In conclusion it may be said that the decision in *Otter* v. *Church*[16] though apparently reasonable, is one which nevertheless seems difficult to support on a purely legal basis, considering the above principles. If these principles are correct, and *Otter* v. *Church*[17] is founded on a wrong view of the law, the apparent justice of the decision would seem to suggest that some modification of the law may be necessary to enable legal personal representatives to recover damage caused to the estate in such circumstances. But it seems that the doubts created by this rare case will not be resolved unless a similar case should arise in the future, which, though not impossible, seems rather unlikely.

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POWERS OF APPOINTMENT AMONG A CLASS WHOSE MEMBERSHIP IS UNCERTAIN THOUGH LIMITED
IN RE GESTETNER SETTLEMENT.
BARNETT AND OTHERS v. *BLUMKA AND OTHERS*

A settlor may vest property in a person intending that he should hold it as trustee for certain third parties, with a power to appoint among them. As the settlor intends that at least some of these persons must benefit from the trust, if the trustee fails to exercise this power to appoint, which is not a mere discretionary power of appointment, but which is coupled with a trust, the Court will enforce the trust by equal apportionment among the third parties.[1] But such apportionment cannot be made unless the class of persons from whom the beneficiaries must be chosen is clearly defined. Consequently, if it is uncertain who are the members of the class, the trust is invalid.[2]

A settlor may also vest property in a person together with a power of appointment among a class of persons with the intention that the members of such class should receive no benefit, and have no interest in the property, unless and until such an appointment is made. In such a case the Court will not intervene in default of the exercise of the power, which is a mere discretionary power of appointment not coupled with a trust.[3] One of the questions raised in the recent case of *In re Gestetner*[4] was whether such a power will be valid if the membership of the class among whom the appointment is to be made is uncertain, even though limited.

The facts were that a settlor conveyed a fund to trustees for a specified class of persons[5] on the following trusts: (1) For five years the trustees were to hold so much of the income as they thought fit on discretionary trusts for the members of the class, to accumulate the balance, and to hold the capital for such members of the class as they might appoint. (2) After five years the income was to be held on trust "to pay or apply the same for the maintenance or

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[16] (1953) 1 Ch. 280.
[17] *Ibid.*

[1] *Re Hughes* (1921) 2 Ch. 208; *Re de Cateret* (1933) Ch.103. The *cestius que trustent* may end the discretion of the trustee by joining together and agreeing to take in equal shares.

[2] *In re Ogden* (1933) Ch.678.

[3] *Brown* v. *Higgs* (1799) 8 Ves. 561; *Harding* v. *Glyn* (1739) 1 Atk. 469. Even if the person in whom the property and the power are vested is a trustee of the settlement, nevertheless he is not a trustee of the property for the members of the class unless and until he makes an appointment.

[4] (1953) 1 Ch.672, a decision of Harman, J.

[5] The class comprised four named persons, any person living or thereafter to be born who was a descendant of the settlor's father or uncle, any spouse, widow or widower of any such person, five charitable bodies, any former employee of the settlor or his wife or any widow or widower of such employee, any director or employee or former director or employee of a named company, or any company of which the directors included any director of the named company, but so as to exclude the settlor, any wife of the settlor, and any person who was a trustee of the settlement.

benefit of such member or members of the specified class as the trustees from time to time determine." Every interest was to vest within the perpetuity period, and under both heads there was a remainder over in default of any appointments.

The dispute arose as a result of a claim by a charity, to whom a payment had been made under the settlement, for a refund in respect of taxation deducted at the source. The Chief Inspector of Taxes contended that the settlement trusts were void for uncertainty,[6] and the question of validity was submitted to the Court by the trustees.

It was admitted that the class among whom the trustees had power to appoint was a fluctuating body,[7] and that it was impossible to know at any one moment all the members of the class. There were two related questions for the Court to determine. Was the power to appoint vested in the trustees a mere discretionary power of appointment, or was it coupled with a trust? And if it was a mere discretionary power, was it valid in view of the fact that it was in favour of an indefinite, though limited, class?

In relation to the first question, if the trustees of the settlement had been intended by the settler to hold the property on trust for the members of the class with only a discretion as to apportionment, so that the members would benefit even if no appointment were made, then such trust would be invalid for uncertainty.[8] But it is a general rule that the presence of a gift over in default of the exercise of a power to appoint negatives the possibility of there being such a trust.[9] There was such a gift over in this case, with the result that the trustees had a mere discretionary power of appointment, and were not trustees of the fund for the members of the class. But counsel argued that the power of appointment was coupled with a duty to consider the merits and demerits of all the objects of the power, and that as this duty was impossible to perform in the case of an indefinite class, the power was invalid.

Harman, J. rejected this argument and held that the only duty of the trustees was to "consider at all times during which the trust is to continue whether or no they are to distribute any and if so what part of the fund and to whom they should distribute it."[10] To do this, he held, it was not essential for the trustees "to survey the whole field, and to consider whether A is more deserving of bounty than B"[11] but only to consider from time to time the merits of the unknown members of the class, and to give them something if they thought fit. As there was no difficulty in ascertaining whether a particular individual was a member of the class, the trusts could not be upset on the ground of uncertainty as to the total number of members.

In relation to this implied duty to consider the merits of some or all of the known members, Harman J. suggested that a member of the class could procure the removal of a trustee who had "deliberately refused to consider any question at all as to the want or suitability of any member of the class."[12] This appears to be the first case in which any such duty has been expressly referred to in connection with a discretionary power of appointment, and although the obligation involves no more than determining in relation to each member known to the trustee whether or not any appointment should be made, it seems inconsistent with the nature of a mere power. Moreover, a breach would be difficult to establish in the absence of fraud or deliberate refusal to consider. Yet despite these objections, such a duty seems necessary for the purpose of effectuating

[6] The result of this would be that the money would have been the settlor's by way of resulting trust, i.e. it would have been the money of an individual given to a charity not under a covenant, and as a result the charity would have had no right to recover the tax.
[7] See *supra* n.5.
[8] *In re Ogden* (1933) Ch. 678..
[9] *Re Speague* (1880) 43 L.T. 236.
[10] (1953) 1 Ch. at 658.
[11] *Ibid.*
[12] (1953) 1 Ch. at 688.
[13] But *cf. In re Ogden* (1933) Ch. 678.

a settlement such as the one involved. But it is doubtful whether any such duty should be implied in relation to a mere power of appointment, apart from such a settlement, since it would lead to the hampering of the absolute discretion which distinguishes a mere power from a trust. It is important to note in this respect that the duty was so limited as not to be frustrated in any way by the uncertainty as to the membership of the class.[13]

The second question which the Court had to determine was whether a power of appointment in favour of an indefinite though limited class was valid. The two recognised classes of powers of appointment are general powers and special powers.[14] But there are several cases which recognise the existence of a third class of power, neither general nor special.[15] Among these the most important are *In re Park*[16] in which a power to appoint to anyone other than the appointor was held valid, and *In re Jones*,[17] in which a power to appoint to anyone living at the death of the appointor was held valid. Although it has been attempted to assimilate these powers to special powers on the basis that certainty may be achieved as well by an exclusive as by an inclusive definition,[18] this does not seem to be a satisfactory explanation of *In re Jones*,[19] which must be taken to support the proposition expressly affirmed in *In re Gestetner*,[20] that a power of appointment which is neither general nor special, but which is in respect of an indefinite though limited class, is valid.[21] It is to be remembered that *In re Gestetner*[22] dealt with a settlement created by deed, and that as the rules of testamentary disposition are in some respects stricter, such powers may not be valid if created by will.[23]

In 1949 J. G. Fleming, in an article "Hybrid Powers"[24] suggested that this so called third class of power should not be recognised as such with its own rules, but that each of the new powers should be construed individually so as to fall within either of the established classes. For this purpose he suggests a new division of powers into (1) powers unlimited as to method of exercise and choice of objects (these would always be regarded as general powers), and (2) powers limited as to either method of exercise of choice of object. This second class would, he suggests, be characterised as special or general according to the purpose of classification.[25]

There are several cases in which powers strictly neither general nor special

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[14] A special power would be a gift for such members of a certain and definite class as X may appoint. A general power would be a gift "for such persons as X may appoint"; X in such a case can appoint himself and has a right which is in many respects the equivalent of property.

[15] E.g., *Re Harvey* (1950) 1 All E.R. 491, and cases cited *infra* n.26.

[16] (1932) 1 Ch. 580.

[17] (1945) Ch. 105.

[18] *Per* Kitto, J. in *Tatham* v. *Huxtable* (1950) 81 C.L.R. 639, 656.

[19] (1945) Ch. 105.

[20] (1953) 1 Ch. 672.

[21] But see a *dictum* of Fry, J. in *Blight* v. *Hartnoll* (1881) 19 Ch. D. 294, 301, to the effect that the appointer must know the class and that a discretionary power cannot be exercised where the persons are not known. A criticism of this statement, appearing in Farwell, *Powers* (3 ed. 1916) 168-69, was approved in *In re Gestetner* (1953) 1 Ch. at 687.

[22] (1953) 1 Ch. 672.

[23] Testamentary power cannot be delegated; the testator must choose his own beneficiaries and cannot leave the disposal of his property to others (*Chichester Diocesan Fund* v. *Simpson* (1944) A.C. 341, 349; *Houston* v. *Burns* (1918) A.C. 337, 342-43). A special power satisfies this rule and also a general power, because the beneficial interest is passed to the donee to dispose of as his own but in *Tatham* v. *Huxtable* ((1950) 81 C.L.R. 639) it was held that a power to appoint among an indefinite, though limited class was not a true testamentary disposition. Fullager, J. (at 648-650) doubts *In re Jones* ((1945) Ch. 105) and *In re Park* ((1932) 1 Ch. 580), both cases involving wills on this ground, though he admitted that the powers were otherwise good.

[24] (1949) 13 *Conveyancer and Property Law* (N.S.) 20.

[25] These purposes include the rule against perpetuities (a special power must be capable of being read into the original document), testamentary disposition (under s.27 of the Wills Act, 1837 (Eng.) (7 Will. 4 & 1 Vict., c.43) and s.23 of the Wills, Probate and Administration Act, 1898 (N.S.W.) (Act No. 13, 1898 — Act No. 41, 1947) general words of disposition pass property which the testator may appoint in any manner he may think

have been recognised as such for some purpose.[26] As these powers are of varying natures,[27] they could not form one new class of powers with its own rules. As a result of their recognition, the question of whether a power will have the effect of either a general or special power, e.g. in relation to the rule against perpetuities,[28] may not be determined by whether it corresponds with the recognised definition of either of these powers, as there exist several powers which do not fall strictly within these definitions. This means that the nature of the new power and the purpose of the distinction between general and special powers in the particular instance, e.g. the rule against perpetuities, must be looked at to determine the effect of the new power. This result will in each case be similar to that of either a general power or a special power, and therefore, it could be said, as was suggested by Dr. Fleming, that in relation to the rule against perpetuites, a power such as that in *In re Jones*[29] is to be regarded as a special power. But it should not be overlooked that general and special powers are in reality only the two main types among several kinds of powers.

There are not yet sufficient decisions to indicate whether these "hybrid" powers will be divided into further distinct classes each with its own rules. Should they become numerous, however, such a division may result in greater clarity than can be achieved by regarding a particular power as special for one purpose and general for another.

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proper), and the administration of assets (under ss. 32 (1) and 34 (3) of the Administration of Estates Act, 1925 (Eng.) (15 & 16 Geo. 5, c.23) and s.46 A of the Wills, Probate and Administration Act, 1898 (N.S.W.) property disposed of under a general power is assets for the payment of debts).

[26] *In re Dilke* (1925) 1 Ch. 35; *In re Phillips* (1931) 1 Ch. 374; *In re Watt's Settlement* (1931) 2 Ch. 302; *Re Harvey* (1950) 1 All E.R. 491; *Re Penrose* (1933) Ch. 793. See also *Re Byron's Settlement* (1891) 3 Ch. 474; *Platt* v. *Routh* (1840) 3 Beav. 257; *Drake* v. *A.G.* (1843) 10 Cl & F. in 251 (H.L.).

[27] They include powers to appoint among an indefinite though limited class, powers to appoint to any one except certain persons, and powers to appoint to any one with the consent of certain persons.

[28] See *supra* n.25.

[29] (1945) Ch. 105.

EDITOR'S NOTE: *The decision of the Privy Council in* HUGHES AND VALE PTY. LTD. V. N.S.W. *was handed down after this Case Law section was closed. In view of the importance of that decision a preliminary note has been included on pp. 429-431*