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I. INTRODUCTION

The commentators in the field of future interests have, for the most part, agreed there is a trend in the law toward piercing the fictional veil that a general power is a mere mandate or authority to dispose of property.[1] They see the current of judicial opinion and statutory enactment as flowing toward a recognition that the general power, involving as it does the right to appoint to oneself or

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[1] "What one sees in the cases . . . is the conflict between the agency approach justified by the historical origin of powers of appointment and the demand of modern reality that the law recognize the donee of a power as having a property interest in the appointive assets, whenever the finding of such an interest leads to the presently desirable result. This conflict marks an important potential growing point in the law." 3 POWELL, REAL PROPERTY § 387 (1952) [hereinafter cited as POWELL].

"No branch of the law of property has been more adaptable to the uses of legal legerdemain than the law of powers. By logical deductions from patent fictions it has been possible to produce results somewhat resembling those claimed for black magic. To the uninitiated it would appear that a general power of appointment is substantially the equivalent of ownership, and that to exercise a power is in effect to make a conveyance. But the theory of the common law was that the only act of transfer is that of the donor, and that the donee, when he exercises the power, merely causes an event to occur on which ownership shifts from one person to another just as it shifts by the operation of the shifting use. Looked at broadly, it would seem that the major trend in the law of powers is one toward a recognition of the power as ownership rather than as a mere mandate. By that statement, it must not be inferred that a power is ownership; but only that the tendency is to treat the donee as if he were owner in a larger number of situations than fifty years ago." Simes, *Fifty Years of Future Interests*, 50 HARV. L. REV. 749, 772 (1937). See also 7 HOLDSWORTH, HISTORY OF ENGLISH LAW 150 (1926) and SUGDEN, POWERS 396 (8th ed. 1861).

Indeed, Dean Griswold has suggested that even the special power be treated as property for estate tax purposes. Griswold, *Powers of Appointment and the Federal Estate Tax*, 52 HARV. L. REV. 929, 955-60 (1939). But Professor Leach took sharp exception to this thesis. Leach,

one's estate,[2] is for many purposes an interest in property. They add that the law must recognize this in dealing with the manifold problems of substantive law as they relate to the interest of the donee of the power.

Since the donee of a general power can appoint to himself, if the power is presently exercisable, or at least to his estate, if the power is testamentary only, it may indeed be questioned whether for all purposes the general power should not be treated as an interest in property. If the general power is but an historical relic which has outlived its usefulness except to evade rules of law relating to the liabilities and duties of ownership,[3] and if the legitimate objects of the donor of a power can be accomplished by other means without the accompanying evasion of these liabilities and duties, perhaps there is no need at all for the general power.[4] On the other hand, if these legitimate objects cannot be effectuated by any other device, perhaps the approach should be to retain the general power but to change some of the legal effects of its creation.[5]

Powers of Appointment and the Federal Estate Tax—A Dissent, 52 HARV. L. REV. 961, 964 *et seq.* (1939).

[2] "A power is general . . ., if (a) being exercisable before the death of the donee, it can be exercised wholly in favor of the donee, or, (b) being testamentary, it can be exercised wholly in favor of the estate of the donee." RESTATEMENT, *Property* § 320 (1) (1940).

For a detailed discussion of the distinctions between general and special powers and the no-man's land in between see Gold, *The Classification of Some Powers of Appointment,* 40 MICH. L. REV. 337 (1942) and SIMES & SMITH, FUTURE INTERESTS § 875 (2d ed. 1956) [hereinafter cited as SIMES & SMITH].

[3] This criticism was probably first leveled by the Revisers of the New York Statutes of 1828. "The law of powers . . . is probably the most intricate labyrinth in all our jurisprudence. . . . In plain language, it abounds pre-eminently in useless distinctions difficult to be understood and difficult to be applied. . . . It is liable to still more serious objections, since as will appear in the course of our remarks, it affords the ready means of evading the most salutary provisions of our statutes." 3 N.Y. REV. STAT., Revisers' Notes, 588 (2d ed. 1836).

[4] This is also suggested by the Revisers of the New York Statutes of 1828. In speaking of the general and beneficial power they said: "It appears to us, that in this country, it can hardly happen that such a power of disposition will be separated from the legal estate for any purpose the law ought to favor." 3 N.Y. REV. STAT. Revisers' Notes 589-90 (2d ed. 1836).

[5] This view is suggested by Professor McDougal. "Could not the dogma [that a power is not property] and its nonpreferred consequences be banished but the 'device' [of the power of appointment] preserved for the sake of 'flexibility' only?" McDougal, *Future Interests Restated,* 55 HARV. L. REV. 1077, 1114 (1942).

The purpose of this article is to explore, in summary, the historical basis for the general power and the reasons for the current prevalence of its use. The question of whether the general power does have peculiar characteristics and advantages in intent effectuation will be evaluated in more detail. In addition, the law as it relates to the rights of third parties claiming through or against the donee of the power (creditors, spouse, and heirs) will be critically examined with a view to determining to what extent the donee's power is and should be treated as a property interest.[6] Suggestions as to recommended changes in the law will be advanced. Such changes of necessity would have to be by statute because of the properly strong judicial predisposition toward the doctrine of *stare decisis* in the property area. In traversing all these problems, the distinctions between a testamentary power and a power presently exercisable[7] as well as between powers simply collateral, in gross, and appendant[8] are of some convenience and should be kept in mind.

[6] Decisions in other areas of the law of powers also depend upon whether the courts view the power as a mandate or as property. These would include, *inter alia*, estate and gift taxation of the donee's interest, delegation of powers, the rule against perpetuities, the capacity of the donee, allocation or marshalling problems, the effect of an ineffectual attempt to exercise the general power, and release of powers. The rights of third parties are analyzed in detail because these rights are perhaps the most directly dependent upon the resolution of the nature of the power.

[7] "(1) A testamentary power, . . . is a power exercisable only by will.
"(2) A power presently exercisable, . . . is a power as to which the donor has not manifested an intent that its exercise shall be postponed." RESTATEMENT, *Property* § 321 (1940). The essence of the power presently exercisable is, of course, that the donee may exercise the power inter vivos. See SIMES & SMITH § 874.

[8] "Where the donee of a power of appointment has no other interest in the thing with respect to which the power exists the power is said to be collateral. . . . Thus if A conveys Blackacre to B for life remainder to such persons as C shall appoint, C, having no interest in Blackacre, other than the power is said to have a collateral power. On the other hand, if the donee has an interest in addition to the power, which interest will not be affected by an exercise of the power, the power is said to be 'in gross'. If A conveys to B for life remainder to such persons as B shall appoint, B's power, by reason of his life estate, is a power in gross. . . . A power was said to be 'appendant' or 'appurtenant' when an exercise of it divested an interest owned by the donee of the power. Thus, if A should transfer Blackacre to such persons as B shall appoint and until and in default of appointment to B and his heirs, B, if the classification is accepted, has a power appendant." 5 AMERICAN LAW OF PROPERTY § 23.12 (Casner ed. 1952) [hereinafter cited as AMERICAN LAW OF PROPERTY].

II. EARLY HISTORY[9]

It will be recalled that before the Statutes of Uses and Wills there were a few places in England where land was devisable at the common law according to local custom.[10] In those cases the law allowed the devisor to give his executor a power to *sell* the lands though the executor had no interest in the land at all.[11] This was apparently the beginning of the concept in the law that a person who had no property interest in land could cause the estate to move from one person to another.

The power of *appointment* itself was developed in Chancery through the vehicle of the use.[12] It was utilized chiefly in those places where land was not devisable to make it in effect devisable. In such case, the owner in fee would convey to a feoffee to the use of such persons as the feoffor should appoint by will, and in default of and until the appointment to the use of the feoffor. If the feoffor died testate, equity compelled the feoffee to convey to the devisee.[13] Even after the Statute of Wills in 1540, powers of appointment were used for a similar purpose, for under that statute only two-thirds of the land held in knight service could be devised.[14] It was decided in *Clere's* case[15] that this inhibition of the statute[16] could also be evaded by use of the power. Thus, the first type of power recognized by the law, was a general power, a device developed chiefly to evade rules of law which have been off the books for literally hundreds of years.[17]

[9] For a more detailed treatment see SIMES & SMITH § 872 and 5 AMERICAN LAW OF PROPERTY § 23.2.

[10] 3 HOLDSWORTH, HISTORY OF ENGLISH LAW 136, 137 (1926).

[11] Anonymous Y.B., 9 Hy. VI, Trin. pl. 19 (1430); 7 HOLDSWORTH, *op. cit. supra* note 10 at 153; LITTLETON, TENURES § 169.

[12] Basset's Case, 2 Dyer 136a, 73 Eng. Rep. 297 (1557); 4 HOLDSWORTH, HISTORY OF ENGLISH LAW 474 (1926).

[13] SIMES & SMITH § 872.

[14] 32 Henry VIII, c. 1 (1540).

[15] 6 Co. Rep. 17b, 77 Eng. Rep. 279 (1599).

[16] This inhibition continued until 1660 when knight tenure was changed to socage tenure, 12 Car. II c. 24. Land held in socage tenure was fully devisable under the Statute of Wills.

[17] The special power developed somewhat later. The first case on the subject was decided in 1625. Daniel v. Ubley, W. Jones 137, 82 Eng. Rep. 73. Cases in the latter part of the seventeenth and eighteenth centuries finally established the special power as a separate concept. Liefe v. Saltingstone, 1 Mod. 189, 86 Eng. Rep. 819 (1674); Thomlinson v. Dighton, 1 Salk. 239, 91 Eng. Rep. 212 (1795); 7 HOLDSWORTH, HISTORY OF ENGLISH LAW 168-71 (1926).

Later, in the eighteenth and nineteenth centuries in England, the general power was used by conveyancers to give flexibility to the land law system and also to skirt other inconvenient rules of law, particularly those involving dower and curtesy,[18] and the incapacity of married women to convey.[19]

These evasions were made possible by the development of the doctrine of "relation back," the main strut in the ancient superstructure of powers. This doctrine was expressed in two forms: (1) that the appointee of the property takes directly from the donor of the power; or (2) that the instrument exercising the power is to be read as part of the instrument creating the power.[20] The exercise of the power of appointment was viewed as a shifting event much as any other shifting executory interest was viewed. The taker in default was said to have a vested remainder subject to complete defeasance.[21] The appointee would take by way of shifting use, although he would not have an executory interest before the appointment was made.[22] Thus, according to classical theory, if A left Blackacre to B for life, remainder as B appoints by will and in default of appointment to C and his heirs, C would have a vested remainder subject to complete defeasance, though the likelihood is that C will never have enjoyment of Blackacre.

The doctrine of relation back, minimizing as it does the importance of the donee of the power, is the hoary theoretical mainstay for those rules of law which treat the donee as a mere agent with no property interest.[23] Indeed, it is still a much pro-

[18] It was held that where a man had a fee simple with an appendant power of appointment, the exercise of the power defeated the wife's claim of dower in the fee. Ray v. Pung, 5 Madd. 310, 56 Eng. Rep. 914 (1821) and 5 B. & Ald. 561, 106 Eng. Rep. 1296 (1822).

[19] It was early held that a married woman could exercise a power of appointment though she could not convey property not subject to a power without her husband's joining. See 7 HOLDSWORTH, HISTORY OF ENGLISH LAW 181 (1926).

[20] SIMES & SMITH § 911. For an excellent general discussion of the entire problem of relation back, see SIMES & SMITH §§ 911-20.

[21] RESTATEMENT, *Property* § 157 c, illustration 3 (1936).

[22] RESTATEMENT, *Property* § 25, comment d (1936).

[23] The RESTATEMENT discusses this in the following paragraph:

"Many of the characteristic rules of the law of powers are accounted for by the conception of a power as a mere authority and its doctrinal corollary of 'relation back'—for example, the rule that married women can exercise a power over types of property which they have no capacity to convey . . ., the rule that the period of perpetuities is computed from the creation of the power with reference to appointments under special powers and general testamentary powers . . ., the rule that the spouse

claimed principle in handling problems of powers,[24] although it has been widely attacked as of little value in solving specific problems.[25]

III. LATER HISTORY

The frequency of the use of powers has ebbed and flowed in English history.[26] In the United States there was very little use of the power of appointment, general or special, before 1900.[27] The increase in its utilization since that time is accounted for by the recognition of these advantages:[28] (1) it enables the decision as to who shall be the final taker of property to be postponed, thus giving additional flexibility to property settlements in meeting later changed conditions; (2) it (more especially the special power) provides a convenient vehicle for tax avoidance;[29] (3) it serves as a means to block the operation of those rules of law which impose burdens upon the owner of property, especially in relation to the creditor's and spouse's rights.[30]

Today, the power of appointment is a widely used device in the estate planner's portfolio. It should be noted, however, that it is judicious use of the special power which best effectuates the ob-

of the donee has no dower in the property. . . ." RESTATEMENT, *Property* c. 25, introductory note (1940).

[24] For the latest case to use the language of relation back see *In re* Von Der Hallen's Trust, 169 N.Y.S.2d 698, 701 (Sup. Ct. 1957).

[25] "[T]he tendency to apply the 'relation back' doctrine woodenly to all situations frequently has led the law to disregard the essential nature of a general power." 5 AMERICAN LAW OF PROPERTY § 23.3. See also SIMES & SMITH § 920.

[26] "Periods of large importance and of comparative disuse have followed one another. They began in a blaze of importance in the latter half of the fifteenth and the first half of the sixteenth centuries; they slumped into comparative desuetude during the seventeenth century; they revived as major stars in the legal firmament while family settlements in England were being evolved, particularly in the eighteenth century; they were of negligible importance in the United States down to 1900 and now they are again on the upswing into a role which is likely to be of great importance." Powell, *Powers of Appointment,* 10 BROOKLYN L. REV. 233 (1941).

[27] *Ibid.*

[28] See Leach, *Powers of Appointment,* 24 A.B.A.J. 807, 808 (1938), and 7 HOLDSWORTH, HISTORY OF ENGLISH LAW 192 (1926) for a discussion of the uses of powers.

[29] INT. REV. CODE OF 1954 § 2041. See Craven, *Powers of Appointment Act of 1951,* 65 HARV. L. REV. 55 (1951).

[30] See text accompanying notes 35 *et seq.* and 42 *et seq.*

jects of the intelligent estate planner because of the aforementioned tendency of the law to identify the general power with property interests.[31]

IV. RIGHTS OF CREDITORS, SPOUSE AND HEIRS OF DONEE

As was noted above,[32] depending upon for what purposes they are evaluating the interest, the courts and legislatures have emphasized either the agency aspect or the diametrically opposed proprietary aspect of the general power. In studying the rights of third parties claiming against or through the donee of the power, the interplay between these two concepts is very evident.

Two main lines of authority concerning third party rights have formed. The common law system evolved first. In protest of and in conflict with many of the common law rules, the New York statutory system of powers was enacted in 1830.[33] Many states have copied New York's system.[34] As a background for our discussion, a short summary of the common law and New York rules is set out for the reader's convenience.

A. Common Law System—Creditors' Rights

Where the general power is unexercised, the creditors of the donee generally may not reach the appointive property.[35] This rule has two exceptions. If the donee of the power is also the donor and the original conveyance is fraudulent as to creditors at the time it was made, creditors may come in.[36] Also, if the settlor of

[31] Of course the most compelling reason for the draftsman to use the special power is that the Federal Estate Tax, INT. REV. CODE OF 1954, § 2041, in effect, treats the donee of a general power as owner for tax purposes. Thus, the tax is imposed on the estate of the donor when the power is created by will, and on the estate of the donee when the power is exercised by will. In the case of the special testamentary power, the exercise of the power is not taxed. See Craven, *Powers of Appointment Act of 1951,* 65 HARV. L. REV. 55 (1951).

[32] See note 1 *supra.*

[33] N.Y. REAL PROPERTY LAW §§ 130 to 183.

[34] MICH. STAT. ANN. (1959) §§ 26.91-.152; N.D. REV. CODE (1943) §§ 59-0501-59; 60 OKLA. S.A. (1941) §§ 181-299; S.D. CODE (1939) §§ 59.0401-61; WIS. STAT. ANN. (1957) §§ 232.01-.58; D.C. CODE (1951) §§ 45-1001-19.

[35] Gilman v. Bell, 99 Ill. 144 (1881); Bentham v. Smith, 15 S.C. Eq. 33, 34 Am. Dec. 599 (1840); Arnold v. Southern Pine Lumber Co., 58 Tex. Civ. App. 186, 123 S.W. 1162 (1909); RESTATEMENT, *Property* § 327 (1940).

[36] UNIFORM FRAUDULENT CONVEYANCES ACT §§ 4 and 7. See SIMES & SMITH § 944 n. 22 and cases therein cited.

a trust reserves a life estate and a general testamentary power over the corpus, the courts allow the creditors of the settlor-donee to obtain satisfaction out of the property, whether the power is exercised or not, on the ground that he retained substantial ownership of the property.[37]

Where the power is exercised by will, the courts have generally allowed the creditors of the donee to levy upon the property if his personal estate is not sufficient to pay the debts.[38] In the case of the inter vivos exercise of a power presently exercisable, authority is sparse, but the little there is asserts that the creditors of the donee may reach the property to the extent that they could set a conveyance aside under the rules relating to fraudulent conveyances had the property been owned by the donee at the time of the conveyance.[39] In general, then, the common law holds that exercised general powers are subject to the rights of the donee's creditors but unexercised powers are not. A really satisfactory explanation for the rationale of the distinction has yet to be given.[40] The Federal Bankruptcy Act completely ignores such distinctions with respect to the general power presently exercisable. Such powers, whether exercised or not, pass to the trustee in bankruptcy for distribution to the donee's creditors.[41]

B. Common Law System—Spouse's and Heirs' Rights

It is universally accepted that the rights of dower and curtesy do not attach to the interest of the donee of a general power

[37] Nolan v. Nolan, 218 Pa. 135, 67 Atl. 52, 12 L.R.A. (N.S.) 369 (1907); see 3 POWELL § 389 n. 91 and cases therein cited; RESTATEMENT, *Property* § 328 (1948 Supp.).

[38] Clapp v. Ingraham, 126 Mass. 200 (1879); Seward v. Kaufman, 119 N.J. Eq. 44, 180 Atl. 857 (Ch. 1935). See also SIMES & SMITH § 945 n. 30 and cases therein cited.

[39] Townshend v. Windham, 2 Ves. Sr. 1, 28 Eng. Rep. 1 (Ch. 1750); RESTATEMENT, *Property* § 330 (1940). See also 5 AMERICAN LAW OF PROPERTY § 23.16 and SIMES & SMITH § 945.

[40] Professor Simes says this is a unique remedy for a unique situation. SIMES & SMITH § 945. This is true, but is this a really satisfactory explanation of the holding? See also 3 POWELL § 389 nn. 96-99.

[41] "The trustee of the estate of a bankrupt . . . shall . . . be vested by operation of law with the title of the bankrupt . . . to all of the following kinds of property . . . (3) powers which he might have exercised for his own benefit, but not those which he might have exercised solely for some other person, . . ." 11 U.S.C. § 110 (1958). The courts have held that a testamentary power does not pass under this provision. Forbes v. Snow, 245 Mass. 85, 140 N.E. 418 (1923).

whether the power is exercised or not.[42] This rule follows, of course, from the common law requirement that the spouse to whose property these rights attach, must have seisin of an estate of inheritance during coverture.[43]

In those states which have statutorily replaced dower and curtesy with a right in the spouse to renounce the will and take a specified share of the estate, the courts have reached the same result.[44] In such case, the problem obviously is one of the statutory interpretation, the statutes generally providing for a share out of the "property" or "estate" of the deceased at his death.[45]

The heirs of the donee of an unexercised general power have no rights in the appointive property. The property reverts to the donor or his estate unless there is an express provision in default of appointment in the original gift.[46] The power itself is personal and does not pass to the heirs.[47]

C. New York System—Creditors' Rights

The New York statutory system enacted in 1830[48] is the result of the Revisers' strong opposition to the "intricate labyrinth" of the common law system of powers.[49] The Revisers recommended a statute which in almost all respects is still the law today. The statute included within its ambit powers of sale as well as powers of appointment.[50] It contains many important departures in defini-

[42] RESTATEMENT, *Property* § 332; SIMES & SMITH § 947; 3 POWELL § 391; 5 AMERICAN LAW OF PROPERTY § 23.21.

[43] CO. LITT. 29a.; 1 AMERICAN LAW OF PROPERTY §§ 5.6, 5.10.

[44] Fiske v. Fiske, 173 Mass. 413, 53 N.E. 916 (1899); *In re* Kates Estate, 282 Pa. 417, 128 Atl. 97 (1925), and see 5 AMERICAN LAW OF PROPERTY § 23.22.

[45] For collection, see 3 VERNIER, AMERICAN FAMILY LAWS 351 *et seq.* (1935).

[46] Wintuska v. Peart, 237 Ky. 666, 36 S.W.2d 50 (1931); Brown v. Fidelity Union Trust Co., 126 N.J. Eq. 406, 9 A.2d 311 (Ch. 1939); Cook v. City Bank Farmers Trust Co., 3 App. Div. 2d 634, 158 N.Y.S.2d 315 (1956); RESTATEMENT, *Property* § 367 (1940).

[47] SIMES & SMITH § 943 and cases therein cited.

[48] N.Y. REAL PROPERTY LAW §§ 130 to 183.

[49] See note 3 *supra.*

[50] "Powers, as they existed by law on the thirty-first day of December, eighteen hundred and twenty-nine are abolished. Hereafter the creation, construction and execution of powers, affecting real property, shall be subject to the provisions of this article; but this article does not extend to a simple power of attorney to convey real property in the name and for the benefit of the owner." N.Y. REAL PROPERTY LAW § 130.

tion and in substantive result in the field of powers of appointment. In the first place, the classification of powers as collateral, in gross or appendant, is abandoned as meaningless.[51] The general power is redefined as one in which a fee simple may be appointed to any taker.[52] A power is defined as special where there is a designation of the person or class of persons to whom the property may be appointed or where the interest to be appointed is less than a fee.[53]

The statute then creates a new classification of powers based upon the determination of whether any person other than the grantee (donee) has an interest in its execution. If no person does, then the power is "beneficial".[54] If, however, the object of the power is a person or class of persons other than the donee, or such person or class is entitled to the proceeds of the exercise of the power, the power is said to be "in trust".[55]

[51] The Revisers were quite vehement in their opposition to the terminology as can be gathered from the following quotation:

"These cabalistic terms, we are aware, must sound like an unknown tongue to unpracticed ears; but our objection is not to the strange phraseology in which this division is expressed but to the principle on which it is founded. . . .

"It is a striking error in this classification, that it overlooks entirely the nature and objects of the power itself, and regards solely the connexion between the party exercising the power, and the lands which it embraces." 3 N.Y. REV. STAT., Revisor's Notes 588 (2d ed. 1836).

[52] "A power is general, where it authorizes the transfer or incumbrance of a fee, by either a conveyance or a will of, or a charge on, the property embraced in the power, to any grantee whatever." N.Y. REAL PROPERTY LAW § 134.

[53] "A power is special where either:

"1. The persons or class of persons to whom the disposition of the property under the power is to be made are designated; or

"2. The power authorizes the transfer or incumbrance, by a conveyance, will or charge, of any estate less than a fee." N.Y. REAL PROPERTY LAW § 135.

[54] "A general or special power is beneficial, where no person, other than the grantee has, by the term of its creation, any interest in its execution. A beneficial power, general or special, other than one of those specified and defined in this article, is void." N.Y. REAL PROPERTY LAW § 136.

[55] "A general power is in trust, where any person or class of persons, other than the grantee of the power, is designated as entitled to the proceeds, or any portion of the proceeds, or other benefits to result from its execution." N.Y. REAL PROPERTY LAW § 137.

"A special power is in trust where either,

"1. The disposition or charge which it authorizes is limited to be made to a person or class of persons, other than the grantee of the power; or

"2. A person or class of persons, other than the grantee, is designated

The most important change wrought by the statutory system concerns those instances where the donee of a power is deemed to have a fee.[56] The net effect of the statute is that creditors of the donee can reach the appointive property whether the power is exercised or not if the donee can in *his own lifetime* dispose of the fee for his own benefit.[57] If the donee is also a life tenant, then the creditors can attach the fee even if the power is testamentary only, as long as it is general and beneficial.[58] Under these rules the creditors, purchasers or incumbrancers can come in and cut off the rights of the takers in default of appointment.[59] The statutory system was almost completely emasculated in the case of *Cutting v. Cutting*[60] which held that creditors cannot come in if the donee has

as entitled to any benefit, from the disposition or charge authorized by the power." N.Y. REAL PROPERTY LAW § 138.

[56] The text of the relevant sections of the N.Y. REAL PROPERTY LAW is as follows:

"§ 149. When estate for life or years is changed into a fee.

"Where an absolute power of disposition, not accompanied by a trust, is given to the owner of a particular estate for life or for years, such estate is changed into a fee absolute in respect to the rights of creditors, purchasers and incumbrancers, but subject to any future estates limited thereon, in case the power of absolute disposition is not executed, and the property is not sold for the satisfaction of debts.

"§ 150. Certain powers create a fee.

"Where a like power of disposition is given to a person to whom no particular estate is limited, such person also takes a fee, subject to any future estates that may be limited thereon, but absolute in respect to creditors, purchasers and incumbrancers.

"§ 151. When grantee of power has absolute fee.

"Where such a power of disposition is given, and no remainder is limited on the estate of the grantee of the power, such grantee is entitled to an absolute fee.

"§ 152. Effect of power to devise in certain cases.

"Where a general and beneficial power to devise the inheritance is given to a tenant for life, or for years, such tenant is deemed to possess an absolute power of disposition within the meaning of and subject to the provisions of the last three sections.

"§ 153. When power of disposition is absolute.

"Every power of disposition by means of which the grantee is enabled, in his lifetime, to dispose of the entire fee for his own benefit, is deemed absolute."

[57] N.Y. REAL PROPERTY LAW §§ 149, 150, 153. See Whiteside & Edelstein, *Life Estate with Power to Consume,* 16 CORNELL L.Q. 447, 462 and cases therein cited.

[58] N.Y. REAL PROPERTY LAW §§ 149, 152; *In re* Davies' Estate, 242 N.Y. 196, 151 N.E. 205 (1926).

[59] N.Y. REAL PROPERTY LAW § 150.

[60] 86 N.Y. 522 (1881). The court said that the donee does not have an absolute power of disposition because of the outstanding legal interest of the

merely an equitable estate. In such case, the creditors are in a worse position than at common law, because the court held they cannot reach the property even if the power is exercised. The reason given is that the statutory system supersedes the common law rights of creditors. Of course, where the power of appointment device is used, the trust situation is by far the most common and this holding thus defeats the rights of creditors in New York in the great majority of cases.

D. New York System—Spouse's and Heirs' Rights

The statute explicitly states that where a donee has an absolute power of disposition and there is no gift in default of appointment, he shall have an absolute fee.[61] This is in contrast to the situation where there is a gift in default, in which case the donee is deemed to have a fee with respect to creditors, purchasers, and incumbrancers only.[62] It would seem therefore that under the New York statute where there is no gift in default and the donee can dispose of the entire fee in his own lifetime for his own benefit, dower or its statutory substitute should be allowed in the property as in any other fee simple. This should also be true under the statute when the donee has a life estate with a general, beneficial, testamentary power, as long as there is no gift in default.

There are apparently only two cases in New York on the question of the wife's right to dower in these instances.[63] In the first, the husband had been left a life estate in realty "with the right and power to dispose of the property by will." A codicil left the property to the husband's heirs-at-law, if he did not dispose of it by will. In holding that there was no dower right in this case, the court expressly limited its decision to the case where there is a gift in default of appointment. No case has been found where there was no such gift.

With respect to the statutory forced share, Professor Powell

trustee. See Dudley v. People's Trust Co., 57 Misc. 230, 107 N.Y. Supp. 930 (Sup. Ct. 1907). The doctrine of *Cutting v. Cutting* has been much criticized. 3 POWELL § 390; Whiteside & Edelstein, *supra* note 57, at 464-467.

[61] N.Y. REAL PROPERTY LAW § 151. See Ward v. Stanard, 82 App. Div. 386, 81 N.Y. Supp. 906 (2d Dept. 1903); Ryder v. Lott, 123 App. Div. 685, 108 N.Y. Supp. 46, *aff'd*, 199 N.Y. 543, 93 N.E. 1131 (1908).

[62] N.Y. REAL PROPERTY LAW § 150.

[63] Barr v. Howell, 85 Misc. 330, 147 N.Y. Supp. 483 (Sup. Ct. 1914); Matter of Davies, 124 Misc. 541, 209 N.Y. Supp. 296, *aff'd*, 215 App. Div. 750, 212 N.Y. Supp. 796, *aff'd*, 242 N.Y. 196, 151 N.E. 205 (1926).

in his treatise cites three New York cases for the general principle that there is no such right in the donee's power. He gives, as the reason behind the rule, the dogma that the appointee takes from the donor.[64] This principle would seem to be inapposite here in view of the explicit words of the statute in Section 151 creating a fee. In all the cases cited, the limitations contained gifts in default of appointment. Therefore, it would appear that in a properly argued case, where there is no such gift, the court should allow the wife's interest.

No cases have been found deciding the rights of the donee's heirs in an unexercised power falling under Sections 149 to 153 of the Law, except those where the donee had an equitable life estate.[65] In such cases, as above noted,[66] the courts have held that Sections 149 to 153 do not apply and they therefore never have to reach the question of the heirs' rights. Seemingly, the analysis applicable to the wife's rights would be here apposite.

V. ANALYSIS OF DONOR INTENT AND THE SUBSTANCE OF THE DONEE'S INTEREST

Having examined these fundamentals, we will direct our inquiry in the next succeeding sections to two underlying groups of questions.

First, since a general power of appointment approaches a property interest, it may be queried what purpose its use would have that could not be served by giving the donee the fee?[67] If the same purpose would be served by giving the interest outright, should not the law disregard the agency fiction and treat the donee of the power as the owner for all purposes? On the other hand, if the general power does serve purposes other than merely to help the donee avoid some of the burdens of ownership, and if a testator or settlor could have legitimate reasons for giving the general power

[64] 3 POWELL § 391 n. 32, citing City Bank Farmers Trust Co. v. Green, 160 Misc. 370, 289 N.Y. Supp. 473 (1936); Matter of Rogers, 250 App. Div. 26, 293 N.Y. Supp. 626, and 168 Misc. 633, 6 N.Y.S.2d 255 (1938), and City Bank Farmers Trust Co. v. Miller, 163 Misc. 459, 297 N.Y. Supp. 88, *rev'd on other grounds*, 278 N.Y. 134, 15 N.E.2d 553 (1938). See also Comment, 58 MICH. L. REV. 753, 758 n. 22 (1960), and cases there cited.

[65] *In re* Fowler's Estate, 199 Misc. 995, 95 N.Y.S.2d 165 (Surr. Ct. 1949). The court here does not seem to base its decision on the fact that the donee had an equitable estate only. *But cf.* Matter of Hayman's Estate, 134 Misc. 803, 809, 237 N.Y. Supp. 215, 223, *aff'd*, 256 N.Y. 557, 177 N.E. 139 (1931). See also Cook v. City Bank Farmer's Trust Co., 3 App. Div. 2d 634, 158 N.Y.S.2d 315 (1956).

[66] See text accompanying note 60 *supra*.

[67] See note 4 *supra*.

but withholding the fee, should not the attitude of the law toward its use perhaps be more liberal?

Second, with respect to each separate gift, it may be asked what is the substance and nature of the conflicting claims seeking to affirm or deny that the donee has an interest in property? [68] Should not the law weigh and balance these conflicting claims in making the determination of whether the donee is the owner, regardless of whether the donor's intent was to evade law-imposed burdens of ownership or to effectuate a specific plan of disposition? What principles and rules of law should follow from this process of weighing and balancing the opposing interests?

In discussing these problems, we shall deal in more detail with collateral powers,[69] presently exercisable and testamentary, as they present the most difficult questions for analysis. In addition, powers in gross and appendant will be dealt with more cursorily. The power to appoint less than a fee and the effect of the presence or absence of a gift in default of appointment will also be considered.

A. General Collateral Power Presently Exercisable

Suppose A, the owner in fee, devises Blackacre to whomever C appoints by deed or will and until and in default of appointment to B. What purpose could A have in leaving his property in this manner that could not be effectuated by another method? The apparent intent of A here is to give B the entire interest in the property, but if C for any reason wants to divest B of his interest and either give it to himself or to someone else, then A wants C to have the power to do it. Such a situation might arise if B is A's wife and C is A's son. A perhaps would want B to have the entire interest as the first object of his bounty. But A might feel that if B remarries, the interest should then go to C. In that case, of course, A's object would be fulfilled if he left it to B in fee, but if B remarries then to

[68] Professors Simes and Smith suggested that a power may not always be so easily categorized when they say:

"Doubtless, the same group of legal relations may be regarded as a property interest for one purpose and not for another. And it may be said at the outset that, until we know the purpose for which the classification 'interest in property' is to be applied, it is futile to attempt to decide whether a given situation presents such an interest." SIMES & SMITH § 942.

[69] See note 8 *supra* for definitions of powers, collateral, in gross or appendant.

C.[70] But suppose A does not want the gift automatically to shift. Suppose he feels that an independent judgment as to the worth of the man that B marries should be made at the time that she remarries. In that case, the only way that A could effect this result would be to give someone he trusts the power to divest B of the property. No means of disposition other than a general power could effectuate A's intent. Even a special power would not serve because C, the second natural object of A's bounty would then be unable to appoint to himself.

What of the interest of C before he divests B of the property? Can it be said that he has such an interest in Blackacre that his creditors should be able to reach it, his wife should have dower in it, and his heirs should inherit it if he dies intestate? Or should C's interest be treated as an expectancy[71] which creditors, spouses and heirs cannot touch?[72]

It is obvious that the power is not just like an expectancy. An expectancy is a prospective advantage to C over which C would have no volitionary control. It represents something he may or may not get according to what someone else chooses to do. On the other hand, C has most effective control over whether he takes Blackacre, if he has the general power. In that situation it is a pure question of policy as to whether C's interest should be treated as property or as something else; and the result may well depend upon for what purpose we are evaluating C's interest.[73] It does not necessarily follow that because we would allow creditors to attach, C's heirs should take by intestacy. The question must be narrowed to whether we should in effect force C to exercise the power in behalf of the different claimants. The law here must balance many conflicting interests and intents: the intent of A, the original

[70] This would be a fee simple subject to an executory limitation by way of a shifting executory devise. RESTATEMENT, *Property* § 25, illustration 5 (1936).

[71] "(1) One person is an 'expectant distributee' of another when such person
"(a) would be an heir or next of kin of that other, if that other died forthwith; or
"(b) is reasonably likely to be an heir or next of kin of that other; or
"(c) is named in the existing testamentary instrument of a living person as a devisee or legatee thereunder; or
"(d) is reasonably likely to be named as a devisee or legatee in the future testamentary instrument of another. . . ." RESTATEMENT, *Property* § 315 (1940).

[72] Sackett v. Paine, 46 R.I. 439, 128 Atl. 209 (1925); RESTATEMENT, *Property* § 317(1) (1940).

[73] See note 68 *supra*.

testator, that B have Blackacre unless and until C actually wants it; the interest of B the fee owner; and the interest of C, the donee of the power; all these must be balanced against the interest of the outside claimants.

One other group of persons, however, must also be considered as well. They are the heirs, creditors and spouse of B. The law must decide whether as a matter of policy a piece of property can be placed in the hands of B with an elastic string attached. When it becomes inconvenient to B or C for B to have the property, because of, let us say, B's attaching creditors, C pulls the string and miraculously B no longer has an interest; C is now the fee owner. Or take the reverse situation, with C's creditors seeking payment of their debts. In such case, C can refuse to pull the string and under present principles of law C's creditors can do nothing.[74] Clearly, then, the law should regard the interests of B and C as attachable or otherwise subject to outsiders' claims without regard to whether or not the power is actually exercised, unless it makes the deliberate choice of subordinating the outsiders' claims to the intent of the donor of the power and of the donee. It is the contention here that these should not be so subordinated. Since C has the power to make the property his own, those claiming adversely through him (creditors and tax collectors) should be treated as though the power has been exercised in their favor. Otherwise, the power of appointment device is usable to defeat those claiming against one who realistically and substantially viewed has a very valuable asset.[75] The strong public policy that a creditor be able to collect from the assets of his debtor should not by the use of the power fiction be so easily circumvented.

It may be asked whether under this analysis the creditors of B and C can both attach. The answer to this must be, of course, that B's creditors can take only the interest that B has, which, according to traditional doctrine, would be much analogous to a fee subject to

[74] See also note 35 *supra* and accompanying text.

[75] This opinion of course is held by many writers in the field. The following, found in the American Law of Property, is an apt example of what has been said:

"This donee-is-a-mere-agent notion may be quite acceptable as a description of the position of the donee of a special power, who cannot himself benefit from its exercise, but it is difficult to avoid the conclusion that it is unsatisfactory when applied to the donee of a general power. He, like the 'owner' of a checking account, may secure the beneficial use of the property merely by executing the proper document. No policy which would permit creditors to reach the property in one situation but not in the other has been articulated." 5 AMERICAN LAW OF PROPERTY § 23.17. See also SIMES & SMITH § 944.

a shifting executory interest.[76] This analysis is helpful in balancing the interests of the parties. Under it the attaching creditors of B would get the property subject to exercise of the power.[77] To this it might be argued that we are being inconsistent; that in the case of an unexercised power we are treating B's interest as though the power is unexercised for the purpose of assessing the rights of B's creditors, but for the purpose of determining the rights of C's creditors we are treating the power as exercised. This is no doubt true. However, it is not complete logical and technical consistency that we are seeking here, but a proper balancing of interests. It is submitted that the results thus obtained are desirable. B's creditors never historically had the right to cut off the power.[78] We are merely adding now a new right, a right in C's creditors in consonance with the substantial interests of the parties.

The more difficult problems are presented when the interests of the spouse and heirs of the donee are considered. They are more difficult because these parties have not given value for their interests and their equities are therefore not as compelling. Can it be said in our example above, if C dies intestate without having exercised the power inter vivos, that C's heirs and next of kin should take in preference to B and B's successors? It is submitted that the heirs of C, in such case, have no equity that would call for divesting B of her interest. There has been no policy of the law against the disinherison of heirs, as such, since the Statute of Wills in 1540.[79] And without this countervailing equity, is there any reason not to effectuate the apparent intent of the donor and donee of the power? The donor manifestly intended that B remain the owner in fee unless C exercised the power. In most situations, C, by not exercising the power in his own favor or for his heirs, has evinced the intent that B remain the owner. It would appear, therefore, that B and her successors should prevail over the heirs of C.

[76] SIMES & SMITH § 872.

[77] In the case where the creditors of both simultaneously seek satisfaction out of the property, C's creditors would levy on the property unfettered by the rights of B's creditors.

[78] Doe v. Jones, 10 B. & C. 459, 109 Eng. Rep. 521 (1830); Tunstall v. Trappes, 3 Sim. 286, 57 Eng. Rep. 1005 (1829); Brandies v. Cochrane, 112 U.S. 344 (1884).

[79] The following quotation shows the development of this:

"An ancient doctrine of Anglo-Saxon law which continued until Glanvil's time in the latter half of the twelfth century limited the power of the owner in fee to alien his land, especially if it was land which he had inherited, by requiring him to retain a part of it for the benefit of his presumptive heirs. The proportion which he could convey without

The situation is different, however, with respect to the interest of the spouse of the donee. Although since the Statute of Wills it has always been possible to disinherit one's heirs, the same has not been true of the spouse, who has had rights of dower and curtesy and more recently the statutory forced share.[80] The policy of the law has always been that the spouse has such rights in spite of the contrary intent of the testator, and the attachment of dower is generally favored.[81] Society's continuing acceptance of this policy is evidenced by the fact that the legislatures in a number of jurisdictions are replacing or adding to the older traditional rights of dower with the more substantial statutory forced share. It is submitted, therefore, that the spouse of the donee has such an equity in the donee's substantial interests and the law should recognize the power of appointment as such as interest, regardless of the fact that it is not a freehold interest or property in the traditional sense. In a conflict between the spouses of B and C after the death of both, C's spouse under this analysis should prevail even though B died before C.[82]

the consent of his heirs is not known, and the actual details of this old law are indefinite and obscure. It seems clear that the doctrine was designed simply as a limitation on the owner's power to alien his estate in fee. . . .

"Toward the close of the twelfth century, this doctrine disappeared silently and completely from the law. At the same time, the rule that the heirs' portion could not be defeated by will came into being. From that time until the enactment of the Statute of Wills (1540), freehold estates in land could not be devised at law. . . . Maitland suggests that the disappearance of the old rule, and the creation of the new rule as to wills of land, was probably the result of compromise in order to make land more readily alienable *inter vivos*: the presumptive heirs lost their ancient and indefinite veto power over alienation, but were freed from the possibility of disinheritance by will." 1 AMERICAN LAW OF PROPERTY § 2.1.

Of course it could be strongly argued that there should be a policy of the law against the disinherison of minor children. The law has never gone quite this far, except to the extent that it protects pretermitted children and in some states allows support out of the parent's estate. See ATKINSON, WILLS 138-46 (1953).

[80] For a detailed discussion of these rights see 1 AMERICAN LAW OF PROPERTY §§ 5.1-5.74.

[81] "The rights of dower and curtesy are favored in the law." Shannon v. Watt, 87 N.J. Eq. 142, 146, 99 Atl. 114, 115 (Ch. 1916), *aff'd on opinion*, 87 N.J. Eq. 611, 101 Atl. 251 (Ct. Err. & App. 1917). See also Cushing v. Blake, 30 N.J. Eq. 689, 697 (1879).

[82] This result would conform to the rule that dower attaching to an estate subject to the exercise of a power is defeated by the exercise of the

Because of the fact that doctrines contrary to those suggested here are so well established, it would of course take statutory reform to effectuate these results.

B. The General Collateral Testamentary Power

Suppose A devises Blackacre to whom C appoints by will but until and in default of appointment to B and his heirs. In such case, it would seem that C's power of disposition over the property is an asset though clearly not as valuable an asset as the power presently exercisable.[83] C can leave the property to his estate or creditors, but that is of no direct benefit to C in his own lifetime. Nor under present principles can C effectively "sell" his power to dispose of the property, for the traditional rule is that contracts by the donee to exercise a testamentary power are unenforceable.[84] If our hypothesis that creditors and spouses should share in the donee's substantial assets is correct, then any rule excluding them would clearly rest on the doctrine proscribing enforcement of contracts to exercise a testamentary power. This rule in turn is based solely upon the policy of the law that the donor's intent (in this case, that the power not be exercised until the donee's death) be effectuated.[85]

Under the analysis suggested here, then, the interests of the third party claimants must be weighed against the policy of the law that the donor's intent be effectuated. When the relationship between the donee of the power and the person with whom he has purported to contract to exercise the power is alone considered, there would appear to be no strong competing interest to donor's intent. There is no possible reason why the donee himself should have more than his donor chose to give him. It could be argued that the party contracting with the donee should be preferred. However, it would seem that he should be just as chargeable with knowledge of the extent of the donee's power as he

power. See note 18 *supra.* The rule should be on analysis equally applicable to a curtesy interest.

[83] "In the case of the general testamentary power—one which the donee can exercise in favor of anyone but cannot exercise except by will—the approximation to ownership is present but considerably restricted by the limitation on the time of an effective appointment." 5 AMERICAN LAW OF PROPERTY § 23.4.

[84] Northern Trust Co. v. Porter, 368 Ill. 256, 13 N.E.2d 487 (1938); U.S. Trust Co. v. Montclair Trust Co., 133 N.J. Eq. 579, 33 A.2d 901 (Ch. 1943); RESTATEMENT, *Property* § 340 (1940).

[85] *Ibid.*

would be if the donee were a mere life tenant attempting to sell him a fee simple. It is when the rights of the spouse and creditors are considered that an argument suggesting a competing interest can be more effectively made. It is submitted, however, that these two are really derivative interests and should rise to no greater standing than the interest of the donee from which they are derived.[86] Since the donee could not himself enjoy the property or its proceeds during his lifetime, it is not a substantial asset inter vivos and should not be subject to his creditors during his lifetime.

That is not to say, as the courts do, that these third parties should not be able to reach the property subject to the power at all. It is submitted that *after the donee's death* the third party claimants should be able to reach the property to the extent that we suggested they should be able to reach it, in the case of the power presently exercisable.[87] Specifically, the creditor of the donee should be able to levy upon the appointive property after the donee's death whether the power is exercised or not, since the property could have been a substantial asset to the estate of the donee had he chosen to exercise the power. The spouse of the donee should have dower, curtesy or forced share rights on the same ground, considering the policy of the law prohibiting his or her disinherison. The heirs of the donee on the other hand should be excluded on the ground that the donee evinced an intent not to exercise the power in their behalf and there is no policy of the law against their disinherison.

C. Collateral General Powers to Appoint the Remainder

Suppose A devises property to B for life, remainder to whomever C appoints by deed or will and until and in default of appointment to D and his heirs. The apparent intent of A here is to give B a life interest with remainder to D, but if C for some

[86] For a most convincing argument that dower and curtesy should in all cases end when the estate to which it attaches terminates by the terms of its own limitation see RESTATEMENT, *Property*, appendix 1: Dower and Curtesy as Derivitative Estates (1936).

As to the rights of creditors in defeasible interests see RESTATEMENT, *Property* § 52 (1936).

[87] The editors of The American Law of Property seem to suggest this. "[The donee of a general testamentary power] can, however, make any appointment he pleases effective at his death, including an appointment to his own estate, *and with respect to incidents attaching after his death,* he should be treated as effectively the owner of the appointed property." 5 AMERICAN LAW OF PROPERTY § 23.4. (Emphasis added.)

reason needs the property or wants to divest D of it, he may do so. Such a situation might arise where B is the wife and C and D are the two children of A. If A feels that D has the greater need for the entire interest in the property but does not trust D's discretion in dealing with it, he may want to give C, a child whose discretion he does trust, the power to divest D of his interest. Such an intent could not be effectuated with the trust device (C as trustee for D) because A wants D initially to have the entire interest and to continue to have control unless he is indiscreet in handling it. A discretionary device, the power of appointment, would have to be used.

It is apparent that the interest of C, the donee here, is somewhat different on analysis from the case where the donee has a power presently exercisable to appoint the fee to himself. C no longer has absolute control of the property; there is no way that he can divest B of her life interest. The parties claiming through C should no more be able to cut off B's life estate than they should if C's interest were a vested remainder following a life estate. However, third party claims should be allowed with respect to the remainder interest itself under the approach we suggested for the collateral power to appoint the fee.[88] Thus, creditors should be allowed to attach the donee's remainder interest whether the power is exercised or not and the spouse's claims should be allowed on the same basis. The heirs of the donee would be excluded.

A similar solution is suggested for the testamentary power. Suppose A devises Blackacre to B for life, remainder to whom C appoints by will, and until and in default of appointment to D and his heirs. In such case the creditors of C should be able to levy upon the remainder after C's death whether the power was exercised or not, and the spouse should get his or her rights after the death of B and C. The heirs of the donee would be excluded.

D. The General Power in Gross

The general power in gross presents in even bolder relief the proprietary aspect of the power. Thus, suppose A devises Blackacre to B for life, remainder as B by deed or will appoints, and in default of appointment to C. B in this case has a present right to possession together with a presently exercisable power to dispose of the remainder. Such an interest when realistically analyzed is prac-

[88] This would be on the same basis as creditors can now reach a true vested remainder. See SIMES & SMITH § 1923 and RESTATEMENT, *Property* § 166 (1936).

tically and substantially the equivalent of complete ownership.[89] And indeed, it is difficult to find a legitimate reason why A would not give the donee a fee simple in the first place. What is the purpose in giving B a life interest and a power to make the fee his own any time he wants to if it is not to help B evade some of the burdens of ownership? Here there is no element of the donor wanting to give the donee a discretion to divest the first taker of his interest, for the first taker is also the donee. It is submitted, therefore, that there is even more compelling reason to brush aside the technicalities and allow the creditors and spouse of the donee to reach the entire interest, the former at any time and the latter after the donee's death.

The heirs of the donee in this type of case also have a stronger argument in their favor. If, as before stated, the donee realistically has a fee, why should his heirs not take by intestacy if he does not exercise the power? It is suggested that the answer to this also must be found by weighing the conflicting interests and intents. It would seem that in the case posited, the intent of the donor that the property go elsewhere in default of appointment should control, since the heirs have no standing *via* a recognized policy of the law. To this it might be replied that possible grantor intent that the heirs not take is immaterial where the grantee is given a fee simple absolute. In rejoinder, however, it should be said that the rights of the heirs here are more analogous to the case where the intestate has a fee simple subject to a shifting executory interest. The limitation "to X but if X dies without issue him surviving then to Y" would be an example. X's heirs would not take if X died intestate without issue surviving; and they would not take because of the expressed intent of the grantor that the gift shift on a certain event. The same would be true in the case of the power under discussion. The donor has expressed the intent that the gift shift upon the happening of a certain event, *viz.*, the donee dying without having exercised the power. The heirs, then, should not take.

The testamentary power in gross involves other problems. If

[89] Statements of this purport are found even where the donee does not have a life estate.

"The donee of a general power of appointment, where the power is presently exercisable, is effectively the beneficial owner of the property subject to the power." 5 AMERICAN LAW OF PROPERTY § 23.4.

"The general power presently exercisable is the practical equivalent of ownership, since it gives to the donee the power to acquire ownership at any time by appointing to himself." RESTATEMENT, *Property*, c. 25, introductory note at 1813 (1940).

A leaves Blackacre to B for life, remainder as B by will appoints, little argument could be made against A's having legitimate dispositive intent. Such a case would exist if A and B were husband and wife, A had no other object of bounty, and A feared B would completely dissipate the funds and be left without means of support. A, under these circumstances, would give B a life estate (usually in trust) with a general power to appoint the remainder.[90]

What of B's creditors and spouse here? It would seem that the rules suggested with respect to the collateral testamentary power should be applicable with one exception. Since the creditor seeking satisfaction out of the donee's assets also has a right to levy upon the life estate, there is no reason to postpone until the donee's death the levy upon the remainder subject to the power.[91]

E. The Power Appendant

As noted above,[92] the power appendant to the fee was widely used in early English history as a means of evading certain restrictive rules of law. The patent anomaly of a person having a fee simple or life estate and a power of appointment over the same interest has been thoroughly discussed and attacked by several important authorities,[93] as well as by at least one court.[94] The Restatement of Property has taken the position that there is no such type of interest in this country.[95] One authority has taken a contrary position.[96] No matter which view is taken, however, it is perfectly clear that the power device should not be permitted to

[90] Of course where the donor has secondary objects of bounty, use of the special power would be appropriate.

[91] It should be noted that New York has equated a life estate and testamentary power in gross to a fee, to the same extent it has a power presently exercisable. N.Y. REAL PROPERTY LAW § 152, *supra* note 56. The results suggested here are somewhat the same.

[92] See text accompanying note 13 *supra*.

[93] SIMES & SMITH § 914; 5 AMERICAN LAW OF PROPERTY § 23.13; Simes, *Devolution of Title to Appointed Property*, 22 ILL. L. REV. 480, 497 (1928).

[94] Browning v. Bluegrass Hardware Co., 153 Va. 20, 149 S.E. 497 (1929).

[95] "Powers Appendant Excluded.

"(1) To whatever extent an instrument purports to create a power to divest a beneficial interest transferred by such instrument to the purported donee, or at that time owned by him, it is ineffective.

"(2) When the donee of a power of appointment acquires a beneficial interest which was theretofore subject to being divested by an appointment, the power to divest such interest is thereby extinguished." RESTATEMENT, *Property* § 325 (1940).

[96] 3 POWELL § 388.

be used to defeat the spouse, creditors, or even the heirs of the fee owner-donee. It is believed that no modern authority would take a contrary position.

F. Effect of Donor's Failure to Make a Gift in Default of Appointment

As noted before, the New York statute enacts that the donee of an absolute power of disposition (as defined in the statute) has a fee as to all the world where there is *no* gift in default of appointment.[97] On the other hand, the donee has a fee as to creditors, purchasers, and incumbrancers only, where there is such a gift.[98] It is doubtful whether this approach is sound upon analysis. When we are weighing the conflicting intents and interests, the only interest to which the presence or absence of a gift in default has relevance is the donor's. And whether the donor intended the gift to go to a third party in default of appointment or back to himself is immaterial. The fact is that in either case his presumed intent would be that the heirs of the donee not take in default of appointment; otherwise, he would have provided for them by an express gift.[99] It would appear, therefore, that the lack of a gift in default should be deemed irrelevant in determining the rights of the parties.

VI. CONCLUSION

The general power of appointment does serve a most legitimate function in adding flexibility to our conveyancing system. The argument that the same purposes can be served by other devices does not really stand up under close scrutiny. No other device can be used to postpone the exercise of discretion as to the identity of the taker and the time that he takes. There is, therefore, no really convincing reason why the use of a general power should be proscribed or abolished. The law, on the other hand, should not allow the power device to be used automatically to defeat third-party claims by blind application of the dogma that a power is not property. Whether a general power is to be properly viewed as a property interest or as an authority depends upon the facts case by case and for what purpose the power is being evaluated.

[97] See note 61 *supra.*

[98] See note 62 *supra.*

[99] *But see* Commentary by Dean Everett Fraser, under MINN. STAT. ANN. (1945) § 502.78 which says that this would not be true in the case of home-made wills.

No all-inclusive rule that a general power is or is not property is desirable or helpful in solving problems. The goal should be the achievement of substantial justice between the parties without regard to ancient legal fictions.

The New York statutory system had promise of eliminating some of the abuses of powers until the *Cutting* case,[100] in effect, destroyed the statute. The statutory rules in New York, however, never went far enough. Under them, it would seem the only time a wife could have dower or forced share rights to the donee's appointive property is where the donee has an absolute power of disposition and there is no gift in default of appointment. Spouse's and creditors' rights should be allowed in all appointive property subject to a general power, testamentary or presently exercisable, and whether the power has been exercised or not. These rights should be subject to certain limitations where the power is testamentary only.[101]

An examination of all the American cases on powers decided in the past fifteen years has revealed that there is no discernible trend toward the results here suggested. State statutory reform[102] is necessary and advisable in the field of powers of appointment in order to make the rules concerning them conform more with salutary policies of the law which create burdens upon ownership.

[100] See note 60 *supra*.

[101] That is, creditors should be allowed to attach only after the death of the donee.

[102] A reform statute was enacted in Minnesota under the guidance of Dean Fraser. Under the statute the creditors of the donee of a general power presently exercisable may reach the appointive property whether the power is exercised or not. However, the creditors of the donee of the general testamentary power may not come in unless the power is actually exercised. MINN. STAT. ANN. (1945) § 502.70.