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THE MEANING OF "GENERAL" POWERS OF APPOINTMENT UNDER THE FEDERAL ESTATE TAX

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Section 302(f) of the Revenue Act of 1926[1] provides that there shall be included in the value of the gross estate of a decedent the value of "any property passing under a general power of appointment exercised by the decedent" by will or by deed made in contemplation of or intended to take effect in possession or enjoyment at or after his death. Section 803(b) of the 1932 Act[2] broadens this provision to some extent by providing that the value of the property subject to the general power, should be included in the gross estate if the power be exercised by a deed wherein the decedent retained possession, enjoyment or income from the property or reserved the right to control further its devolution either alone or in conjunction with others. Similar provisions are found in the 1924, 1921 and 1918 Acts.[3] There is the usual reservation exempting bona fide sales made for adequate consideration.

The cumulative effect of these provisions may fairly be stated to represent an attempt on the part of Congress to tax property subject to a general power of appointment to the same extent and under the same conditions as property belonging absolutely to the decedent.[4] This paper will be limited to a discussion of the meaning of the word "general" as it is used to limit and qualify the particular type of powers of appointment, the exercise of which will bring into effect the imposition of the estate tax. In other words, this paper deals with the difference between "general" and "special" powers of appointment as applied to the estate tax.

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[1] 44 Stat. at L. 9, 71, C. 27 (1926).

[2] 47 Stat. at L. 169, 279, C. 209 (1932).

[3] 43 Stat. at L. 253, 305, C. 234 (1924); 42 Stat. at L. 227, 279, C. 136 (1921); 40 Stat. at L. 1057, 1097, C. 18 (1918).

[4] See Report of Ways and Means Committee of the House of Representatives, H. R. 767, 65th Cong., 2d Sess., p. 21.

Prior to the Revenue Act of 1918[5] there was no section of the Revenue law dealing specifically with property passing under a power of appointment, whether general or special, but, nevertheless, the Treasury Department ruled that property passing under a general power of appointment was to be considered as a portion of the gross estate of a "decedent appointor."[6] In *United States v. Field*,[7] the Supreme Court invalidated this Regulation, holding that the Revenue Act of 1916[8] could not support a construction which would tax property subject to powers of appointment. Even before the decision in *United States v. Field* had been announced Congress had amended the Revenue laws to provide specifically for the taxation of general powers.[9]

The distinction between general and special powers has, of course, not been created by the Revenue Acts, but was known to the Common law.[10] Mr. Gray defines the distinction as follows:

> "Again, powers are either general or special. Under a general power an appointment can be made to any one, including the appointing donee. Under a special power an appointment can be made only to certain persons or objects, or to certain classes of persons or objects other than the donee. Special powers are sometimes called limited powers."[11]

The Treasury Regulations follow much the same thought in stating that "Ordinarily a general power is one to appoint to any person or persons in the discretion of the donee of the power. If the donee is required to appoint to a specified person or a class of persons, the property should not be included in his gross estate."[12] The use of the word "required" seems to be unfortunate, as a power may be special or limited, i. e., not general, even though there is no requirement that the donee appoint to any one. The

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[5] Supra note 3.
[6] Treasury Regulations 37, Art. XI.
[7] 255 U. S. 257, 65 L. Ed. 617, 41 S. Ct. 256 (1921).
[8] 39 Stat. at L. 756, 777 C. 463.
[9] Supra note 7.
[10] Farwell on Powers, 8th ed., (1916) p. 8.
[11] Gray, *Release and Discharge of Powers*, (1911) 24 Harv. L. Rev. 511.
[12] Treasury Regulations 80, Art. 24.

thought of the Regulation could be better expressed by substituting "may only" for "is required to". There is at once apparent a gap or a sort of "no man's land" between the contrasting definitions of a general power and a power "not general" or special, as many conveyances can be imagined which do not permit the donee of a power to appoint to everyone or anyone including himself, but yet do not restrict his appointment to a specified person or a class of persons.[13] For example, assume that the creating conveyance permits the donee to appoint a fee by deed or will to any person, firm or corporation whatsoever except the donee himself, or his personal representatives or estate, or assume that the donee may appoint by deed or will to anyone, including himself, except the donor's mother-in-law. In each of the illustrations, the donee's power certainly is not an all inclusive one as respects the possible appointees, yet neither is it restricted to a "specified person or class of persons". Some powers do not restrict the possible appointees, but the method of appointment is restricted, as in the familiar situation where a donee may appoint only by will. Further, a power may be unrestricted as to grantees, but yet its exercise may be conditioned upon an event which may or may not happen. Whether the powers illustrated and others of similar nature are general or special cannot be decided from a reading of the Act itself, but the answers are being developed by the decisions of the Federal Courts. Before discussing the decisions dealing with specific circumstances such as are suggested by the above illustrations, it is believed that it is first necessary to consider the effect of state law upon the general question.

Effect of State Law

The incidents of powers of appointment are, of course, not uniform among the various states, the most discussed difference with respect to the Federal estate tax being concerned with whether or not the property subject to the power constitutes a part of the donee's estate for the pur-

[13] Leach, Cases and Materials on Future Interests, 578, note 2.

pose of paying claims of creditors.[14] The taxpayer has contended in a proportionately large number of Federal cases construing the statute that Congress did not intend to tax property subject to a power except in those states where the property formed a part of the decedent's estate for the benefit of creditors[15] and such an argument has been uniformly rejected.[16] The reasoning of the Federal Courts is well exemplified by the opinion of Judge Kirkpatrick in the Eastern District of Pennsylvania, in *Fidelity-Philadelphia Trust Company v. McCaughn* quoted and adopted by the Third Circuit Court of Appeals on appeal.[17] In the *Fidelity-Philadelphia Trust Company* case the father of the decedent had created a trust by his will, which was to endure for the lives of all of his grandchildren in being at his death and for twenty-one years thereafter. Each of the father's seven children was given the power to appoint, either by deed or will, one-seventh of the trust fund, the devolution of the income of the share so appointed to take effect upon the death of the donee and that of the principal of the share so appointed to take effect only upon the termination of the trust. The decedent, one of the seven children, died in 1922 and exercised the power of appointment as to her one-seventh interest by appointing the income to her granddaughter for life and then the principal to such persons as her granddaughter might appoint. Under the applicable state law (Pennsylvania) neither the income nor the principal of the property appointed formed a part of the decedent's estate for the benefit of creditors. In dealing with the contention that as the property was not subject to the claims of creditors and, therefore, was not to be taxed, Judge Kirkpatrick said:

> "When the Congress passed the act of 1919 and added to the property which it had already included

[14] See discussion in United States v. Field, supra note 7.

[15] Fidelity Trust Co. v. McCaughn, 1 F. (2d) 987 (D. C. E. D. Pa. 1924); Whitlock-Rose v. McCaughn, 21 F. (2d) 164 (C. C. A. 3rd 1927), aff'g., 15 F. (2d) 591 (D. C. E. D. Pa. 1926); Fidelity-Philadelphia Trust Co. v. McCaughn, 34 F. (2d) 600 (C. C. A. 3rd 1929), Cert. Den'd. 280 U. S. 602, 74 L. Ed. 647, 50 S. Ct. 85 (1929); Stratton v. United States, 50 F. (2d) 48 (C. C. A. 1st 1931), aff'g., 42 F. (2d) 779 (D. C. Mass. 1930), Cert. Den'd., 284 U. S. 651, 76 L. Ed. 552, 52 S. Ct. 31 (1931).

[16] Supra note 15.

[17] Fidelity-Philadelphia Trust Co. v. McCaughn, supra note 15.

in the gross estate of the decedent for tax purposes property passing under a general power of appointment exercised by the decedent, its purpose could only have been to extend the incidence of the tax to property which had not previously been subject to it. If the plaintiff's position were correct, section 402(e) of that act would have added no new subject to those already selected for taxation. In that event its purpose could only have been to clarify the act of 1916. But that suggestion was expressly rejected by the Supreme Court which considered the effect of the act of 1919 in U. S. v. Field, though that act had been passed too late to directly affect the case then before the court."

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"The Congress thus had the power to tax any transmission of property effected by death even though by the law of the decedent's domicil such property was not part of his estate. In view of the construction of the act of 1916 given by the court in U. S. v. Field, the enactment of section 402(e) of the act of 1919 indicates a clear intent to exercise that power. The question of an intent to act in harmony with state laws does not arise. In the sense that the act of 1919 did not create any diversity in the incidence of the tax in the different states it operated in harmony with the state laws. In the sense that it included a subject of taxation which in no state was part of the decedent's estate, the Congress was acting in disregard of state rules of property."[18]

Judge Dickinson expresses the thought in another manner by stating: "It is just as true, however, that no state can, by declaring the law of property to be different from what it is in other jurisdictions, force the hand of Congress in respect to how the tax shall be admeasured."[19]

In order that the tax may be imposed with any degree of uniformity between the states the Federal Courts have necessarily been compelled to disregard any distinction based on the liability of the property to creditors, as is exemplified by the following quotation, again from Judge Dickinson:

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[18] Ibid, 602, 603.

[19] Fidelity Trust Co. v. McCaughn, supra note 15, 1 Fed. (2) at 988.

> "In construing any legislative enactment, aid may be sought from the situation unaffected by the legislation; the need which was felt for a change, and the change sought to be effected. This is the time-honored phrase of 'the old law; the mischief and the remedy.' So far as this leads us to delve into the legislative mind, we have found that the motive for the adoption of the phrase in question was to bring about as nearly as it could be reached a uniformity throughout the United States in the admeasurement of the tax. If it was measured 'by the estate passing,' there was no such uniformity for the reason that what constituted the estate of a decedent received a different answer in different states. There was the additional motive of making property taxable, if in practical effect it formed part of the decedent's estate."[20]

The Federal Courts, therefore, have determined that the mere fact that some of the most important incidents of powers may differ from state to state will not in itself cause a differing application of the taxing statute as between the residents of the various states. In order to find out, however, what the incidents of a particular power may be, the Federal Courts must look to the state law.[21] Thus, in *Helvering v. Grinnell,*[22] the Supreme Court, in a case involving the exercise, vel non, of a general power of appointment, said: "We think the reasoning of the New York Court as to the meaning and application of the state law equally applies to the federal statute here in question."[23] In *Leser v. Burnet,*[24] the Fourth Circuit Court of Appeals found it necessary to construe a power of appointment granted by the will of a resident of Maryland, dealing with property

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[20] Whitlock-Rose v. McCaughn, supra, note 15, 15 Fed. (2) at 591.

[21] Helvering v. Grinnell, 294 U. S. 153, 79 L. Ed. 825, 55 S. Ct. 354 (1935), Aff'g., 70 F. (2d) 705 (C. C. A. 2d 1934); Whitlock-Rose v. McCaughn, supra note 15; Fidelity-Philadelphia Trust Co. v. McCaughn, supra note 15; Blackburne v. Brown, 35 F. (2d) 963 (D. C. E. D. Pa. 1929) Aff'd. 43 F. (2d) 320 (C. C. A. 3rd 1930); Stratton v. United States, supra note 15; Wear v. Commissioner, 65 F. (2d) 665 (C. C. A. 3rd 1933); Lee v. Commissioner, 57 F. (2d) 399 (Ct. App. D. C. 1932), Cert. Den'd. 286 U. S. 563, 76 L. Ed. 1295, 52 S. Ct. 645 (1932); Leser v. Burnet, 46 F. (2d) 756 (C. C. A. 4th 1931); Pennsylvania Co. v. Lederer, 292 F. 629 (D. C. E. D. Pa. 1921).

[22] Supra note 21.

[23] Ibid, 294 U. S. 153, 156, 79 L. Ed. 825, 828, 55 S. Ct. 354, 355 (1935).

[24] Supra note 21.

located in Maryland. In discussing the effect of state law, Judge Parker said:

> "We come, then, to the question as to whether the power created by the conveyance of Charles Carroll Fulton, the language of which we have quoted above, is a general power within this meaning of the act of Congress. This is to be determined by the law of Maryland; for, while we look to the federal decisions, and in the absence of such decisions, to the general law, in interpreting the act of Congress, we look to the law of Maryland as laid down by its courts to determine the effect of conveyances executed within that state and relating to property there situate."[25]

It can now no longer be a matter of dispute that insofar as this taxing statute is concerned, the Federal Courts will look to the state law to determine the meaning and effect of the particular power of appointment in question; the Federal Courts must look to the state courts to determine the rights of creditors of the donee,[26] to determine to whom the donee may appoint,[27] to determine whether or not the appointee is to be considered as taking from the donor or donee,[28] and other matters of similar import. It is, however, equally well settled that once those incidents and effects are determined by the applicable state law, the Federal courts must still make an independent conclusion as to whether or not those incidents and effects constitute, in the particular case, a "general" or a "special" power.

Suppose, however, that the state statutes or decisions have attempted to define a general power and have classified powers as general or special in a manner differing from the interpretation given those expressions by the Federal Courts. There is then an apparent conflict between the two principles above outlined.

In *Whitlock-Rose v. McCaughn,*[29] the contention seems to have been made that the power under consideration was

[25] Ibid, 46 F. (2d) 756, 760.

[26] Fidelity Trust Co. v. McCaughn, supra note 15; Whitlock-Rose v. McCaughn, supra note 15; Fidelity-Philadelphia Trust Co. v. McCaughn, supra note 15; Stratton v. United States, supra note 15.

[27] Leser v. Burnet, supra note 21.

[28] Stratton v. United States, supra note 15; Wear v. Commissioner, supra note 21; Pennsylvania Co. v. Lederer, supra note 21.

[29] Supra note 15 (District Court).

a New Jersey power, that it was exercisable only by will, that the New Jersey courts did not call such a power a general one, and that, therefore, the power was not a general power. The Court ruled against this contention, holding that the common law did not classify powers as between general and special by looking at the mode of exercising the power, but rather by the absence of limitations when exercised. The Court relied on the "uniformity" theory, but did not expressly comment upon the contention that the state law did not use the term "general" as applied to the power in question. On appeal,[30] the Third Circuit Court of Appeals seems to have given some weight to the argument of the tax payer, holding, however, that under the New Jersey law the power in question was a general power since it was subject to the donee's debts. The Court, therefore, found the tax payer's interpretation of the state law to be erroneous and so was not forced to decide the precise point of the effect of the state court's definition.[31]

In *Fidelity-Philadelphia Trust Co. v. McCaughn*,[32] the power considered was a Pennsylvania power which did not authorize the appointment of a fee. The Third Circuit Court of Appeals, adopting the opinion of the lower court, referred to *Thompson v. Garwood*,[33] a decision of the Supreme Court of Pennsylvania in which it was stated that "a general power is, in regard to the estates which may be created by force of it, tantamount to a limitation in fee . . . because it enables him [the donee] to give the fee to whom he pleases". Because of other remarks of the Court in *Thompson v. Garwood* the Federal Court held that the above quotation did not necessarily mean that the state court had defined a general power in such a way as to exclude all powers granting to the donee the right to appoint less than a fee. The significant part of the opinion, however, is that the Court further said:

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[30] Supra note 15 (Circuit Court of Appeals).

[31] The Court relied on Crane v. Fidelity Union Trust Co., 99 N. J. Eq. 164, 133 A. 205 (1926) which does not directly decide whether the power there involved was general or special, although the intimation is that the Court considered it general.

[32] Supra note 15.

[33] 3 Whart. 287, 305, 31 Am. Dec. 502, 506 (1837).

> "In any event, however, the exact definition adopted by the court in Thompson v. Garwood is not necessarily binding upon this court in construing a tax statute."

In *Blackburne v. Brown*,[34] the question of whether or not a Pennsylvania power exercisable by will alone was a general power within the meaning of the estate tax was involved. The Court quoted from the opinion below as follows:

> "But I do not think that the meaning which the courts of Pennsylvania have given to the expression 'general power of appointment,' whatever it may be, is binding upon this court in construing those words in an act of Congress imposing an inheritance tax."[34a]

again, therefore, establishing the rule in the Third Circuit that definitions of the state courts are not controlling.

In *Helmholz v. Helvering*,[35] the Board of Tax Appeals took the opposite view. The power in question in the *Helmholz* case reserved to the decedent only the right to appoint income from the corpus of the trust and only for the lifetime of the appointee. The power to appoint was restricted to a natural person or a charitable organization. The major contention of the Government was that the property subject to the power was taxable as a transfer by the decedent in trust with the right to alter, amend or revoke the trust, but as an alternative contention, the Government argued that the power was a general power. The Board of Tax Appeals rejected both contentions and in dealing with the latter, quoted a Wisconsin statute[36] which restricted the use of the term "general" to a power which authorized alienation in fee. The Board therefore held the power to be a special power. It is to be noted, however, that the Third Circuit had decided four years earlier in dealing with a Pennsylvania power that the mere fact that the power did not authorize the appointment of a fee did not keep it from being a general power.[37] The opinion

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[34] Supra note 21.
[34a] 43 F. (2d) 322.
[35] 28 B. T. A. 165 (1933).
[36] Wisconsin Statutes (1927) Sec. 232.05 and 232.06.
[37] Fidelity-Philadelphia Trust Co. v. McCaughn, supra note 15, and see United States v. Field, supra note 7.

of the Board of Tax Appeals, therefore, can only be rationalized on the theory that the Board gave binding effect to the Wisconsin statute because it specifically stated what should and what should not be considered a general power. On appeal to the Circuit Court of Appeals[38] and the Supreme Court[39] the question of whether the power was a general one was not discussed, as the Government seemed to have abandoned this point.

There appears to be no justification for the Board's decision in the *Helmholz* case with respect to the binding effect of the law of Wisconsin. If the desired uniformity is to be attained, a power in one state which has the same incidents and effects as a power in another state should receive the same treatment from the Federal taxing authorities regardless of what name or designation each state gives to the power. To give a binding effect to the definitions of state courts and legislative acts could well cause injustices under the Revenue Act. Suppose, for example, a decedent in state A has a power of appointment by will which restricts his possible appointees by providing that property may not be appointed to his estate, but is otherwise unrestricted; assume further that by statutory definition such a power is called a general power in state A. Assume further that in state B the decedent has a power exercisable only by will which is absolutely unrestricted as respects the possible appointees, and state B, by statutory definition, has classified such power as a special power because it can only be exercised by will. If a binding effect is to be given to the definition of the two states, the power in state A would be taxable, while the power in state B would not, although the rights of the decedent in state B are far greater than those of the decedent in state A.[40]

The Federal Courts should, therefore, exercise their own judgment and follow their own decisions with regard to defining powers as general or special, regardless of state law, and should look to the state law solely to find out what

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[38] Helmholz v. Helvring, 75 F. (2d) 245 (Ct. App. D. C. 1934).
[39] Helvering v. Helmholz, Commissioner, etc., 296 U. S. 93, 80 L. Ed. 76, 56 S. Ct. 68 (1935).
[40] Cf. Leser v. Burnet, supra note 21.

the rights of a particular decedent are in property over which a particular power has been exercised. Nor should the Federal courts be bound by the definitions of the term "general" made by state courts or legislatures.[41]

Mode of Exercise of the Power

In several cases before the Federal courts, it has been contended that powers exercisable by will alone are not, for that reason, general powers,[42] but no taxation case has been discovered where such a contention has been upheld.[43] There seems to be no question but that a power exercisable by will alone may still be a general power since the classification as between general and special should be made with regard to the possible appointees rather than with respect to the particular form of instrument which can be used.[44] It is, of course, true that where the donee may not appoint by deed, he cannot appoint to himself and to that extent the possible appointees are limited. However, if the donee may appoint to his estate or his creditors,[45] he has all the practical advantages of being able to appoint to himself. In addition, at the time when the power is to be exercised, i. e., at the donee's death, the mere fact that his appointment can only be by will does not restrict his possible appointees since he can at that time appoint to anyone *then* living.[46]

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[41] It is interesting to compare the opinion of the Supreme Court in Tyler v. United States, 281 U. S. 497, 502, 74 L. Ed. 991, 998, 50 S. Ct. 356 (1930), where it was held that it was within the power of Congress to impose an estate tax on property held by husband and wife as tenants by the entireties in spite of the State law (Maryland) which regarded such a tenancy between husband and wife as constituting one legal entity. In the course of his opinion, Mr. Justice Sutherland said: "But mere names and definitions, however important as aids to understanding, do not conclude the lawmaker, who is free to ignore them and adopt his own."

[42] Whitlock-Rose v. McCaughn, supra note 15; Fidelity-Philadelphia Trust Co. v. McCaughn, supra note 15; Blackburne v. Brown, supra note 21; Leser v. Burnet, supra note 21; Lee v. Commissioner, supra note 21; Johnstone v. Commissioner, 76 F. (2d) 55 (C. C. A. 9th 1935) Cert. Den'd. 296 U. S. 578, 80 L. Ed. 408, 56 S. Ct. 88 (1935).

[43] Cf., however, Fidelity-Trust Co. v. McCaughn, supra note 15.

[44] Farwell, op. cit. supra note 10; I Simes, Future Interests (1936) 431.

[45] Compare the situation in Leser v. Burnet, supra note 21, where under the applicable state law (Maryland) the donee could not appoint to his creditors and the power was thus held to be special.

[46] See discussion in the last part of this article.

A more difficult question is presented when the donee may exercise the power only with the concurrence of some other person or persons.

In *Farmers Loan & Trust Co. v. Bowers*,[47] the decedent had created a trust reserving only a limited or special power of appointment. In addition, however, the decedent had retained the right to revoke the trust with the consent of the trustee. The Court held that an absolute and unqualified power to revoke a trust is equivalent to a general power, but that a power to revoke only in conjunction with others is not a general power. It seems doubtful that a power to revoke a trust is a power of appointment at all,[48] but granted, arguendo, that it is equivalent to a power of appointment, why should it be called limited or special merely because the power cannot be exercised by the decedent alone? If the distinction between general and special powers is to be made solely on the basis of the possible appointees,[49] it is clear that the mode of exercise, whether by the donee alone or in conjunction with others, should make no difference. If, however, the practical result is to be considered, a donee whose appointment can be checked by a person possibly adverse to his interests has rights which are far from those enjoyed by a donee who needs no consent to his acts and, a fortiori, his rights hardly approach those of an absolute owner.[50] It will be noted, however, that the power dealt with in the *Farmers' Loan* case was not an ordinary power of appointment at all, but a power of revocation and thus the rights of the donee were described as "merely analogous to a power of appoint-

[47] 29 F. (2d) 14 (C. C. A. 2d 1928).

[48] The Court relied on Bullen v. Wisconsin, 240 U. S. 625, 60 L. Ed. 830, 36 S. Ct. 473 (1916), to establish that "an absolute and unconditional power to revoke a trust is treated as equivalent to a general power to appoint." However, the right to revoke by the settlor of the trust in the Bullen case was not only to revoke the trust, but to "direct and control the disposition of" the trust estate.

[49] Supra note 44.

[50] Committee Reports, supra note 4. "A person having a general power of appointment is, with respect to disposition of the property at his death, in a position not unlike that of its owner. The possessor of the power has full authority to dispose of the property at his death, and there seems to be no reason why the privilege which he exercises should not be taxed in the same degree as other property over which he exercises the same authority."

ment."[51] If, however, a true power were granted to a donee where exercise of the power could be checked by a possibly adverse person, the result should be the same, not perhaps from a technical point of view, but from the practical efficacy of such a power when compared to other taxable interests.[52]

Powers With Restricted Appointees

As above indicated,[53] the Federal courts have followed the historical distinction between general and special powers by classifying as general powers only those where the possible appointees are unrestricted. Whether or not the possible appointees are in fact unrestricted can, however, raise interesting questions.

In *Fidelity-Trust Co. v. McCaughn*,[54] the decedent had a power exercisable only by will and exercisable (except with respect to $25,000) only during the time she should remain unmarried. The decedent-donee did in fact remain unmarried and did exercise the power. It was held that the property which was the subject of the power should not be included in the estate of the decedent for the purpose of the estate tax. The Court said that there was a limitation in respect to the possible beneficiaries "for the reason that no husband or children of the donee could be such beneficiaries."[55] This reasoning ignores the fact that as long as there was any power at all, it was an absolute one. As long as the power could be exercised, it could be exercised in favor of anyone, including the estate of the decedent; the only time when there could exist any possible person to whom the donee could not appoint must, by very definition, be at a time when there was no power in existence at all. The Court reasoned that Congress only intended to tax property subject to a power when the donee "has actual and practical dominion of the property, as fully to all practical intents and purposes as if it were

[51] Farmer's Loan & Trust Co. v. Bowers, supra note 47, 29 Fed. (2) at 18.
[52] See discussion in Simes, op. cit. supra note 44, at 435.
[53] Supra note 44.
[54] Supra note 15.
[55] Supra note 15, 1 Fed. (2) at 988.

owned outright,"[56] and again, "Congress . . . has said that the Act is to apply . . . only when the power is a 'general' one and has been exercised. This we have interpreted to mean a power of disposition as broad as that which arises out of ownership."[57] Suppose, however, that the decedent in this case had had a fee simple estate subject to a condition subsequent and that this condition had been based on remarriage, so that had the decedent remarried, her entire interest in the property would have been divested; under these conditions, if the decedent had in fact not remarried, the conclusion is inescapable that the property would be subject to the estate tax.[58] The decedent in the case at bar certainly had dominion of the property as fully as the decedent in the hypothetical case set forth so far as the effect of the remarriage was concerned. The Court was influenced by the fact that the exercise of the power was restricted to a will, but as seen above,[59] that should have made no difference. Looking at the situation at the date of the donee's death, she certainly had "a power of disposition as broad as that which arises out of ownership."[60]

The *Fidelity Trust* case seems to have been overruled by the Third Circuit Court of Appeals in *Fidelity-Philadelphia Trust Co. v. McCaughn.*[61] In this case, the power could be exercised as to the principal of a trust fund only to take effect upon the termination of a trust which was to exist until 21 years after the death of the last surviving grandchild of the donor living at his death; thus the decedent-donee could appoint no beneficial interest in the corpus of the trust to those grandchildren. The Court held the power to be a general one on the theory that the limitation arose from the inherent nature of the property itself and was not a condition affecting the possible appointees. This decision

[56] Ibid.
[57] Ibid.
[58] Montedonico, Adm'r. v. Commissioner, 12 B. T. A. 572 (1928), where, however, the condition was not remarriage.
[59] Supra note 42. In Whitlock-Rose v. McCaughn, supra note 15, the same judge who decided the Fidelity Trust case held that a power exercisable by will alone was a general power.
[60] What disposition was made of the $25,000 does not appear from the report of the case.
[61] Supra note 15.

seems to be entirely correct. The property which was the subject of the power was analogous to a remainder after the completion of a life interest; obviously the possessory interest in the remainder in such case cannot be appointed to the person or persons who hold the beneficial life interests since they will of necessity be dead before the remainder can vest in possession, but there seems to be no valid reason why such a power should not be taxed as a "general" power.

In *Lee v. Commissioner*,[62] the decedent could only exercise his power by will and only in the event that he predeceased his mother and died without issue. From the nature of the power, therefore, the decedent-donee could not appoint to his issue. The power was held to be a general one, although the impossibility of the issue as potential beneficiaries was not expressly discussed. The decision on the question of whether or not the power was a general one seems to be correct since as long as the power could be exercised at all it could be exercised in favor of anyone.[63] To the same effect is the decision in the Ninth Circuit in *Johnston v. Commissioner*.[64]

In *Leser v. Burnet*,[65] the Court construed the power as prohibiting the donee from appointing to his creditors and, therefore, held the power to be a special one. The Court reasoned that Congress intended to tax property over which the donee stood in a position not unlike that of an absolute owner and that such was not the case where the donee could not subject the property to the payment of her debts. The Court points out that property subject to a general power is, by the majority rule in this country and in England, subject to the claims of creditors of the donee and that a power which cannot *even by express direction of the donee* place the property within reach of creditors cannot be called a "general" power. Whatever may be thought of the rule of the State Court which compelled

[62] Supra note 21.

[63] The qualified disapproval of this case expressed by the Supreme Court in Helvering v. Grinnell, supra note 21, was on the question of whether or not the power was exercised; not on the question here discussed.

[64] Supra note 42.

[65] Supra note 21.

this peculiar interpretation of the power involved in the *Leser* case,[66] the decision seems to be clearly correct. While the exercise of the power in this case was not restricted to a specified class of persons, the limitation against the use of the property for the payment of the donee's debts must be said to have deprived her of beneficial rights to the property to such an extent that her interest was far from approximating that of an owner of the property.

Power Where the Exercise Is Contingent

In the *Johnston*[67] case and the *Lee*[68] case, the power could be executed only in the event of the donee's death without issue, but at the date of death the contingency had occurred and the power, therefore, was completely vested. Similarly, in *Minis v. United States*[69] the power was exercisable only in the event the donee survived her husband and again it was held that the power was a general one. No case has been found where the effect of the exercise of the power was still contingent on the date of exercise. Such a case could occur where the decedent has a power to appoint by will provided a third party should die without issue and the appointment is made by the will of decedent during the lifetime of the third party. It is submitted, that in such a case the possibility that the contingency may not occur should reflect upon the *value* of the decedent's interest in the property, but should not affect the question of whether or not the power is general or special. Certainly the control of the property subject to such a power is within

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[66] The Court felt itself bound by the decision in Balls v. Dampman, 69 Md. 390, 16 A. 16, 1 L. R. A. 545 (1888), which dealt with a devise to E. A. B. for life with power to "will and dispose of the same in such manner as she may see fit by any instrument, in the nature of a last will and testament she may see proper to make". The Maryland Court of Appeals, by way of dictum, held that the donee had no authority to devise the property for the payment of her debts. This dictum seems to be an oddity in the law of construction of powers, but the Federal court seems to have been correct in following it in light of the citation of the case with approval in Price v. Charbonnier, 103 Md. 107, 63 A. 209 (1906), and Prince de Bearn v. Winans, 111 Md. 434, 74 A. 626 (1909). Cf., however, Merwin v. Safe Deposit & Trust Company, 188 Atl. 803 (Md. 1937).

[67] Supra note 42.

[68] Supra note 21. The power in this case could be exercised only if, in addition to dying without issue, the decedent predeceased his mother.

[69] Minis v. United States, 66 Ct. Cl. 58 (1928).

the control of the decedent to the same extent as property in which he has, at his death, a contingent remainder or other future interest, depending on the happening of a contingency to reduce it to possession.[70]

Conclusion

The comparatively few decisions of the Federal Courts[71] defining general powers of appointment have tended to brush aside distinctions based on form rather than substance. The decisions have further tended to reconcile, for purposes of taxation, the divergent rules of the state courts and legislatures as to the effect of various powers of appointment. While an amendment of this portion of the Revenue Law or a more detailed article in the Estate Tax Regulations might serve to clarify the present definition and perhaps anticipate questions which have not yet been presented to the Courts, it is believed that the existing interpretations developed by the Federal Courts are, on the whole, so reasonable that a revision of the law is not necessary at this time, either from the standpoint of the government or the taxpayer.

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[70] Treasury Regulations 80, Article 11, provide that "nothing should be included (in the gross estate of a decedent), however, on account of a contingent remainder in the case that the contingency does not happen in the lifetime of the decedent, and the interest consequently lapses at his death." The inference is clear that if the interest has not lapsed at the death of the decedent, the contingent remainder is taxable, even though the contingency has not occurred at or prior to such time.

[71] No attempt has been made to cite or analyze all of the decisions of the Board of Tax Appeals dealing with the question here presented.