (1940).

ficiaries designated by the donor of the power, there appear to be no persons other than the donee who are to be considered as the objects of the donor's interest. Rather he gave the donee almost full control over the property limiting his discretion only to exclude four objects, the donee himself, his estate, his creditors and the creditors of the estate. It seems difficult, therefore, to classify this as a "special power" as that term has been used in the past.

It might be argued with some merit that since an exercise of the power will appoint only the remainder after the donee's death, his own exclusion is of no importance. Likewise the exclusion of the estate is only a slight limitation, since he may appoint to anyone who could take from his estate except the creditors. Also, as we have seen above, the taxing authorities may be unable to benefit from the donee's possession or exercise of the power. Thus the conclusion might be reached that the purpose of the particular limitations on the donee's discretion is not to benefit others but to benefit the donee himself by keeping the property out of the hands of creditors or the taxing authorities and thereby preventing a reduction of its value in the hands of the donor. Both the *American Law of Property* and the *Restatement* indicate that where the donor has manifested an intention to create a power primarily for the benefit of the donee, it may be treated as a general power for some purposes.[31]

Does it follow from this that the present power must be primarily classified as general? To do so in all cases would probably mean that the creditors and the taxing authorities would be allowed to reach the property. Furthermore it would seem to disregard the traditional definition of a general power as one exercisable in favor of anyone including the donee himself. Therefore a preliminary characterization of the power as "non-general" seems preferable. This term indicates that the power is not clearly general and at the same time does not bring it within the class of special powers.

With these preliminary considerations in mind, let us now examine the three individual problems which may arise with respect to the exercise of a non-general power and the arguments which may be made in favor of the various possible treatments of the power and its exercise.

II

In dealing with attempts by the donee to exceed the discretion given him by the donor, a distinction must be made between "excessive" and "fraudulent" appointments.[32] An "excessive" appointment occurs

31. 5 AMERICAN LAW OF PROPERTY 492 (Casner ed. 1952); RESTATEMENT, PROPERTY § 320, comment *a* (1940).

32. See 1 SIMES, FUTURE INTERESTS § 290 (1936); RESTATEMENT, PROPERTY 1947-48 (1940); Note, 42 HARV. L. REV. 419, 420 (1929).

when the donee makes a direct appointment to one outside the objects of the power or appoints an interest greater than that permitted by the power.[33] A "fraudulent" appointment occurs when the donee gives the appointive assets to an object but attaches thereto a condition benefiting a non-object or appoints with the intention of conferring a benefit on a non-object.[34] While the two are alike in that the donor's intentions have been disregarded by the donee, the effect of the two types of appointments may be different.[35]

It is clear that the donee did not get a power to give the property directly to himself, his estate or the creditors of either. To permit him to make such a direct appointment would be in direct violation of the terms of the power. Therefore any "excessive" appointment should be considered void in all cases.

The donor has manifested no intention of benefiting anyone other than the donee, however, and may be treated as manifesting an intention to increase the benefit to the donee by removing the burdens of taxation of the property for some time and by making the property free from the claims of the donee's creditors. The exclusion of the donee as a potential appointee may only mean that the donor did not want the property to become so much the donee's that the tax authorities or the creditors could reach it.[36] The donee may argue that he should be allowed to receive an indirect benefit from the appointment of the property. He may attempt to repay others for services rendered to him.[37] He may supply a potential surety with sufficient property to support a bond.[38] He may attempt to contract with an appointee to support him for the rest of his life.[39] None of these hypothetical appointments disregard the intention of the donor, the donee will argue. Although each of these has been treated as a fraudulent appointment under more restricted powers,[40] the court faced with this "non-general"

33. *E.g., In re* Trowbridge's Estate, 124 Misc. 317, 208 N.Y. Supp. 662 (Surr. Ct. 1924) (power limited to lineal descendants exercised in favor of husband and educational institution); Daniel v. Brown, 156 Va. 563, 159 S.E. 209 (1931) (power limited to nephews and nieces exercised in favor of grand-nephews and grand-nieces).

34. *E.g.*, Sikes v. Sikes, 163 Ga. 510, 136 S.E. 523 (1927) (land appointed to object who never obtained possession and who deeded back to donee immediately); Horn v. Sayer, 184 Ill. App. 326 (1913) (land appointed to objects who deed immediately to stranger who has contracted with donee); *In re* Carroll's Will, 274 N.Y. 288, 8 N.E.2d 864 (1937) (at time of drawing will appointing to object, appointee agreed to pay large portion of property over to non-object).

35. The authorities cited in note 32 *supra* point out that "excessive" appointments are treated as void and may be separated from other appointments which are valid, while "fraudulent" appointments are only voidable but may taint the entire exercise of the power.

36. See *supra* pp. 57-58.

37. *Cf.* Chenoweth v. Bullitt, 224 Ky. 698, 6 S.W.2d 1061 (1928).

38. *Cf.* Bostick v. Winton, 33 Tenn. 304 (1853).

39. *Cf.* Shank v. Dewitt, 44 Ohio St. 237, 6 N.E. 255 (1886); *In re* Wright, [1920] 1 Ch. 108.

40. See cases cited notes 37-39 *supra*.

power and the argument just made might consider these as valid appointments.

While the above analysis seems plausible as far as it goes, the court in following this line of reasoning in reality is saying that this is a general power. From this it is only a short step to treating the "non-general" power in the same way for the purpose of taxation. The Internal Revenue Code does not say that a power which is *not exercisable* directly in favor of the donee, his estate or the creditors of either *is not* a general power, but only that one so exercisable is.[41] The United States Court of Appeals for the Fourth Circuit has said that a power general on its face is not general for tax purposes since it cannot be exercised in favor of the donee's estate or creditors under state law.[42] This indicates that the courts will not consider the words of the power alone in determining the "general" nature of the power for tax purposes.

Some question might arise as to whether, in the face of the statutory language, all powers which might be exercised so as indirectly to benefit the donee should be taxed as property of the donee or only those which are so exercised. To adopt the latter rule would give the donee the ability to determine the taxability of the appointive property. The fact that the tax is imposed not on a power which *is* exercised but on one which *may be* exercised in favor of the donee indicates a Congressional intention to impose the tax not on the basis of exercise but on the basis of the type of power involved.[43] Therefore the broader rule of taxing any power which may be exercised so as to benefit the donee indirectly would be the preferable one.

With this possibility of taxation of the appointive assets as those of the donee, the argument against allowing the donee to so exercise the power as to confer an indirect benefit on himself or his estate becomes stronger. The donor did not intend that a tax be imposed on the donee because of his possession or exercise of the power. Any result which will impose such a burden would be a violation of the donative intent. For this reason the court should refuse to permit any indirect benefit to the non-objects of the power, treating it as a "fraud on the power."

The donee may also attempt to appoint the assets to an object in return for the payment of his debts. In addition to the arguments made above against permitting indirect benefit to the donee himself, the takers in default of appointment or the trustee of the assets will be able to argue that an indirect benefit to the creditors is clearly in violation of the donor's intentions.

41. INT. REV. CODE §§ 811(f)(3), 1000(c)(3).
42. Leser v. Burnet, 46 F.2d 756 (4th Cir. 1931). For comment on this case during the debate on the 1951 act, see 97 CONG. REC. 5000 (1951).
43. See, H.R. REP. No. 2333, 77th Cong., 2d Sess. 160 (1942); SEN. REP. No. 1631, 77th Cong., 2d Sess. 232 (1942); 88 CONG. REC. 6379-80 (1942).

III

In spite of the fact that under the express terms of the "non-general" power the donee cannot make any direct appointment to his creditors, and under the analysis just made can confer no indirect benefit on them, the creditors may attempt to reach the property subject to the power if the donee makes a testamentary appointment to others or an inter vivos appointment which if made as to owned property would be a fraud on creditors. This attempt may be based on an argument that for this purpose the donee should be treated as the owner of the appointive property.

Although in most cases the courts have treated appointive property as that of the donor until the time of appointment, they sometimes have recognized that where the donee of a general power exercises it his creditors may be able to reach the assets as if they were the donee's.[44] This has been justified on two grounds. First, the courts argue that the donee having exercised dominion over the property as if it were his own, the court will treat it as his for the purpose of paying his creditors,[45] or in more poetic terms, the donee must "be just before being generous."[46] Sometimes the court speaks of intervening to take the property as it passes through the donee's hands.[47] This rationalization has been attacked by courts and commentators who have said that if the donee is to be treated as the owner of the property, then the court should logically treat him as such without regard to what the donee actually does, or that if the property is not his absolutely it is improper to apply it to the payment of his debts.[48] Second, the court may look upon the rule allowing the creditors to reach the appointive assets as a rule of equity, rather than one of law, which disregards the question of who "owns" the property.[49] This may in fact underlie the first rationale and answer its critics. In at least one case this led a court to ignore the specific provisions in the instrument creating the power which prohibited the creditors

44. 5 AMERICAN LAW OF PROPERTY § 23.16 (Casner ed. 1952); 1 SIMES, FUTURE INTERESTS 466 (1936); 3 TIFFANY, REAL PROPERTY 85-86 (3d ed. 1939); Note, 27 VA. L. REV. 1052 (1941).

45. Johnson v. Cushing, 15 N.H. 298, 41 Am. Dec. 694 (1844); *see* Holmes v. Coghill, 7 Ves. Jr. 499, 506, 32 Eng. Rep. 201, 203-04 (Ch. 1802).

46. *In re* Harvey's Estate, 13 Ch. 216, 222 (1879); *see* Mayberry v. Redmond, 169 Tenn. 190, 195, 83 S.W.2d 897, 899 (1935).

47. Townshend v. Windham, 2 Ves. Sr. 1, 11, 28 Eng. Rep. 1, 7 (Ch. 1750); *see* Commonwealth v. Duffield, 12 Pa. 277, 279 (1849); Harrington v. Harte, 1 Cox Eq. 131, 132, 29 Eng. Rep. 1094, 1095 (1784).

48. St. Mathews Bank v. De Charette, 259 Ky. 802, 83 S.W.2d 471 (1935); Wales v. Bowdish's Ex'r, 61 Vt. 23, 17 Atl. 1000 (1889); *see* Commonwealth v. Duffield, 12 Pa. 277, 279-81 (1849); see 5 AMERICAN LAW OF PROPERTY 501 (Casner ed. 1952); 1 SIMES, FUTURE INTERESTS 467-68 (1936); 3 TIFFANY, REAL PROPERTY § 710 (3d ed. 1939).

49. *See* O'Grady v. Wilmot, [1916] 2 A.C. 231, 245-46, 248; Holmes v. Coghill, 7 Ves. Jr. 499, 506, 32 Eng. Rep. 201, 203, 204 (Ch. 1802); see 5 AMERICAN LAW OF PROPERTY 501 (Casner ed. 1952); 1 SIMES, FUTURE INTERESTS 469 (1936); Note, 27 VA. L. REV. 1052, 1057 (1941).

from reaching the property subject to the general power,[50] a principle which has also been announced by legal writers other than the courts.[51] In several states, statutes have been enacted which give creditors rights whether or not a general or beneficial power is exercised.[52]

The argument might be made by the creditors of the donee of the "non-general" power that since the donee has a life estate and a very broad power, the court of equity should treat him as the owner of the appointive assets at least for the purpose of making the property subject to his debts. Yet, the fact remains that the donor has specifically forbidden the donee to make any direct appointment to his creditors. The reasons outlined above which might lead a court to hold that the donee could confer an indirect benefit on himself would not be applicable here, since the donor has manifested an intention to exclude the creditors from any benefit from this property. And, as we have seen above, the tax effect of allowing any benefit to the donee should enter into a court's consideration of the question of who may benefit from the exercise of the power.[53]

But, the creditors will say, the courts do not always follow the intentions of the donor in determining whether or not the creditors may reach the appointive property. Had the donor given the donee a general power with the provision that no part of the trust funds should become liable for or be paid for the debts or liabilities of the donee, the court might disregard these words.[54] The "non-general" power may be

50. State Street Trust Co. v. Kissel, 302 Mass. 328, 19 N.E.2d 25, 121 A.L.R. 796 (1939).

51. 5 AMERICAN LAW OF PROPERTY 503 (Casner ed. 1952); GRISWOLD, SPENDTHRIFT TRUSTS § 97 (2d ed. 1947); RESTATEMENT, PROPERTY § 329, comment c (1940).

52. Most of these statutes follow N.Y. REAL PROP. LAW §§ 149, 153, treating a general power attached to a life estate as an absolute interest in the property. See 5 AMERICAN LAW OF PROPERTY § 23.17 (Casner ed. 1952). Minnesota has merely provided that all general powers shall be subject to creditors' claims. MINN. STAT. ANN. § 502.70 (West 1947).

The New York law also provides that the creditors of a donee having "a special and beneficial power" shall be able to reach it to the same extent as other interests which cannot be reached by execution. N.Y. REAL PROP. LAW § 159. Cutting v. Cutting, 86 N.Y. 522, 541-42 (1881), indicates that only special powers in which the donee alone has an interest are subject to the creditors under this provision. Other states following New York on this point are: ALA. CODE tit. 47, § 92 (1940); D.C. CODE ANN. § 45-1010 (1951); MICH. COMP. LAWS § 556.21 (1948); N.D. REV. CODE § 59-0550 (1943); OKLA. STAT. tit. 60, § 274 (1951); S.D. CODE § 59-0451 (1939); WIS. STAT. § 232.20 (1951).

53. The Commissioner has issued an unpublished ruling to the effect that even though a power in the terms of the statute may be treated as general for the purposes of allowing creditors to reach the assets, it will not be taxed. See Johnson, *Powers of Appointment*, 29 TAXES 965, 970 (1951); Lauritzen, *Drafting Powers of Appointment under the 1951 Act*, 47 N.W.L. REV. 314, 318 n.25 (1952). But reliance upon this ruling without more authority may not be too wise. Also there is the possibility that the tax statute itself might be changed if this form of power were used too extensively.

54. See State Street Trust Co. v. Kissel, 302 Mass. 328, 19 N.E.2d 25, 121 A.L.R. 796 (1939); 5 AMERICAN LAW OF PROPERTY 503 (Casner ed. 1952); RESTATEMENT, PROPERTY § 329, comment c (1940).

interpreted as saying the same thing. During his lifetime, the donee is given the income, but the principal is not in his hands and so is not normally subject to his debts. As stated above, the restrictions on his appointments really limit him only by forbidding an appointment to creditors.[55] While the property is not inalienable in the hands of the donee, his creditors are denied any rights in it by the terms of the trust. Except where there are statutory provisions as to a spendthrift trust which are not satisfied by this language,[56] the trust may be treated as a form of spendthrift trust.[57]

While many jurisdictions accept the spendthrift trust as applied to gifts of income,[58] there are objections to its use as applied to interests in fee or similar interests which extend beyond the life of the beneficiary.[59] "The purpose of a spendthrift trust, however phrased, is to provide a secure living for the beneficiary,"[60] and no restraint beyond his lifetime can be justified by this purpose.[61] Following this theory, the creditors may argue that the appointive assets must be subjected to their claims if the owned property of the donee is inadequate and if he exercises the power.

One objection which might be made to this line of argument is that the donee has only a power, which is not treated as an interest in property.[62] This point is debatable,[63] however, and may not be too well-taken before a court which gives a liberal interpretation to the nature of the powers.

Another argument of the creditors will be based on a comment in the *Restatement of Property*:

> "The rule stated in this Section [that the exercise of a general power subjects the property to all claims of creditors] applies in spite of the manifestation of a contrary intent by the donor or the donee or both. Thus it is immaterial that the donor provides in the instrument creating the power that the property covered thereby shall in no circumstances be appointed to the donee's creditors or subjected to their claims."[64]

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55. See *supra* pp. 58-59.
56. See discussion of statutory requirements, GRISWOLD, SPENDTHRIFT TRUSTS §§ 61-79 (2d ed. 1947).
57. Although the term "spendthrift trust" is normally applied to restraints on the right to receive income and includes restraints on the beneficiaries' power to alienate the property, *id.* at 2-3, the term has also come to stand for a trust the assets of which the creditors may not reach, and it is so used here.
58. See *id.* at 42-43.
59. Lane v. Lane, 8 Allen 350 (Mass. 1864); McCreery v. Johnston, 90 W. Va. 80, 110 S.E. 464 (1922); see also GRISWOLD, SPENDTHRIFT TRUSTS §§ 84-96, 106 (2d ed. 1947). But see LA. REV. STAT. § 1923 (1950); NEV. COMP. LAWS § 6880.04 (Supp. 1941); OKLA. STAT. tit. 60, § 175.25 (1951).
60. Bucknam v. Bucknam, 294 Mass. 214, 219, 200 N.E. 918, 921 (1936).
61. GRISWOLD, SPENDTHRIFT TRUSTS 104-05 (2d ed. 1947).
62. See Simes, *The Devolution of Title to Appointed Property*, 22 ILL. L. REV. 480, 488-90 (1928), for a discussion of this point.
63. *Ibid.* See also GRAY, RULE AGAINST PERPETUITIES 465 (4th ed., Roland Gray, 1942); 3 TIFFANY, REAL PROPERTY 3-4 (3d ed. 1939).
64. RESTATEMENT, PROPERTY § 329, comment c (1940).

There are also statements in some Massachusetts cases[65] and in the *American Law of Property*[66] and Dean Erwin N. Griswold's treatise on *Spendthrift Trusts*,[67] to the effect that a general power may not be limited by spendthrift provisions. If the court refuses to give effect to the limitations on the power, then the creditors may be allowed to reach the appointive assets.

An examination of the Massachusetts cases indicates some doubt as to whether they are really decisive in the present situation. In *Hill v. Treasurer*[68] there is dictum to the effect that an equitable rule subjecting the property to the claims of creditors "would operate even in the face of his [donor's] testamentary declaration to the contrary."[69] However, the question before the court was whether the property was the donee's for the purposes of state inheritance taxation, and the court decided that it was not. Further, there was no restriction on the general power in that case.

In *Clapp v. Ingraham*,[70] which Dean Griswold cites as authority on the point that the donor cannot impose spendthrift restrictions on a general power,[71] the court specifically said that the spendthrift provisions were never intended by the donor to be applicable to the power but only to other gifts, thereby avoiding any direct question of whether the donor could impose such restrictions on a general power.

The one case which appears to have squarely faced the problem of restrictions imposed on the general power is *State Street Trust Co. v. Kissel*.[72] There the donor had created a trust for her grandchildren, to pay them the income for life, and on the death of each to pay over the portion of principal from which that grandchild had received income " 'to such person or persons as such grandchild by its last will and testament directs and appoints to receive the same, but in no event shall any part of said trust funds by [sic] liable for, or be paid or appropriated to or for any debts or liabilities of such grandchildren. . . .' "[73] One of the grandchildren had appointed to certain persons who were his creditors, apparently in payment of his obligations. The surviving grandchild, who would have taken in default of appointment, claimed that the appointment was invalid. The trial court held the appointment valid and ruled that the limitation on the

65. State street Trust Co. v. Kissel, 302 Mass. 328, 19 N.E.2d 25, 121 A.L.R. 796 (1939); *see* Hill v. Treasurer and Receiver General, 229 Mass. 474, 476, 118 N.E. 891, 892 (1918); Clapp v. Ingraham, 126 Mass. 200, 203-04 (1879).
66. 5 AMERICAN LAW OF PROPERTY 503 (Casner ed. 1952).
67. GRISWOLD, SPENDTHRIFT TRUSTS §§ 94-95 (2d ed. 1947).
68. 229 Mass. 474, 118 N.E. 891 (1918).
69. *See id.* at 476, 118 N.E. at 892.
70. 126 Mass. 200 (1879).
71. GRISWOLD, *op. cit. supra* note 67, at § 94.
72. 302 Mass. 328, 19 N.E.2d 25, 121 A.L.R. 796 (1939).
73. *Id.* at 329, 19 N.E.2d at 26.

power was invalid as an improper limitation upon the general power of appointment. On appeal this decision was upheld. It should be noted, however, that the Supreme Judicial Court of Massachusetts indicated some hesitation in following the *Restatement* comment to the extent of saying that a power may never be so limited:

> "The power was a general one; the subsequent provision, that the property appointed should not be appropriated to or for any debts or liabilities of the donee's, we think was a direction to the trustees, who would be the only persons who could 'pay,' and a restriction upon them rather than a limitation upon the power to appoint. Such an intent cannot be given effect. . . . [The *Restatement* comment] goes further, we think, than we are required to go in the instant case, where the provision is not a specific one that the property shall not be appointed to the donee's creditors, but is one which follows the grant of the general power. . . ."[74]

Since the question before the court was not whether the creditors of the donee could reach the property when he had appointed,[75] but rather whether he could appoint direct to the creditors, and since in the case of the "non-general" power it is clear that the donee is specifically prohibited from appointing to creditors, the argument of the creditors based on the *Kissel* case seems greatly weakened.

This leads to the final and most telling argument against the creditors' claims. The two lines of authority relied upon by the creditors, *i.e.*, that there can be no spendthrift limitations on gifts of principal and that no such limitations may be attached to a general power, assume that the "non-general" power is actually either full ownership or a general power. Even if the power is treated as an interest in property, it is not an unlimited one. The donee may not appoint directly to himself or creditors. The argument seems strong that he may not even indirectly benefit either himself or creditors through appointments to others. He is not in fact the complete owner of the property, therefore. The doctrine which allows creditors to reach appointive assets under a general power has received sufficient criticism[76] to make a court unwilling to extend its application to this situation. If the court does so extend the doctrine, it is saying to the donee that although he lacks the complete benefits of ownership he is going to be saddled with the burdens of ownership. This hardly

74. *Id.* at 335, 336, 19 N.E.2d at 28, 29.

75. In the course of its opinion the court does say that the appointments should be set aside and the creditors all take pro rata shares, the appointees taking as creditors rather than as appointees. *Id.* at 335-36, 19 N.E.2d at 29. However, the lower court had not been asked to so rule as far as the report discloses, and the appeal was taken only by the taker in default as to the validity of the appointment, so that the question of whether the creditors as such could reach the appointive assets seems not to have been directly before the court.

76. See *supra* p. 62 and authorities cited note 48 *supra*.

seems the proper result in a court which professes to act on principles of equity and justice.

If the donee of the "non-general" power should become bankrupt, the trustee in bankruptcy may claim either that he becomes vested with the "non-general" power under Section 70 (a) (3) of the Bankruptcy Act which vests in the trustee "powers which he [the bankrupt] might have exercised for his own benefit, but not those which he might have exercised solely for some other person,"[77] or that he gets a lien on the appointive assets under Section 70 (c) which gives the trustee a lien on all property, whether within the possession or control of the bankruptcy court, on which a creditor of the bankrupt could have obtained an equitable or legal lien on the date of the bankruptcy.[78] The arguments made in the preceding section indicate that there is serious doubt that this power would be treated as one which might be exercised for the donee's benefit. The arguments made in this section indicate the difficulties of finding that the creditors could obtain any lien on the property subject to the non-general power, even after the death of the donee, much less while he is still living. Therefore, the claims of the trustee in bankruptcy should be denied by the court.

IV

The two problems discussed above are closely connected with the taxability of the "non-general" power of appointment, since if the donee is permitted to exercise the power so as to confer an indirect benefit on himself or his creditors, or if the creditors of the donee are permitted to reach the appointive assets after any appointment, the tax authorities may well claim that the power should be treated as a "general power" under the present tax law.[79] The final problem, however, is not so intimately related to the tax law, but rather presents a situation where the attempt to avoid taxation may lead to some difficulty with purely property principles, *i.e.*, how the Rule against Perpetuities is to be applied to the "non-general" power. At the same time, there are some tax considerations involved in this question, for under the existing law if a power is exercised so as to create a second power which may under state law postpone the vesting of an estate, or suspend the absolute ownership or power of alienation, for a period "ascertainable without regard to the date of the creation of the first power," the first power is includable in the donee's estate[80] and the creation of the second power is treated as a transfer by the donee

77. 30 STAT. 565 (1898), as amended, 66 STAT. 429 (1952), 11 U.S.C.A. § 110(a) (3) (1953).
78. 36 STAT. 838 (1910), as amended, 66 STAT. 429 (1952), 11 U.S.C.A. § 110(c) (1953).
79. *But cf.* unpublished ruling of the Commissioner cited in note 53 *supra.*
80. INT. REV. CODE § 811 (f) (4).

under the gift tax.[81] At present, only the State of Delaware allows any power other than a general power exercisable by deed to be so exercised as to postpone the vesting of interests for a period measured without regard to the date of creation of the original power.[82] However, if the Rule against Perpetuities is so applied to the "non-general" power as to permit the creation of interests whose validity depends not on the date of creation but on the date of exercise, the property subject to the power may be taxable under these provisions of the Internal Revenue Code.

Actually the application of the Rule raises not one but two questions: (1) Does the "non-general" power itself violate the Rule? (2) Does the exercise of the power violate the Rule?

The common-law Rule against Perpetuities is:

> No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.[83]

This rule prevails in all jurisdictions of the United States except Arizona, Idaho, Louisiana, Minnesota, Mississippi, Montana, New York, North Dakota, Oklahoma, Pennsylvania, South Dakota and Wisconsin. In most of these states there is a statutory period of perpetuities.[84]

Louisiana, having the civil law rather than the common law of property, has no doctrine of perpetuities as such.[85] Pennsylvania, although adopting the common-law period of perpetuities, applies it to interests not on the basis of the possibilities of vesting existing at the date of creation but on the basis of actual vesting within the period.[86] The following discussion is primarily based on the common-law Rule, but may be equally applicable to the statutory versions since it turns not on the period of perpetuities but rather on the application of that period to particular interests.

In general, Gray asserts that any power which can be exercised at a time beyond the limits of the Rule is bad.[87] The reason back of this

81. INT. REV. CODE § 1000(c)(4).
82. Delaware provides by statute that the period of perpetuities shall be measured from the date of exercise of powers and that the powers are to be treated as if created when exercised. DEL. REV. CODE § 4414 (1935).
83. GRAY, *op. cit. supra* note 63, at 191.
84. These statutes may be characterized as follows: (1) those adopting a period of two lives in being, *e.g.*, N.Y. REAL PROP. LAW § 42; N.Y. PERS. PROP. LAW § 11; (2) those adopting a period of multiple lives in being, with an alternative of twenty-five years in gross, *e.g.*, IDAHO CODE ANN. § 55-111 (1948); (3) those adopting independent systems, MISS. CODE ANN. § 838 (1942) (an interest may be given to "a succession of donees then living" and on the death of the survivor "to any person or any heir"), WIS. STAT. §§ 230.14, 230.15, 230.23 (1951) (lives in being plus thirty years as to realty).
Three states have enacted by statute the common law period of perpetuities. CAL. CIV. CODE §§ 715.1, 715.2 (Supp. 1953); D.C. CODE ANN. §§ 45-102 to 45-104, 45-823 (1951); KY. REV. STAT. § 381.220 (1948).
85. Whiteside, *Statutory Rules: Perpetuities and Accumulations*, 6 AMERICAN LAW OF PROPERTY § 25.88 (Casner ed. 1952).
86. PA. STAT. ANN. tit. 20, § 301.4 (1950).
87. GRAY, *op. cit. supra* note 63, at 464.

doctrine is that any future interest which has the effect of preventing the absolute vesting of a fee simple absolute within the period is bad. Since a power of appointment can assure the final vesting of all fee simple interests no earlier than its exercise, or termination by death of the donee or release, if it may be exercised beyond the limits of the Rule, it will be bad.[88] In a few states there are statutory provisions making an interest following a power vest without regard to the existence of the power.[89] There is an exception to the general rule, however, if the power is a general power exercisable by deed, and if the power must vest in the donee within the period of perpetuities.[90] This follows from the basic idea that a presently exercisable general power is the equivalent of complete ownership of the appointive property. The moment such a power vests in the donee, he becomes, for the purposes of the Rule, the owner of the property in fee.

In the case of the "non-general" power stated above, since the donee is living at the time of the donor's death, or never, the Rule would not be violated. However, if a "non-general" power is created in a person not yet born at the date of creation, so that it may be exercised beyond the period of perpetuities, the Rule might be violated. As we have seen in the previous discussion, in spite of the great breadth of this power, which might argue for treatment as a general power, the limitations imposed on the donee are real limitations. Underlying the Rule against Perpetuities is a policy of not allowing the alienation of property to be restricted for too long a period. Slight though they may be, the restraints on the donee's power are sufficient to bring this policy into play, since there is no absolutely vested interest in the donee, or in the taker in default, except in states allowing the interest in default of appointment to vest in spite of the existence of the power.[91]

When we consider the application of the Rule to the exercise of the power, we find a similar divergence of result depending upon the nature of the power. All powers other than general powers presently exercisable place a restraint on alienation or vesting and therefore in measuring the period of perpetuities the beginning date is the time of creation rather than the date of exercise of the power.[92] On the

88. *E.g.*, Burlington County Trust Co. v. Di Castelcicala, 2 N.J. 214, 66 A.2d 164 (1949); see Leach and Tudor, *The Common Law Rule Against Perpetuities*, 6 AMERICAN LAW OF PROPERTY 93 (Casner ed. 1952); GRAY, *op. cit. supra* note 63, at 464-65.

89. The following states provide that general or special powers shall not affect the vesting of the remainders following them. CAL. CIV. CODE § 781 (1949); IDAHO CODE ANN. § 55-207 (1948); MONT. REV. CODES ANN. § 67-522 (1947); N.D. REV. CODE § 47.0423 (1943); OKLA. STAT. tit. 60, § 43 (1951); S.D. CODE § 51.0422 (1939).

90. *E.g.*, Camden Safe Deposit & Trust Co. v. Scott, 121 N.J. Eq. 366, 189 Atl. 653 (1937); *see* Appeal of Appleton, 136 Pa. 354, 364, 20 Atl. 521, 522 (1890); see 6 AMERICAN LAW OF PROPERTY 63 (Casner ed. 1952); GRAY, *op. cit. supra* note 63, at 471.

91. See note 89 *supra*.

92. *E.g.*, Heald v. Briggs, 83 Conn. 5, 74 Atl. 1123 (1910) (special power); Albert v. Albert, 68 Md. 352 (1888) (special power); St. Louis Union Trust

other hand, if the power is general and exercisable by deed there is no restraint on alienation and therefore the period for determining the validity of interest created by the exercise is measured from the date of exercise.[93] Of course, the validity of interests created by special or testamentary powers is determined with regard to the facts as they appear at the date of exercise, *e.g.*, the fact that all the children of the donee were in being at the date of creation, so that any interest given to the grandchildren of the donee when they reach twenty-one will be valid.[94]

Since the "non-general" power does have the effect of placing a restraint on alienation and preventing the vesting of fee simple absolutes from the date of creation, the period of perpetuities must be measured from the date of creation rather than from the date of exercise. It would be unlikely, therefore, that the application of the Rule

Co. v. Basset, 337 Mo. 604, 85 S.W.2d 569, 101 A.L.R. 1266 (1935) (general testamentary power); American Trust Co. v. Williamson, 228 N.C. 458, 46 S.E.2d 104 (1948) (general testamentary power); see 6 AMERICAN LAW OF PROPERTY, 98-99 (Casner ed. 1952); GRAY, *op. cit. supra* note 63, at 498-99. The late Professor Albert M. Kales disagreed with Professor Gray's statement that the period of perpetuities as applied to general testamentary powers should be measured from the date of creation. Kales argued that the donee of such a power was at the time of his death in complete control of the property and therefore the purpose behind the Rule was not violated by treating interests created by testamentary exercise as valid if they vested in interest within lives in being at the date of the exercise plus twenty-one years. Kales, *General Powers and the Rule against Perpetuities*, 26 HARV. L. REV. 64 (1912). This position has never received wide acceptance, only one state having followed it clearly. Miller v. Douglass, 192 Wis. 486, 213 N.W. 320 (1927). The majority of American jurisdictions follow Gray's statement of the Rule. *E.g.*, Minot v. Paine, 230 Mass. 514, 120 N.E. 167 (1918).

Delaware measures all periods of perpetuities from the date of the exercise of the powers creating interests. See note 82 *supra*.

Several states have adopted a New York statutory rule that in determining the validity of interests created by the exercise of a power, the period of perpetuities is measured from the date of the creation of the power rather than from the date of exercise. MICH. COMP. LAWS § 556.55 (1948); N.Y. REAL PROP. LAW § 178; MINN. STAT. ANN. § 502.73 (West 1947); N.D. REV. CODE § 59.0536 (1943); OKLA. STAT. tit. 60, § 237 (1951); S.D. CODE § 59.0434 (1939); WIS. STAT. § 232.52 (1951).

93. Appeal of Mifflin, 121 Pa. 205, 15 Atl. 525 (1888); see 6 AMERICAN LAW OF PROPERTY 97 (Casner ed. 1952); GRAY, *op. cit. supra* note 63, at 509-10.

There is some question as to whether the New York statute, cited note 92 *supra*, applies to general powers presently exercisable, which may be treated as absolute powers of alienation under other provisions of the New York statute. See note 52 *supra*. The *Restatement* says that in the case of a presently exercisable general power, the period of perpetuities should be measured from the date of exercise even in New York. RESTATEMENT, PROPERTY, APPENDIX ¶ 36 (1944). There is also persuasive dictum in Farmers Loan & Trust Co. v. Kip, 192 N.Y. 266, 276-77, 85 N.E. 59, 62 (1908). The Minnesota statute specifically excepts from its provisions a general power presently exercisable. MINN. STAT. ANN. § 502.73 (West 1947). See also Delaware rule, note 82 *supra*.

94. Legg's Estate v. Commissioner, 114 F.2d 760 (4th Cir. 1940); Minot v. Paine, 230 Mass. 514, 120 N.E. 167 (1918). Pennsylvania provides by statute that the validity of future interests under the Rule shall be determined by whether they in fact do vest within lives in being at creation plus twenty-one years, rather than by the possibility of non-vesting occurring as of the date of creation. PA. STAT. ANN. tit. 20, § 301.4 (1950).

would ever have the effect of making the "non-general" power taxable under the provisions of the Internal Revenue Code.[95]

V

In considering the proper characterization of the hypothetical power at the beginning of this article, the conclusion was reached that while it was not within the classical or the tax definitions of a "general" power, it was still too broad to be brought within the term "special" power, and that it might better be characterized as "non-general" and the rule to be applied in any specific situation determined independent of the over-all classification.[96] In each of the three problem situations, the conclusion was reached that in that specific situation the "non-general" power should not be treated as general powers would be. Under such a power the donee should be precluded from conferring either direct or indirect benefits on the excluded persons.[97] The donee's creditors should be denied any equitable claim to the appointive assets if an exercise is made.[98] The power should be considered as suspending the absolute vesting of interests from the date of creation rather than from the date of exercise in applying the Rule against Perpetuities,[99] with the exception of certain cases covered by specific statutory language.[100] And now we come back to the original question of whether the power should be employed at all.

This is, of course, a question which should be answered by the client after the probable results of the use of the "non-general" power have been presented by the estate planner. In addition to the factors already considered, the estate planner should also add the following points.

First, as was pointed out by Professor Leach in 1939, the donor rarely is interested in having the donee appoint outside the family of either of them.[101] Likewise it is rare that the donee is interested in making an appointment outside the family circle, except for possible charitable gifts. Therefore, in most situations a more limited power of appointment, designating the possible appointees as a discernible class may be sufficient.[102] If there is some question as to whether the donee will

95. INT. REV. CODE §§ 811(f)(4), 1000(c)(4).
96. See *supra* p. 59.
97. See *supra* p. 60.
98. See *supra* pp. 66-67.
99. See *supra* pp. 67-71.
100. See note 89 *supra*.
101. See Leach, *Powers of Appointment and the Federal Estate Tax — A Dissent*, 52 HARV. L. REV. 961, 964, 966 (1939).
102. Such a power might be drafted as follows: "I give the rest and residue of my estate to the X Trust Co., to hold in trust and to pay the income to my son, Doe, for life, and on Doe's death to pay over the principal to such of my issue (including adopted children and illegitimate children), or their spouses (including widows or widowers of deceased issue) not including Doe's estate or his creditors, or to such charities as Doe may appoint by will or by

want to make gifts outside the family, or if the donor wishes the donee to be able to receive some benefit from the appointive property other than income, the estate planner may use one of the powers specifically excluded from "general powers" under the Revenue Code; *i.e.*, a power to consume or invade principal for the benefit of the donee limited by an ascertainable standard relating to the health, education, support or maintenance of the donee,[103] or a power to appoint to the donee held in conjunction with either the donor or a person having a substantial adverse interest in the exercise of the power.[104]

Second, the estate planner may point out that although the conclusions reached above as to the proper treatment of the "non-general" power seem correct, the courts may not accept the arguments which have been put forward in favor of these conclusions, and may treat the power as a general power subject to spendthrift trusts. Also there is a possibility that if the "non-general" power became widely used the tax law would be amended to make it taxable. These possibilities indicate that there is some danger that the purpose of the donor, to have a power which would not be subject to creditors' claims or taxation, may not be accomplished.

Finally, the very possibility of arguments in favor of treating the power as general, whether or not ultimately successful, should prove a deterrent to the use of the "non-general" power. The estate planner should not attempt a "high wire" act with his client's property, but should attempt to satisfy the desires of the client in the clearest possible language and with the least possibility of contest and to indicate to the client where his desires may lead to later difficulties. Let him who would play the legal acrobat take warning from the renowned case of *Jarndyce v. Jarndyce* and its disastrous results.[105] While the delays

written instrument attested by two witnesses during his lifetime, and in default of such appointment to the issue of Doe who survive him, per stirpes, and in default of issue surviving Doe to Vanderbilt University." For a fuller discussion of some of the problems of drafting powers under the 1951 Act, and some examples, see Johnson, *Powers of Appointment*, 29 TAXES 965 (1951); Lauritzen, *Drafting Powers of Appointment under the 1951 Act*, 47 N.W.L. REV. 314 (1952).

103. INT. REV. CODE § 811(f)(3)(A). Such a power might be drafted as follows: "The trustee shall pay over to Doe out of the principal such sums as are necessary for his support and maintenance or for medical expenses, as he may direct from time to time in writing." See articles cited note 102 *supra*.

104. INT. REV. CODE § 811(f)(3)(C). Such a power might be drafted as follows: "I give the rest and residue of my estate to the X Trust Co., to hold in trust and to pay the income thereof to my son, Doe, for life, and to pay over the principal on Doe's death to such of my issue (including adopted and illegitimate children) or their spouses (including widows or widowers of deceased issue), not including Doe's estate or creditors, or such charities as Doe may appoint by will, and in default of appointment to the issue of Doe (including adopted or illegitimate children) who survive him, per stirpes. I further direct that the trustee shall pay to Doe out of principal during his lifetime such sums as shall be directed in writing jointly by Doe and his eldest issue then living." See articles cited note 102 *supra*.

105. See DICKENS, BLEAK HOUSE (1853) *passim*.

of equity may be less today than in Dickens' time, the costs of litigation are hardly negligible, even for the successful suitor.

If the client still is desirous of having the broadest of powers possible, and does not want to use either of the excepted powers stated above, it may be the wisest plan to tell him that he should use a general power and make some provision for the payment of taxes which will follow the use of such power. The use of the "non-general" power seems to raise too many difficulties to justify its use as a tax avoidance device. The "non-general" power of appointment should remain what it apparently is today, an interesting hypothetical for the classroom and the legal periodical.