NOTES

THE LAW SCHOOL—The anticipated falling off in First Year enrollment has not taken place. Our entering class is in fact five larger than last year; the total registration in all three classes is two larger than that of last season.[1] Attention was called last November to the upward trend in the numbers coming from colleges other than the University of Pennsylvania. This movement is again marked.[2] The proportion of those coming from distant homes has, however, slightly decreased,[3] as might be expected under the present financial strain of support away from the student's family.

Measures of economy have been forced by present conditions upon all departments of the University, but by careful adjustments we have reduced to a minimum the consequent interference with the normal program. Quasi Contracts and Domestic Relations have been temporarily dropped from the Second Year roster and Insurance from the Third Year. Laurence H. Eldredge, Esq., LL. B., 1927, of the office of Montgomery and McCracken, Philadelphia, will aid Professor Bohlen in the conduct of the Seminar in Tort Problems. Last year we announced that Partnerships and Private Corporations would hereafter be merged under one subject head, Business Associations, which would be carried through two years. Last year's Second Year Class was the first group to receive instruction from this new angle. This year both Second and Third

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[1] Class enrollment:

	1932-33	1933-34
First Year	180	185
Second Year	121	125
Third Year	105	98
Graduate and unclassified	9	9
Total	415	417

[2] DEGREE DISTRIBUTION

University of Pennsylvania:		Harvard	5	Rochester	1
College	32	Hiram	1	Rutgers	2
Wharton	19	Holy Cross	1	St. Joseph's	7
Miscellaneous	2	Juniata	1	Susquehanna	2
	— 53	Lafayette	4	Swarthmore	7
Other Institutions:		La Salle	1	Temple	5
Albright	1	Lehigh	5	Union	2
Amherst	1	Mount St. Joseph's	1	United States Naval Academy	2
Brown	2	Muhlenberg	3	University of Delaware	1
Bucknell	4	New Mexico	1	University of Kansas	1
Carnegie Tech	1	Notre Dame	2	Ursinus	5
Cornell	1	Ohio State	1	Villanova	2
Dartmouth	3	Ohio Wesleyan	1	Williams	2
Dickinson	2	Pennsylvania Military College	2	Yale	7
Franklin & Marshall	6	Pennsylvania State	13	Foreign	1
Georgetown	2	Pittsburgh	1		
Gettysburg	2	Princeton	6	Total	185
Haverford	11				

	1932-33	1933-34
From University of Pennsylvania	31+%	28+%
From other Colleges	68+%	71+%

[3] GEOGRAPHICAL DISTRIBUTION

	1932-33	1933-34
Philadelphia	38+%	41+%
Pennsylvania (outside Philadelphia)	48+%	46+%
Other States and Foreign Countries	13+%	12+%

Year classes will work upon the problems of the changing law of group rights and liabilities with a more modern approach.

The new materials used in the Second Year course are being constantly molded as experience in the class room suggests improvement. A third year course in advanced problems in the law of corporations has been established under the direction of Professor Frey and Mr. Thomas K. Finletter of the New York Bar. The content of this course will be kept flexible and subject to variation from year to year to meet current situations. This year the mimeographed material employed will relate principally to Law and Accountancy, Corporate Reorganization and Receivership, Issuance of Securities and Mergers and Consolidations.

Professor John Dickinson, appointed last spring to the position of First Assistant Secretary of the Department of Commerce, Washington, continues his courses in Constitutional Law, Administrative Law, and Public Service Corporations.

I am happy to use this occasion to acknowledge our gratefulness to Judge George Gowen Parry of the Court of Common Pleas, Philadelphia, and to those alumni who contributed with him towards the expense of cleaning the valuable collection of law engravings which hang in our class rooms. To Philip Price, Esq., we also express our appreciation of a large gift, mainly of English material, from the library of his father, the late Eli Kirk Price, for many years President of the Law Alumni.

The Pennsylvania Bar examinations held in July were passed by 71.9 per cent. of those coming up with degrees from our Law School. The percentage of all candidates was 43.3.

Students excluded for a year for scholastic deficiency, but entitled to re-examination for reinstatement, are now permitted under a late ruling of the Faculty to attend their failed courses as auditors. It is hoped that this provision for an ordered program of review will lead to a more successful subsequent history for this group both in the Law School and at the Bar examinations.

Herbert F. Goodrich.

TAXABILITY OF POWERS OF APPOINTMENT UNDER STATE AND FEDERAL STATUTES—Powers of appointment have long been known to the common law as a facile and useful method of conferring interests in land.[1] Their development was fostered by Chancery in connection with uses prior to 1535 and thereafter in connection with trusts.[2] In the course of the three centuries following the Statute of Uses, powers were gradually developed and classified, analogies with shifting and springing uses, of which powers constituted the most useful and convenient applications, having been of no uncommon occurrence.[3] A power of appointment was regarded as an authority to do an act in relation to real property, or to the creation of an estate therein, which the owner, granting the power, might himself lawfully perform.[4] In itself, it comprised no interest or estate in land.[5] It represented merely a right of disposition which the grantor (the donor of the power) vested in the grantee (the

[1] See CHANCE, POWERS (1841); FARWELL, POWERS (3d ed. 1916); SUGDEN, POWERS (8th ed. 1861). No reference will be made in this note to powers of revocation, which, in themselves, comprise a distinct field of taxation.

[2] GOODEVE AND POTTER, MODERN LAW OF REAL PROPERTY (5th ed. 1929) 345; see BURDICK, REAL PROPERTY (1914) § 268 *et seq.*

[3] GOODEVE AND POTTER, *loc. cit. supra* note 2; WILLIAMS, REAL PROPERTY (24th ed. 1926) 455.

[4] BURDICK, *op. cit. supra* note 2, at 723; GOODEVE AND POTTER, *op. cit. supra* note 2, at 344.

[5] Eaton v. Straw, 18 N. H. 320 (1846); BURDICK, *op. cit. supra* note 2, at 724.

donee) to be exercised in favor of another (the appointee). Despite having granted the power, the donor's interest in his land remained intact and, as a logical development, when the power was exercised, the appointee's interest in the land was derived from the instrument creating the power.[6] Thus the appointee was considered as taking directly from the donor.

If the power, granted by will or deed, was sufficiently extensive, so as to include anyone whom the donee might nominate, even himself, the power was considered to be general. But if the donee was limited in his appointment to a specific class, or to certain designated persons, the power was deemed to be limited or special.[7] Numerous other classes of powers were developed by conveyancers [8] but are unimportant in the present discussion.

One of the problems arising early in the law in connection with the use of powers of appointment was the rights of the creditors of the donee in the property which the donee's general power of appointment controlled. As long as the donee could pay his obligations, or, being unable to do so and the power remaining unexercised, the rights of creditors were not involved.[9] But where the donee was insolvent and the general power was exercised, the situation was deemed to require different treatment. If the appointee was a volunteer, Chancery, in its historic zeal to defeat the claim of this legal parasite, would impress the property with the claims of creditors.[10] The Chancellor reasoned that since the donee was empowered to appoint himself, what better motive than the payment of his debts should impel the donee to exercise in his own favor? Acceptance of this doctrine was not long postponed by many American courts;[11] indeed, in several of the states statutes have gone beyond this remedy and allow creditors to reach the property even before appointment.[12] A number of others, including Pennsylvania, have remained adamant and have refused to honor its dictates.[13] It is significant that both the English [14] and American [15] Bankruptcy Acts empower a trustee in bankruptcy to exercise, in favor of the donee's estate, a general power of appointment.

When Congress and many of the state legislatures enacted statutes taxing the transfer of property at death, or in contemplation of death, it was intended that existing powers of appointment were within their purview, though such intention was not expressly denoted in the acts. Applying the common law principle that the appointee takes directly from the donor, both state [16] and

[6] Christy v. Pulliam, 17 Ill. 59 (1855); FARWELL, *op. cit. supra* note 2, at 331; KALES, FUTURE INTERESTS (2d ed. 1920) 707; SUGDEN, *op. cit. supra* note 2, at 470.

[7] GOODEVE AND POTTER, *op. cit. supra* note 2, at 352; 1 TIFFANY, REAL PROPERTY (2d ed. 1920) § 315.

[8] See GOODEVE AND POTTER, *op. cit. supra* note 2, at 348, 349.

[9] Holmes v. Coghill, 12 Ves. 206 (Eng. 1806); FARWELL, *op. cit. supra* note 2, at 286. For excellent treatment of appointive property as assets of a bankrupt estate, see 1 TIFFANY, *op. cit. supra* note 7, at § 332.

[10] Jones v. Clifton, 101 U. S. 225 (1880); Security Trust Co. v. Ward, 10 Del. Ch. 408, 93 Atl. 385 (1915); Russell v. Joys, 227 Mass. 263, 268, 116 N. E. 549, 550 (1917); Holmes v. Coghill, *supra* note 9; Note (1929) 59 A. L. R. 1510 *et seq.*

[11] Clapp v. Ingraham, 126 Mass. 200 (1879); Freeman's Adm'r v. Butters, 94 Va. 406, 26 S. E. 845 (1897); (1929) 77 U. OF PA. L. REV. 422; (1929) 38 YALE L. J. 395.

[12] ALA. CODE (Michie, 1928) § 6928; MINN. STAT. (Mason, 1927) § 8115; N. Y. REAL PROPERTY LAW (1917) § 159; WIS. STAT. (1931) §§ 232.20, 232.30.

[13] Commonwealth v. Duffield, 12 Pa. 277 (1849); Rhode Island Hospital Co. v. Anthony, 49 R. I. 339, 142 Atl. 531 (1928); Note (1929) 59 A. L. R. 1510 at 1523. For a vigorous attack on the principle, see the opinion of Chief Justice Gibson in the Duffield case, *supra.*

[14] 4 & 5 GEO. V., c. 59, s. 38 (2b) (1914), 1 HALS. LAWS 644 (1929).

[15] 44 STAT. 667 (1926), 11 U. S. C. A. § 110 (Supp. 1932).

[16] *In re* Higgins, 194 Iowa 369, 189 N. W. 752 (1922); State v. United States Trust Co., 99 Kan. 841, 163 Pac. 156 (1917); Winn v. Schenck, 33 Ky. 615, 110 S. W. 827 (1908); Emmons v. Shaw, 171 Mass. 410, 50 N. E. 1033 (1898); Matter of Harbeck, 161 N. Y. 211, 55 N. E. 850 (1900); GLEASON & OTIS, INHERITANCE TAXATION (4th ed. 1925) 346; ROBINSON, SAVING TAXES (1930) 18.

federal [17] courts held the statutes inapplicable where such power was in existence prior to the passage of the act, the donor having died. Since the statutes made no express provision for the taxing of powers of appointment, the courts applied the usual formula that in order to impose a tax a transfer at death must have taken place. And since the donee takes directly from the donor, the property passing under the exercise of a power could not be taxed since the donor had been dead before the taxing act was in effect. To impose a tax on existing powers of appointment, the courts held, the statute must expressly so provide.

Thus, the enactments failed to reach many opulent life tenancies whose devolution depended upon powers, and revision was in order. New York led the way, and in 1897 [18] amended its act to provide that a tax should be imposed upon the exercise of a power of appointment, whether by deed or will, in the same manner as though the property belonged absolutely to the donee of the power. The amendment served as a model for other states.[19] Courts held the amendment imposed a valid tax on the exercise of a power even though such power was created prior to the passage of the amendment.[20] In other words, the defense of retroactivity, fatal to the application of the act prior to the amendment, was now ineffective. The United States Supreme Court found in it no constitutional infraction.[21] State courts, in refuting the argument that the act was retroactive, reasoned that the tax was imposed on a transfer and that the transfer did not become complete until the appointment was made, and at that time the law was in effect. But this reasoning might well have been applied to the statutes before they were amended. Probably the reason for holding the tax valid, after the amendment, was that a tax was expressly imposed and the courts were unable to avoid its effect. Before the amendment, the courts, because of the statute's silence as to powers of appointment, were able to dismiss its validity on interpretative grounds.

Though the statute required an obvious break with the existing state of the law, courts repeatedly held that it was not designed to change the common law.[22] The appointee was still recognized as successor in title of the donor.[23] Only for purposes of taxation was the donee treated as the appointee's predecessor in title. With the latter as a starting point, the rate of tax has been determined by the relationship of the appointee to the donee,[24] and valuation of the estate is made at the time of appointment rather than at the time of the creation of the power. With few exceptions, of which Pennsylvania is one,[25]

[17] United States v. Field, 255 U. S. 257, 41 Sup. Ct. 256 (1920); Lederer v. Pearce, 266 Fed. 497 (C. C. A. 3d, 1920); Ebersole v. McGrath, 271 Fed. 995 (S. D. Ohio, 1920).

[18] N. Y. CONS. LAWS (Cahill, 1923) c. 284, § 220, s. 6.

[19] GLEASON & OTIS, *op. cit. supra* note 16, at 349; PINKERTON AND MILLSAPS, INHERITANCE TAXATION (1926) 131; ROBINSON, *op. cit. supra* note 16, at 19.

[20] Matter of Vanderbilt, 163 N. Y. 597, 57 N. E. 1127 (1900); Montague v. State, 163 Wis. 58, 157 N. W. 508 (1916).

[21] Orr v. Gilman, 183 U. S. 278, 22 Sup. Ct. 213 (1902); Chanler v. Kelsey, 205 U. S. 466, 27 Sup. Ct. 550 (1907).

[22] Simes, *The Devolution of Title to Appointed Property* (1928) 22 ILL. L. REV. 480, 509.

[23] *Id.* at 511; Manning v. Board of Tax Commissioners, 46 R. I. 400, 127 Atl. 865 (1925).

[24] *In re* Luques, 114 Me. 235, 95 Atl. 1021 (1915); *In re* Rogers' Estate, 71 App. Div. 461, 75 N. Y. Supp. 835 (1902), *aff'd* 172 N. Y. 617, 64 N. E. 1125 (1902). *Contra:* Hill v. Treasurer, 229 Mass. 474, 118 N. E. 891 (1918); Bullitt's Est., 26 Dist. R. 566 (Pa. 1917). In North Carolina and Rhode Island, by statute, the rate is determined by the relationship of the appointee to the donor. N. C. CODE (1931) § 7880 (1); R. I. Gen. Laws (1929) c. 1355, § 4. In New York, where there is a failure to exercise the power, the relationship of the appointee to the donor determines the tax. N. Y. TRANSF. TAX REG. (1926) Arts. 91 and 92.

[25] Highfield v. Delaware Trust Co., 152 Atl. 124 (Del. 1930), *aff'g* 152 Atl. 117 (Del. Super. 1929). Pennsylvania so provides by statute. PA. STAT. ANN. (Purdon, 1930) tit. 72, § 2301.

the tax is levied on the estate of the donee.[26] Under the federal statute, even if the proper tax has been paid on the transfer from the donor at his death, there is a further tax to be paid on the tranfer under the appointment from the donee.[27] However, where a general power has been exercised within five years from the imposition of the first tax, the donee's estate is exempt from further levy.[28] In some state courts, especially New York, the only remedy open to the donee's estate where the tax has been once imposed, is to seek a modification of the order taxing the donor's estate.[29] The harshness of the New York rule is apparent, and its adoption by other states has not been general.

When imposing the tax, the statutes of the various states make no distinction as to the extent of the dominion over the property exercisable by the donee. All powers of appointment, whether general or special, are taxable.[30] This summary treatment of the donee seems, on its face, to be little short of arbitrary. A tax is imposed on the donee's estate where he exercises a minimum of control in the same degree as where he exercises the greatest possible control.

The Federal Estate Tax Act,[31] however, distinguishes between general and special powers, and declares that only property passing under a general power of appointment should be included, for tax purposes, in the gross estate of the donee.[32] But the importance of this distinction must, of necessity, vary with the interpretations of the courts when confronted, in particular cases, with powers of appointment. The first question to arise is, did Congress have in mind the common law distinctions between general and special powers when it enacted the statute? If so, will effect be given to the statute by adhering to such distinctions?

The commonest case arising under this section of the Act involves the situation in which the donee is given power to appoint in favor of anyone, but is limited to its exercise by will. To place the power in the category of general powers, the common law required the right to exercise the power both by will

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[26] Stratton v. United States, 50 F. (2d) 48 (C. C. A. 1st, 1931), *certiorari* denied 284 U. S. 651, 52 Sup. Ct. 31 (1931); Matter of Dow's Estate, 167 N. Y. *227*, 60 N. E. 439 (1901); GLEASON & OTIS, *op. cit. supra* note 16, at 348. But in New York if the donee fails to exercise the power, the tax is assessed on estate of donor. *In re* Duff, 114 Misc. 309, 186 N. Y. Supp. 259 (1921).

[27] ROBINSON, *op. cit. supra* note 16, at 81.

[28] *Ibid.*

[29] *Re* Tillinghast, 94 Misc. 50, 157 N. Y. Supp. 382 (1916), *aff'd* 184 App. Div. 886, 170 N. Y. Supp. 1116 (1918).

[30] Burnham v. Treasurer, 212 Mass. 165, 98 N. E. 603 (1912); Matter of Dow's Est., *supra* note 26; Montague v. State, *supra* note 20; Bentley, *Inheritance Taxation on Powers of Appointment* (1929) 23 ILL. L. REV. 446, 451; ROBINSON, *op. cit. supra* note 16, at 23.

[31] The federal act, as amended, in 1926, reads: "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible, or intangible, wherever situated. . . .

(f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, . . . except in case of a bona fide sale for an adequate and full consideration in money or money's worth". 44 STAT. 70 (1926), 26 U. S. C. A. § 1094f (1928).

This section of the Act was amended in June, 1932, by inserting between the words "at or after, his death" and "except in case of a bona fide sale", the following: "or (3) by deed under which he has retained for his life or any period not ascertainable without reference to his death or for any period which does not in fact end before his death (A) the posession or enjoyment of, or the right to the income from, the property, or (B) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom, . . ." 47 STAT. 279 (1932), 26 U. S. C. A. § 1094f (Supp. 1932).

[32] Farmers Loan & Trust Co. v. Bowers, 29 F. (2d) 14 (C. C. A. 2d, 1928); Leser v. Burnet, 46 F. (2d) 756 (C. C. A. 4th, 1931); Surrey and Aronson, *Inter Vivos Transfers and the Federal Estate Tax* (1932) 32 COL. L. REV. 1332, 1360.

or deed. Only in this way was it possible for the donee, during his lifetime, to appoint himself. But the courts avoided this apparent obstacle, when confronted with it, and, while pronouncing continued adherence to the precepts of the established law, held such a power to be general, and taxable as such.[33] The fact that the donee could not exercise the power for his own benefit during his lifetime did not interfere with its being a general power under the federal act.[34]

In *Whitlock-Rose v. McCaughn*[35] the Circuit Court of Appeals found "general" not to refer to the mode or manner of the exercise of the power, but to the "absence of limitations" on the power when exercised in the prescribed manner. Yet several years earlier in *Fidelity Trust Co. v. McCaughn*[36] the same jurisdiction held a power not to be general where it was limited to disposition by will on condition that the donee remain unmarried, even though the donee did, in fact, remain unmarried and exercised the power. So long as the donee remained unmarried, there was no "absence of limitations". She might have appointed anyone. Her dominion over the appointive property, so long as she remained unmarried, was no less than the dominion of the donee in the *Whitlock-Rose* case. Moreover, the two cases are directly contradictory in their definitions of a general power of appointment within the meaning of the statute. The *Fidelity* case defines it thus:

> "A general power of appointment . . . is of such a character that the donee of it has actual and practical dominion of the property as fully to all practical intents and purposes as if it were owned outright".[37]

Inasmuch as the *Whitlock-Rose* case represents a later adjudication, it must be taken as limiting the *ratio decidendi* of the *Fidelity* case. Subsequent decisions of the federal courts support this conclusion.[38]

A power of appointment will not be regarded as special, to avoid the tax, where a limitation arises from the inherent nature of the property controlled, rather than from any restriction as to the exercise of the power itself. It is immaterial if the property is a fee or less; if the interest be legal or equitable; or if enjoyment is to take place at present or in the future.[39]

> "The important thing is the latitude of the donee's powers of disposition, rather than the quantum of the interest which he may dispose of, or the time of its vesting".[40]

We may conclude, then, for federal estate tax purposes a power is regarded as special when it is restricted by the donor to particular objects or beneficiaries; a power is regarded as general when it is not restricted by the donor to particular objects or beneficiaries, even though the method of exercising it is restricted.

The federal courts having set forth what they regard as a general power of appointment, and having repeatedly affirmed that a special power is to be

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[33] Minis v. United States, 66 Ct. Cl. 58 (1928), *certiorari* denied 278 U. S. 657, 49 Sup. Ct. 186 (1929); Fidelity-Phila. Trust Co. v. McCaughn, 34 F. (2d) 600 (C. C. A. 3d, 1929), *certiorari* denied 280 U. S. 602, 50 Sup. Ct. 152 (1929); Stratton v. United States, *supra* note 26; Lee v. Commissioner, 57 F. (2d) 399 (App. D. C. 1931), *certiorari* denied 286 U. S. 562, 52 Sup. Ct. 645 (1932); Blackburne v. Brown, 43 F. (2d) 320 (C. C. A. 3d, 1930).

[34] Fidelity-Phila. Trust Co. v. McCaughn, *supra* note 33.

[35] 21 F. (2d) 164 (C. C. A. 3d, 1927).

[36] 1 F. (2d) 987 (E. D. Pa. 1924).

[37] *Supra* note 36, at 988.

[38] See Surrey and Aronson, *supra* note 32, at 1361, 1362.

[39] Fidelity-Phila. Trust Co. v. McCaughn, *supra* note 33.

[40] *Per* Kirkpatrick, District Judge, *id.* 604.

excluded from the estate tax, it is surprising to note the dearth of litigated cases involving special powers. An examination discloses that since the enactment of the statute in 1919, but three cases have been adjudicated in which a special power of appointment was involved. In *Farmers Loan & Trust Co. v. Bowers,*[41] where the Astor trust was before the judges, the Circuit Court of Appeals for the Second Circuit, in 1928, held the power of appointment to be special and the estate passing on its exercise to be exempt from taxation. In *Leser v. Burnet,*[42] the Circuit Court of Appeals for the Fourth Circuit, in 1931, held a power which prevented the donee from appointing his creditors to be special. This conclusion was reached on the basis of Maryland law which holds a power of appointment to be limited where the donee may not exercise it in favor of his creditors. In *Fidelity Trust Co. v. McCaughn,*[43] as already pointed out, a power was held to be special where the donee could exercise it only if she remained unmarried. However, the latter case should not be followed too strictly, especially in the light of subsequent decisions, since unrestricted dominion over the property was there reposed in the donee.

The great majority of trust estates are created with the object in mind of providing for specific beneficiaries after the settlor has died. It would seem, then, that draftsmen might well bear in mind the important distinction between general and special powers to avoid the payment of unnecessary taxes and still provide for all reasonable contingencies. Thus, in the ordinary case of an irrevocable trust with income payable to someone other than the settlor, the appointees might be restricted to a special group, such as the heirs of the donee, or those who would take under the state law if the donee died intestate. The power would then be special, and the federal estate tax would thus be avoided.

A problem which has caused the courts a great deal of concern and which has given rise to a well-defined difference of opinion is the taxability of property controlled by a power of appointment where the donee either has failed to make disposition of the property, or where he has exercised the power in favor of one who would have taken on default of such exercise. The difficulty arose when New York in 1897 [44] passed an amendment to its statute, providing, in substance, that the failure or omission to exercise a power of appointment subjects the property to a transfer tax in the same manner as if the donee of the power had owned the property and devised it by will. This provision was copied *verbatim* by several other states.[45]

Lansing's Estate [46] was the first case in which this provision was involved to come before the New York Court of Appeals. There, the appointee would have taken the identical property had the donee failed to exercise his power. The donee, however, exercised the power, but the appointee elected to take under the donor's will. The court, without hesitation, held the provision of the statute to be unconstitutional, and refused to permit the assessment of a tax, saying, "where there is no transfer there is no tax". A short time later the same court had occasion to review its decision in *Slosson's Estate,*[47] and reiterated the conclusion reached in the *Lansing* case, and, though unnecessary in the case before it, stated in no uncertain language that the decision would have been the same had the donee failed to exercise his power of appointment and had the legatee taken under the donor's will. The New York legislature, in

[41] *Supra* note 32.

[42] *Supra* note 32.

[43] *Supra* note 36.

[44] *Supra* note 18.

[45] See GLEASON & OTIS, *op. cit. supra* note 16, at 349.

[46] 182 N. Y. 238, 74 N. E. 882 (1905).

[47] 216 N. Y. 79, 110 N. E. 166 (1911).

1911,[48] shortly after the decision in the *Slosson* case, repealed the unconstitutional provision.

While several of the states which had copied the provision followed New York in repealing it,[49] the majority of them retained it on their statute books and, refusing to be influenced by the New York court, proceeded to give it the fullest possible effect.[50] The Supreme Judicial Court of Massachusetts was presented with the first opportunity of reviewing the act following *Lansing's Estate,* and in *Minot v. Treasurer,*[51] where the donee failed to exercise the power, upheld its constitutionality and imposed a tax on the donee's estate. The court, in subsequent cases,[52] reaffirmed its decision, which has been followed by many of the remaining states which had adopted the language of the New York act.[53] While the New York and Massachusetts cases can be distinguished on their facts, the New York cases involving actual exercise of the power with an election by the appointee to take under the donor's will and the Massachusetts cases involving defaults of exercise, the language of the courts is irreconcilable. It would seem, though no case has been found, that the Massachusetts court would affirm the imposition of a tax if the power was exercised, notwithstanding an election by the appointee to take under the donor's will. While Congress did not adopt the New York amendment, nor language similar to it, the federal courts interpret the federal statute as imposing a valid tax on property passing under a general power of appointment where the appointee would have taken the same property in default of the exercise.[54] The question of the validity of a tax if the power was not exercised has not been raised.

The theory on which the Massachusetts court seeks justification is that the presence of a power in one vests in him the "possibility of disposition", and that a failure to exercise a power is as much a disposal of property as if the donee, in fact, had executed the power. In other words, by refraining to act the donee has disposed of property with the same effect as if he had acted. Since he might have named anyone as the recipient of property, his default thereof amounts to an appointment in favor of the person who takes under the donor's will. The New York court, on the other hand, reasons that the donee, in both situations, takes no part in the disposition of the property, and fails

[48] N. Y. TRANSF. TAX LAW (1911). If the power is exercised to dispose of part of the property different from the way in which it would have gone if there had been no exercise, the tax will apply to that part only. Matter of Ripley, 122 App. Div. 419, 106 N. Y. Supp. 844 (1907), *aff'd* 192 N. Y. 536, 84 N. E. 1120 (1908). If the donee makes material changes in the devolution, the rule in the Lansing case will not apply. *In re* Cooksey, 182 N. Y. 92, 74 N. E. 880 (1905).

[49] Murphy's Estate, 182 Cal. 740, 190 Pac. 46 (1920); see GLEASON & OTIS, *op. cit. supra* note 16, at 350.

[50] ROBINSON, *op. cit. supra* note 16, at 20.

[51] 207 Mass. 588, 93 N. E. 973 (1911).

[52] Burnham v. Treasurer, *supra* note 30; see Attorney General v. Thorpe, 230 Mass. 19, 119 N. E. 191 (1918).

[53] Manning v. Board of Tax Commissioners, *supra* note 23, where the tax was assessed on the donor's estate. For complete table of jurisdictions taxing transfers on non-exercise of powers, see PINKERTON AND MILLSAPS, *op. cit. supra* note 19, at 136.

[54] In Grant v. Commissioner, 13 B. T. A. 174 (1928), the Board of Tax Appeals refused to impose a tax in this situation. However, Hancy v. Commissioner, 17 B. T. A. 464 (1929) expressly overruled the Grant case and imposed a tax. In Bishop v. Commissioner, 23 B. T. A. 920 (1931), the same situation was involved. The Board accepted the decision of the Hancy case, expressly stating that it did so on the authority of Tyler v. United States, 281 U. S. 497, 50 Sup. Ct. 356 (1930). The Tyler case, however, was not precisely on point since a tenancy by the entirety, and not a power of appointment, was involved. However, the same reasoning should apply to both situations. Lee v. Commissioner, *supra* note 33, and Wear v. Commissioner, 26 B. T. A. 682 (1932) have reiterated the conclusions of the Bishop and Tyler cases.

to give the appointee or legatee more than the latter already enjoys. In other words, the donee should not be taxed for transferring property at his death when he, in fact, failed to make a transfer. Logic and justice require a preference for the New York rule, but, it seems, the omnipresent need for government revenue is so far controlling that courts are willing to be guided by its demands.

As has been pointed out, Pennsylvania is one of the few states which tax the estate of the donor on the exercise of a power of appointment. Possibly as an offshoot of this condition, it has developed, peculiar unto itself, a doctrine known as "blending". By means of this doctrine a tax is imposed on the estate of the donee of a general power of appointment where by will he discloses an intention to blend the appointed property with his own estate for all purposes.[55] The Supreme Court of Pennsylvania has found considerable difficulty in applying the principle to specific cases; the determination of the donee's intention constituting the chief problem. In *Commonwealth v. Morris*[56] the court laid down as the test, whether the donee had treated the two estates as one for all purposes and manifested an intention to commingle them generally. Subsequent cases have not disclosed any tendencies toward expansion of the principle, but, if anything, give evidence of restricting its application.[57] No other jurisdiction has seen fit to adopt the doctrine of blending, and at least one court has aimed at it a volley of criticism.[58]

One of the perplexing problems of taxation which powers of appointment have not been able to escape is that of jurisdiction. Which state has power to tax when the donor is a resident of state *A*, the donee a resident of state *B*, and the property passing under the exercise is located in the state of the donor's domicil or the donee's domicil, or the property is located in one state and the donor and donee are domiciled in a different state? In those states where the appointed property is considered as passing from the donee, it might be expected that, under the doctrine of constructive *situs* as applicable to personalty, the property would be taxed by the state of the donee's domicil, notwithstanding such property is located in a foreign state. Some jurisdictions so decide,[59] but the majority hold to the contrary. Thus, in the California case of *Estate of Bowditch*[60] no tax was imposed though the donee was a resident of California and the property was located in a foreign state of which the donor had been a resident. The Supreme Court of the United States in *Wachovia Bank & Trust Co. v. Doughton*[61] reached the same conclusion on similar facts, though in so deciding it was necessary to reverse a decision of the Supreme Court of North Carolina. Connecticut has followed the *Wachovia* case.[62] New

[55] McCord's Est., 276 Pa. 459, 120 Atl. 413 (1923); Forney's Est., 280 Pa. 282, 124 Atl. 424 (1924); Twitchell's Est., 284 Pa. 135, 130 Atl. 324 (1925).

[56] 287 Pa. 61, 134 Atl. 429 (1926).

[57] See Valentine's Est., 297 Pa. 99, 146 Atl. 453 (1929); Mayer's Est., 14 D. & C. 521 (Pa. 1930); see also Hagen's Est., 285 Pa. 326, 132 Atl. 175 (1926). The history of the doctrine is interesting. It was first applied by Judge Penrose of the Orphans' Court of Philadelphia in Stoke's Est., 20 W. N. C. 48 (Pa. 1887) where creditors claimed the donee exercised the power in distributing, along with his other assets, the property subject to the power. "Blending" was argued by counsel for the creditors, Mr. John G. Johnson, in an endeavor to defeat the effects of the Pennsylvania rule that creditors of a donee cannot lay claim to property passing under the exercise of a power. The court accepted the argument without citing a single authority in its favor. "Blending" was reiterated by the same Judge in Finn's Est. (No. 2), 18 Pa. Dist. 408 (1899). McCord's Estate, *supra* was the first pronouncement of "blending" by the Pennsylvania Supreme Court.

[58] McMurtry v. State, 111 Conn. 594, 151 Atl. 252 (1930).

[59] State v. Probate Court, 124 Minn. 508, 145 N. W. 390 (1914).

[60] 189 Cal. 377, 208 Pac. 282 (1922).

[61] 272 U. S. 567, 47 Sup. Ct. 202 (1926).

[62] McMurtry v. State, *supra* note 58.

York,[63] Massachusetts,[64] and Pennsylvania [65] are in accord with this view. The test employed by these courts is the actual *situs* of the property, since the acts of the donee in exercising the power do not give the state jurisdiction to tax. Thus, Massachusetts [66] and New York [67] imposed a tax on property within their borders though both the donor and donee were nonresidents. This test is satisfactory since it reduces the possibility of multiple taxation, an evil which the states have attempted to control by other measures.[68] Under the rule of the minority courts, both the state in which the donee is domiciled and the state in which the property is located levy a tax on the donee's estate.

A question involved in almost every case in which counsel contest the imposition of a federal tax on the exercise of a power of appointment, is the status of the state law as a determinant of the validity of the tax. It is generally held that the laws of the state determine the property rights passing on the exercise of a power.[69] It is also a settled rule that a federal statute is to be applied uniformly throughout the various states.[70] While, at first glance, these two principles appear to be in conflict, since the law differs in the various states, the courts, though with a few exceptions,[71] find no difficulty in applying them. Both are taken to mean that the laws of a state are binding on a federal court insofar as the vesting of property interests are concerned, but when such interests have been defined the further question of their taxability under the federal estate law is controlled by federal decisions.[72] Thus, in *Pennsylvania Co. v. Lederer,*[73] the District Court for the Eastern District of Pennsylvania affirmed the assessment of a tax on the donee's estate notwithstanding that under the law of Pennsylvania the appointees take, not under the will of the donee, but under the will of the donor. And in the recent Supreme Court case of *Burnet v. Harmel* [74] the highest federal court asserted that the taxability of property passing by transfer depends solely on the federal statute, and that the state law may control the operation of a federal taxing act only when Congress expressly or by implication so provides.

H. T.

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[63] *Re* Brett, 123 Misc. 507, 205 N. Y. Supp. 154 (1922), *aff'd* 206 App. Div. 746, 200 N. Y. Supp. 915 (1923); *In re* Canda's Est., 197 App. Div. 597, 189 N. Y. Supp. 917 (1921); *cf. Re* Frazier, 188 N. Y. Supp. 189 (1912); *Re* Seaman, 187 N. Y. Supp. 254 (1913).

[64] Walker v. Treasurer, 221 Mass. 600, 109 N. E. 647 (1915); *cf.* Gardiner v. Treasurer, 225 Mass. 355, 114 N. E. 617 (1916).

[65] See Commonwealth v. Duffield, *supra* note 13.

[66] *In re* Canda's Estate, *supra* note 63.

[67] Walker v. Treasurer, *supra* note 64.

[68] Many of the states have entered into "reciprocity" agreements in order to eliminate multiple taxation of personal property. See ROBINSON, *op. cit. supra* note 16, at 45, for list of states affected by such agreements.

[69] Lederer v. Pearce, *supra* note 17; Lederer v. Northern Trust Co., 262 Fed. 52 (C. C. A. 3d, 1920).

[70] Fidelity Trust Co. v. McCaughn, *supra* note 36.

[71] See Leser v. Burnet, *supra* note 32.

[72] Stratton v. United States, *supra* note 26; Allen v. Henggeler, 32 F. (2d) 69 (C. C. A. 8th, 1929), *certiorari* denied 280 U. S. 594, 50 Sup. Ct. 40 (1929); Blackburne v. Brown, *supra* note 33.

[73] 292 Fed. 629 (E. D. Pa. 1921).

[74] 287 U. S. 103, 53 Sup. Ct. 74 (1932).