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POWERS OF APPOINTMENT AND ESTATE TAXES: I

By LOUIS EISENSTEIN

The author of a recent incisive commentary on powers of appointment and other paraphernalia of property law poses a very pertinent question: "For what good reason should contemporary American taxpayers be allowed to skip a generation or two of estate and inheritance taxes by the use of a verbal form invented several centuries ago to enable an English gentleman to make a will of land?" 1 This query is particularly relevant at a time when the Supreme Court is openly contemptuous of "shadowy and intricate distinctions of common law property concepts and ancient fictions," 2 and "elusive and subtle casuistries" which feed upon the "unwitty diversities of the law of property." 3 If a revenue system is to function successfully, it must burst the bonds of traditional property law classifications and concepts, for principles shaped in a different environment of conflict are inadequate instruments for the solution of modern fiscal problems. 4 Not only may property concepts be enmeshed in elaborate confusion, 5 but there is always the danger that they will be imported into the realm of tax law by the convenient principle that "an interpretation which is in accord with general concepts of property law is preferable to one which is not." 6 It is therefore necessary to cut through the entanglements of traditional property rationalism. 7

* The opinions expressed herein represent the personal views of the author, and do not necessarily reflect those of the Treasury Department.

† Senior Attorney, Tax Legislative Counsel's Office, Treasury Department.

7. Compare Oliver, Property Rationalism and Tax Pragmatism (1942) 20 Tex. L. Rev. 675.
Powers of appointment and federal estate taxation constitute an outstanding case in support of this thesis. "The power of appointment," writes Professor Leach, "is the most efficient dispositive device that the ingenuity of Anglo-American lawyers has ever worked out." And he indicates very clearly that powers are extremely "efficient dispositive" devices to avoid death taxes, if the appropriate ingenuity is employed. Another writer learned in the law of property puts the issue in even simpler, sharper terms: "there has been a tendency in late years to exalt Powers of Appointment, not for any great use for powers of appointment in our scheme of things but primarily to evade taxation." For many years the Treasury has struggled along in its effort to prevent avoidance with an obviously inadequate statute, which has been mutilated and distorted by supposedly "technically elegant" dogma. A renewed legislative attempt has finally been made in the 1942 Revenue Act to cope with the intricacies of powers and their tax avoidance potentialities. While the Act marks a point of departure in federal death taxation of


10. Id. at 808, 809. This is not to say that Professor Leach counsels the use of powers exclusively for tax avoidance purposes, but he leaves no doubt that one of the major benefits of powers is happy tax avoidance. He points out that as long as the property can be kept subject to a special power, it will avoid further taxation. He also observes that under careful drafting a period of upwards of 100 years can be secured for tax immunity. In addition, he advises the use of precautionary devices to safeguard the appointive property from a future change in estate taxation. Compare Professor Leach’s observations in Powers of Appointment and the Federal Estate Tax—A Dissent (1939) 52 HAY. L. REV. 961. See also Powell, Powers of Appointment (1941) 10 BROOKLYN L. REV. 233, 234, 249, 256; Covington, Powers of Appointment in Illinois (1938) 33 ILL. L. REV. 262, 268, 279; Thompson, supra note 8, 26 IOWA L. REV. at 549. In this connection it is interesting to recall that powers of appointment were originally avoidance devices. They were widely used to escape the rigidity of common law rules as to the alienation of property, thus enabling one to do that which the law purported to prohibit. Simes, The Devolution of Title to Appointed Property (1928) 22 ILL. L. REV. 460.

11. Bordwell, Book Review (1939) 53 HAY. L. REV. 157, 159-60. Professor Bordwell adds: “At best this will afford only temporary relief, for death and taxes are sure to catch up with one.” According to 3 RESTATEMENT, PROPERTY (1940) 1310-11, as of 1940 “the American case authority on powers of appointment is distinctly thin in quantity,” but “the number of cases presented to the courts is now rapidly increasing, due largely to the very substantial estate and inheritance tax advantages which often can be obtained by the creation of trusts with powers of appointment.”


appointive property, the case history of the old law is still significant, not only because a proper reflection of "legislative intention" must build upon the evils of the past, but also because the new treatment does not affect the estates of decedents who died before the date of enactment of the 1942 Act. Thus since tax liability of a number of such estates is yet to be determined pursuant to the discarded statute and its judicial gloss, the old law is still litigation law and, in a very practical sense, may be regarded as "existing" law, although at last stricken from the Code.

THE PRE-1942 LEGISLATIVE BACKGROUND

The drafters of the original estate tax statute of 1916 were not so naive as to omit provisions taxing property conveyed by transfer in contemplation of death or intended to take effect in possession or enjoyment at or after death, and property held jointly or by the entirety. But no mention was made of a number of significant property relationships, including powers of appointment. The first regulations were similarly silent on the subject of powers. Shortly thereafter, the Treasury issued a regulation stating that the gross estate included "property passing under a general power of appointment." This interpretation was premised upon section 202(a) of the 1916 Act, which provided for the inclusion of property in the gross estate "to the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate." The next step was the insertion of a new provision in the 1918 Act dealing explicitly with powers of appointment. This provision defined the gross estate as including "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

14. Section 401.
15. The new statute will be discussed in Part II of this article.
16. Revenue Act of 1916, § 202(b), (c).
17. Other omissions were dower and similar marital interests, and life insurance.
19. T. D. 2477, 19 Treas. Dec. Int. Rev. 84 (1917), incorporated, in effect, in U. S. Treas. Reg. 37, Art. XI (1917 ed.), and subsequently modified by T. D. 3088, 22 Treas. Dec. Int. Rev. 491 (1920). T. D. 2477 contained the following puzzling language: "When property is transferred by a special or limited power of appointment the question of taxability will depend upon the terms of the instrument by which the donee of the power—the appointor—acts. The facts, in every such case should be reported fully to the Commissioner in order that decision as to tax liability may be made." It seems that property subject to a special power was considered taxable, depending upon the circumstances, which were not stated.
20. This provision is discussed in 1 Paul, op. cit. supra note 4, § 4.02.
at or after, his death; except in a case of a bona fide sale for a fair consideration in money or money's worth." 21 The House Report 22 accompanying the amendment stated that it was enacted "for the purpose of clarifying rather than extending the existing statute." It emphasized that a donee of a general power is at the date of death "in a position not unlike" that of an owner, and that there is "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." The Report's final words were addressed to the evils of avoidance engendered by the 1916 Act: "The absence of a provision including property transferred by powers of appointment makes it possible, by resorting to the creation of such a power, to effect two transfers of an estate with the payment of only one tax." 23

Despite the fact that the 1918 amendment purported to clarify 24 rather than alter the existing statute, the regulations 25 issued thereafter drew a line between the powers taxable under the 1916 Act and those taxable under the 1918 Act. Taxability under the former Act depended "upon whether the property was subject to the claims of the creditors of the appointor, in preference to the person or persons in whose favor the power was exercised." 26 The regulations assumed that appointive property was generally so subject, recognizing, however, that the amenability of such assets to claims of the donee's creditors was determined by local property law. 27 Although subsection (a) of the 1918 Act provided, at least

21. Revenue Act of 1918, §402(e). Subsections (b) and (f) of the same section provided for the inclusion in the tax base of dower and similar marital interests, and life insurance. Section 811(g), the present provision relating to life insurance, has been amended by section 404 of the 1942 act.


23. The Report was surprisingly subdued. As a matter of fact, under the 1910 Act it was possible to avoid estate tax forever by simply setting in motion a succession of general powers to appoint by deed or will. Under the Rule against Perpetuities such a power "is valid if the donee must acquire the power within the period of perpetuities," and "the validity of the appointment is determined by reckoning the period of perpetuities from the date of creation of the power." Leach, Perpetuities in a Nutshell (1938) 51 HARV. L. REV. 638, 653, 654. Thus A may create a life estate for his child B, at the same time bestowing upon B a general power to appoint by deed or will. B may do the same for his offspring, and following generations may do likewise. See Comment (1937) 50 HARV. L. REV. 938, 945, in connection with the delegation of powers.


27. See T. D. 3088, 22 Treas. Dec. Int. Rev. 491 (1920). Not all states have embraced the English rule that the creditors of a donee exercising a general power can reach the appointed assets. O'Grady v. Wilmot, (1916) 2 A. C. 231. See 3 RESTATEMENT, PROP-
formally, that taxable property had to be subject to administration expenses incurred by the decedent's estate and to distribution as part of his estate, as well as subject to claims against the decedent, the Treasury apparently deemed it sufficient if only the latter condition was satisfied.\(^8\)

The Treasury's attempt to reach powers of appointment via section 202(a) collapsed very shortly in *United States v. Field,*\(^9\) A unanimous Court held that property taxable under that provision had to meet the following conditions "expressed conjunctively": the property had to be an interest of the decedent at the date of his death; the property had to be subject to the payment of charges against his estate and administration expenses; and the property had to be subject to distribution as part of his estate. Although under local law the property may have been subject to the claims of the donee's creditors, it was not, according to the Court, the donee's property. Furthermore, the appointive property was not distributable as part of the donee's estate.\(^3\) Thus by first assuming that an interest in property was a necessary condition to tax, and then defining "interest" as property owned by the decedent, the Court read all powers out of subsection (a). In this interpretation of the statute the Court pursued the well-worn path of the classical dogma that "the appointee takes from the donor of the power, not from the donee, even though the power is general."\(^3\) While one cannot quarrel very much with the Court's

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\(^8\) See Thumber, *Federal Estate Tax* (1921) 72.


\(^3\) See Ebersole v. McGrath, 271 Fed. 995 (S. D. Ohio 1920), *dismissed pursuant to stipulation,* 272 Fed. 1022 (C. C. A. 6th, 1921). Cf. Lederer v. Pearce, 266 Fed. 497 (C. C. A. 3d, 1920), reaching a similar result but on a basis which might support a tax under other circumstances. The regulations issued after the *Field* decision provided that "if the decedent died prior to the effective date of the Revenue Act of 1918, the value of the appointed property is not to be so included." U. S. Treas. Reg. 63, Art. 26.

\(^3\) Leach, *Cases and Materials on Future Interests* (2d ed. 1940) 580. Professor Leach continues: "Anyone can see that in a good many cases this concept flies in the face of common sense. Much of the law of powers is concerned with resolving the conflict between common-law theory and the practicalities of various situations that arise . . . ." See also id. at 654; (1938) 15 Proc. A. L. I. 279. Cf. Simes, *Fifty Years of Future Interests* (1937) 50 Harv. L. Rev. 749, 772: "Looked at broadly, it would seem that the major trend in the law of powers is one toward a recognition of the power as ownership rather than as a mere mandate. By that statement, it must not be inferred
general view that subsection (a) expressed conjunctive conditions, a more sympathetic Court would have noticed that its statement of those conditions hardly did justice to the statutory language. The provision, if read in a "reasonable" manner, imposed tax upon an interest in property which was subject to payment of charges against the decedent's estate, payment of administration expenses, and distribution as part of his estate. Property transferred by a general power could very well satisfy these conditions. For example, a donee exercising a general power might expressly subject the appointive property to liability for claims against the estate and administration expenses, and blend the appointive property with his individual property so that all the assets would be distributable as part of his estate. The Court, however, changed the tenor of the statute by its manner of paraphrasing.

After the decision in the Field case the Treasury apparently handled powers of appointment exclusively under the provision specifically defining their taxable status. This provision, amended at various times in several comparatively unimportant respects, emerged in the Internal Revenue Code as section 811(f), reading as follows:

“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, 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 possession 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; except

that a power is ownership; but only that the tendency is to treat the donee as if he were owner in a larger number of situations than fifty years ago." See further Covington, supra note 10, at 265. The dogma ties in with the doctrine of "relation back." For the development of this doctrine, see 1 Staats, op. cit. supra note 27, § 263. Even at common law the latter doctrine is not always literally applied. Marlborough v. Gedolphin, 2 Ves. Sr. 61 (Ch. 1750). See 3 Restatement, Property (1940) 1811, and compare criticism in McDougal, supra note 1, at 1105.

34. Compare In re Twitchell's Estate, 284 Pa. 135, 130 Atl. 324 (1925) ; In re Forney's Estate, 280 Pa. 222, 124 Atl. 424 (1924) ; In re McCord's Estate, 276 Pa. 459, 120 Atl. 413 (1923). See Comment (1942) 55 Harv. L. Rev. 1025, 1027; (1941) 41 Col. L. Rev. 538. However, this possible interpretation of the 1916 Act does not contradict the Court's assertion that the 1918 amendment was not merely clarifying. The regulations, in effect, conceded that the amendment did more than clarify by setting up two categories of powers for tax purposes. See discussion at p. 299 supra.
35. Clause 3 was inserted by the Revenue Act of 1932, § 803(b), in conjunction with § 803(a) relating to similar inter vivos transfers made by an absolute owner of property.
in case of a bona fide sale for an adequate and full consideration\textsuperscript{38} in money or money's worth . . . \textsuperscript{39}

\textbf{AN INEFFECTIVE STATUTE}

The Power Must be Exercised

The old statute presents an interesting paradox. While designed to forestall tax avoidance, or at least to impose tax if a certain dispositive device is employed, the statute in reality is a standing invitation to avoidance.\textsuperscript{36} A mere reading discloses that it does not apply unless the power of appointment is exercised by the decedent-donee.\textsuperscript{36} Since takers in default are generally those who would receive the property if the power were exercised, there is no appreciable countervailing motive to exercise the power.\textsuperscript{40}


36. The phrase "an adequate and full consideration" replaced "a fair consideration" in the Revenue Act of 1926, § 302(f).

37. At this late date there are clearly no constitutional doubts with respect to this provision, whether the power was created before or after the Revenue Act of 1918. Lee v. Commissioner, 57 F. (2d) 399 (App. D. C. 1932), cert. denied, 286 U. S. 563 (1932); Stratton v. United States, 50 F. (2d) 48 (C. C. A. 1st, 1931), cert. denied, 284 U. S. 651 (1931); Fidelity-Philadelphia Trust Co. v. McCaughn, 34 F. (2d) 600 (C. C. A. 3d, 1929), cert. denied, 280 U. S. 602 (1929); Pennsylvania Co. for Insurances on Lives v. Lederer, 292 Fed. 629 (E. D. Pa. 1921); Harry J. Brown, 38 B. T. A. 298 (1938); James C. Webster, 38 B. T. A. 273 (1938). See discussion in 1 PAUL, op. cit. supra note 4, § 9.05.

38. See Lewis Spencer Morris, 39 B. T. A. 570 (1939), where the decedent refrained from exercising a power because of tax consequences. This criticism, as well as others which follow, is confined to a power bestowed upon a donee by another person. A power to appoint reserved by one transferring property by trust or otherwise falls within subsection (c) and (d) of section 811, which are not similarly defective and consequently are not ineffective. See 1 PAUL, op. cit. supra note 4, § 9.03. Nevertheless there are decisions which erroneously treat reserved powers under subsection (f), sometimes with odd results. See Farmers' Loan & Trust Co. v. Bowers, 29 F. (2d) 14 (C. C. A. 2d, 1928); Waldemar R. Helmholtz, 28 B. T. A. 165 (1933), aff'd, 75 F. (2d) 245 (App. D. C. 1934), aff'd, 296 U. S. 93 (1935). See also Johnstone v. Commissioner, 76 F. (2d) 55 (C. C. A. 9th, 1935), cert. denied, 296 U. S. 578 (1935); Minis v. United States, 66 Ct. Cl. 58 (1928), cert. denied, 278 U. S. 657 (1929); Edward J. Hancy, 17 B. T. A. 464 (1929). Cf. Agnes Davis Exton, 33 B. T. A. 215, 222 (1935); Bank of New York and Trust Co., 21 B. T. A. 197, 204 (1930); U. S. Treas. Reg. 105, § 81.19. In this connection, see CONF. REP. No. 2586, 77th Cong., 2d Sess. (1942) 71 (Amendment No. 418).


Aside from the avoidance aspects of the situation, it seems clear that "failing to exercise a general power is one way of exercising it." A donee of a general power is endowed with a broad appointive discretion which for tax purposes, at least, is equivalent to outright ownership of the property. "To make a distinction between a general power and a limitation in fee, is to grasp at a shadow while the substance escapes." In refraining from formal exercise the donee is actually exercising the discretionary authority conferred upon him. He may be ratifying the choice made by the donor, but the quality of the choice is no longer the same. At the donor's death it is tentative; at the donee's death it is final and conclusive. The donee's failure to exercise his power is hardly removed from the absolute owner's failure to devise his individual estate. An exercise certainly possesses no peculiar attribute which calls for the differentiation. To argue that a non-exercise constitutes a "failure to exercise a privilege" is merely to toy with words. The donee enjoys a power to dispose of the property according to his understanding of the proprieties. As long as he "has the power of appointment, he is in control of the succession." If he is satisfied with the tentative remainder disposition, there is no need to be troubled with a formal exercise. He has nevertheless exercised his discretion and therefore his "privilege."


44. See Montague v. State, 163 Wis. 58, 61, 157 N.W. 508, 509 (1916), holding that "the failure to act equally affects the course of the succession, and until such failure is complete the succession is not fully determined." See further Burnham v. Stevens, 212 Mass. 165, 98 N. E. 603 (1912). Compare with respect to non-tax matters, Comment (1942) 55 HARv. L. REV. 1025, 1028.

45. See Angell, supra note 41, at 1283-84.


47. Compare McDougal, supra note 1, at 1110: "Both donor and donee, whether the power is 'exercised' or not exercised, are equally participants in the factual events which send the property to its ultimate takers. They both do something: the donor signs.
While it is generally said that local law determines whether or not a power of appointment has been exercised, this statement of principle does not mean that the local concept or understanding of "exercise" governs the interpretation of the term for federal purposes. One word may cover the skin of more than one idea. It was obviously not intended that the meaning of "exercise" should vary from state to state. For example, the Restatement, graciously borrowing from tax law for the benefit of property law, declares that creditors cannot reach property subject to a general power if the appointees receive interests identical with those allotted to them as takers in default. The Restatement rationalizes, with the appropriate caveat, that an appointment which fails to divest a taker in default of the interest bestowed upon him by the donor is not an exercise; the donee "does not exercise his power to alter the donor's disposition but merely declares his intention not to alter it." On the other hand, the Supreme Court has held in Helvering v. Grinnell that in similar circumstances a power is exercised within the meaning of the federal statute, although the exercise, for other reasons, does not entail estate tax consequences. The Grinnell case goes even further, for it is permissible to read the opinion as holding that a power is exercised even though the appointees renounce their shares under the appointment.

48. See 1 PAUL, op. cit. supra note 4, § 9.14; Griswold, supra note 8, at 944. Compare Towne v. Eisner, 245 U. S. 418, 425 (1918); Chafee, The Disorderly Conduct of Words (1941) 41 Col. L. Rev. 381; Cheatham, Book Review (1941) 55 HARV. L. Rev. 164. For further discussions as to the effect of local law generally, see 1 PAUL, op. cit. supra note 4, § 1.10 and SELECTED STUDIES ix FEDERAL TAXATION, SECOND SERIES (1938) 1; Comment (1941) 55 HARV. L. Rev. 255.


51. 3 RESTATEMENT, PROPERTY (1940) § 369, comment a. See also (1937-38) 15 PROC. A. L. I. 296; RESTATEMENT, PROPERTY (Proposed Final Draft No. 2, 1938) 151 (Messrs. Powell and Simes dissenting at 155). While the Restatement declares that creditors have no rights to the appointive assets because the power is not exercised, it seems more realistic to state that the power remains unexercised because the creditors have no rights. Whether they should be given rights in this situation is simply a policy matter. See discussion infra at 324.

52. 294 U. S. 153 (1935).

53. See discussion infra at 334.
for federal tax purposes, apparently connotes a transfer by the donee of an interest in property which would be legally effective if the donee were absolute owner of the property and the legal prerequisites of an effective appointment were applicable to a transfer by an absolute owner. Hence it is unimportant whether an appointee derives more, less, or the same benefits as compared with those conditionally granted to him as taker in default.  

Local law, however, impinges upon the question of exercise in various ways. For instance, such law determines whether a general residuary devise in the donee's will disposes of the appointive property. The same is true with respect to the validity of the testamentary act as affected by such matters as the donee's capacity to exercise the power and the Rule against Perpetuities. Or the effect of local law may involve a search for the applicable principle in the realm of conflicts. In the absence of a binding local decree with respect to the property in question, the Board or federal court attempts "to forecast" how a state court would react to the

54. To date this interpretation has been of little practical importance to the Government. See discussion infra at 318.


58. See, e.g., Estate of Zachary Smith Reynolds, 42 B. T. A. 145 (1940), aff'd sub nom. Helvering v. Safe Deposit & Trust Co. of Baltimore, 121 F. (2d) 307 (C. C. A. 4th, 1941), rev'd on other grounds, 316 U. S. 55 (1942); and discussion in 1 PAUL, op. cit. supra note 4, § 9.23.

59. At times there is no need to examine local statutes and decisions if a local decree has determined the question of exercise with respect to the particular power involved and such decree is deemed conclusive by the federal tribunal. See Estate of Cassius E. Wakefield, 44 B. T. A. 677 (1941); Union & Peoples National Bank, 30 B. T. A. 1277 (1934); cf. John S. Montgomery, 17 B. T. A. 491 (1929). In Potter's Estate, 13 D. & C. 667 (Pa. 1930), a decree of nonexercise was obtained for federal estate tax purposes. On the tax effects of local decrees generally see 1 PAUL, op. cit. supra note 4, § 1.11; Cardozo, Federal Taxes and the Radiating Potencies of State Court Decisions (1942) 51 YALE L. J. 783.

60. The Revenue Act of 1942, § 504, has changed the name of the Board of Tax Appeals to "The Tax Court of the United States." However, the former name is employed throughout this paper for purposes of convenience.

61. See Estate of Mary Adele Morris, 38 B. T. A. 408, 414 (1938). Cf. John Frederick Lewis, Jr., 1 T. C. No. 57 (1943), where the Board would have welcomed a local decree. In view of Helvering v. Stuart, 63 Sup. Ct. 140 (U. S. 1942), the Supreme Court
same question. In any event it is clear that the requirement of exercise entails a study of local law which is not supported by any persuasive policy considerations. The same control at death may produce varying results, depending upon the jurisdiction involved. While the revenue system cannot be divorced from local law, since such law creates legal rights and defines their scope and limitations, there is no need to expand the importance of local principles beyond the point where they respond to a reasonable tax rationale.

The recent decision by the Supreme Court in *Helvering v. Safe Deposit & Trust Company of Baltimore* indicates that an exercise is not a private matter between the donee and local law. Those who survive may affect both the devolution and the tax. Confusion results, however, in determining to what extent the acts of the survivors have affected the validity of the exercise. For example, when the takers in default or those who regard themselves as such challenge the donee's appointment, it is not unusual for the quarreling parties to effect a compromise allowing the appointment to stand in part and transferring the remaining portion of the property to the contestants. If such a settlement is made the following alternative results compete for recognition: the entire property is free from tax; the portion of the appointment permitted to remain infact is taxable; or the entire property is taxable regardless of the subsequent changes.

In the *Safe Deposit* case the donee had exercised his power of appointment in favor of his brother and sisters. Thereafter the representatives of the donee's children attacked the validity of the appointment, claiming that the property belonged to the children as takers in default. The claim of the appointees was based upon the alleged validity of the appointment and, in the alternative, upon alleged rights in their favor as takers in default. The issues were complicated by other factors, such as legitimacy and the validity of a divorce, but eventually a judicially approved settlement was reached whereby 37½ percent of the property was allocated

seems to be committed to the position that if local law is obscure, the determination of such law by the circuit court of appeals will not be reversed unless the Supreme Court is brought "to a conviction of error" on the part of the lower court.

62. See 1 *Paul*, op. cit. supra note 4, at 69.
63. 316 U. S. 56 (1942).
64. It is assumed that the requirement for passing is satisfied. See discussion infra at 318.
65. The factors are fully set forth in *Reynolds v. Reynolds*, 208 N. C. 578, 615, 182 S. E. 341, 363 (1935); *Estate of Zachary Smith Reynolds*, 42 B. T. A. 145, 152 (1940). See also the opinion of the circuit court of appeals in *Helvering v. Safe Deposit & Trust Co. of Baltimore*, 121 F. (2d) 307, 314 (C. C. A. 4th, 1941). Another factor was a settlement in trust for the decedent's first wife and child, which was incorporated in a judgment. There were further complications because of North Carolina's claim for inheritance taxes.
to the appointees. A bare majority of the Court held that the portion of
the appointment left intact was taxable to the extent that it was rooted
in the claim based on the validity of the appointment. It was, therefore,
necessary to determine how much of the property allocated to the brother
and sisters was attributable to their claim based on the appointment and
how much was attributable to their claim as takers in default. The case
was remanded to the Board for a determination of this issue, with due
recognition that at most the Board's decision would be "a rough esti-
mate" and "an approximation derived from the evaluation of elements not
easily measured." 66

The prevailing opinion relied upon the decisions in *Lyeth v. Hoey* 67 and
*Helvering v. Grinnell*. 68 In the former case the Court had held that prop-
erty received by an heir pursuant to a compromise of a will contest was
acquired by inheritance and was, therefore, not taxable income. 69 On that
occasion the Court had emphasized that any distinction between acquisition
under a judicial decree of invalidity and an acquisition pursuant to settle-
ment was "too formal to be sound." 70 It was argued in the *Safe Deposit*
case, however, that subsequent events should not be permitted to influ-
ence estate tax liability. 71 The majority countered with the response that
the decision in the *Grinnell* case expressly recognized the effect of events
after death. 72 According to the minority, *Lyeth v. Hoey* was irrelevant
in the present context because there the taxpayer received a portion of the
property in his capacity as heir, whereas here nothing passed by virtue of
the exercise.

Undoubtedly, as the majority points out, if the exercise had been
eventually sustained in the state courts, the appointed property would have
been taxed in its entirety. On the other hand, a determination that
the exercise was invalid would have freed the entire property from tax. 73 In

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66. 316 U. S. at 66.
67. 305 U. S. 183 (1938).
68. The minority also relied on the *Grinnell* case.
70. 305 U. S. at 196.
71. In *Lyeth v. Hoey* the property was immune from income tax whether received by the legatee or contesting heir.
72. Compare Ithaca Trust Co. v. United States, 279 U. S. 151 (1929) (involving a valuation issue); Mayer v. Reinecke, 130 F. (2d) 350 (C. C. A. 7th, 1942), *cert. denied*, 63 Sup. Ct. 257 (U. S. 1942). See 2 PAUL, op. cit. supra note 4, § 18.43. Aside from the *Grinnell* case it is clear that events after death may affect estate tax liability. Administration expenses are a common example. See also note 75 infra.
73. The circuit court of appeals, relying upon a local decree, had treated the exercise as invalid. 121 F. (2d) at 314. The Board had done likewise, although admitting that there was no conclusive adjudication. 42 B. T. A. at 160. The majority opinion in the Supreme Court held to the contrary on the basis of the opinion of the highest court,
the Safe Deposit case the question of validity was disposed of by an essentially private settlement, despite formal approval by the courts. It is arguable that since a settlement is no more determinative of legal rights than a litigant’s interpretation of the applicable law, the Board and federal courts should still determine the validity of an appointment under local law, regardless of a decree which is consensual in character. Otherwise an estate tax liability may be created by agreement subsequent to the decedent’s demise.

The Supreme Court’s decision in the Safe Deposit case leads to the conclusion that the exercise of the power is valid as to one portion of the property and invalid as to the other, although there is but one testamentary act. This conclusion is justifiable where the appointment made is partially invalid because of some substantive provision or because the

which “gave clear recognition to the alleged validity of the decedent’s attempted appointment as a basis of the claim the brother and sisters asserted.” 316 U. S. at 66.

The alternatives stated above do not allow for the possibility that since the appointees also asserted rights as takers in default the appointed shares did not “pass” under the rule of the Grinnell case and were therefore tax-exempt. See discussion infra at 318. A decision on this possibility would seem to require an additional examination of local law to determine whether the appointees were actually the takers in default as claimed. The compromise is no more entitled to the final word in this case than it is on the subject of exercise. The decision of the majority apparently accords no recognition to the possibility of applying the Grinnell case except, perhaps, to the extent that the Board is ordered to include only that portion of the property finally received by the brother and sisters which is attributable to their claim as appointees rather than their alternative claim as takers in default. But if the brother and sisters were nevertheless the takers in default under local law even this portion of the property should not be taxed unless the Grinnell case applies only if the appointees renounce the benefits of the appointment. Such a renunciation did not take place here. The Court’s general disregard of the “passing” problem which is implicit in the case may derive from its assumption that the Grinnell decision is based exclusively upon a renunciation. See discussion infra at 334.

74. See 42 B. T. A. at 166.
75. See Old Colony Trust Co. v. Commissioner, 73 F. (2d) 970 (C. C. A. 1st, 1934). Compare, however, the cases holding that where a charitable legatee conveys to the decedent’s heir a portion of its legacy in compromise of a will contest, the deduction is limited to the amount retained by charity. Thompson’s Estate v. Commissioner, 123 F. (2d) 816 (C. C. A. 2d, 1941); Sage v. Commissioner, 122 F. (2d) 480 (C. C. A. 3d, 1941), cert denied, 314 U. S. 699 (1942); accord, E. T. 17, 1940-1 Cum. Bull. 231. Here, of course, another consideration is involved; the desire to limit the deduction to amounts actually devoted to charitable ends. Compare, further, the old dower cases discussed in 1 Paul, op. cit. supra note 4, § 5.02.
76. Note the suggestion made in 1 Paul, op. cit. supra note 4, at 443-44; The tax consequences should be based upon the actual disposition agreed to by the interested parties unless the case is one “of clear and valid exercise, where the subsequent agreement is nothing but an ex post facto transaction inter vivos, that is to say, where there are in reality three different transfers, from the donor to the donee, from the donee to the appointee, and from the latter to persons participating in the agreement.”
formal requirements with respect to personality differ from those imposed in regard to realty. But no such factors came into play here. Instead the triers of the facts were instructed to determine how much of the appointment remained because of insistence upon its validity and how much survived due to the other claim. As a practical matter, of course, the burden of proof rests upon the taxpayer and, in the event of doubt, the valuation decision should veer in the direction of the Government. The minority was at a loss to understand how the Board, in determining the taxable portion, could calculate the relative weight and influence of the various considerations underlying the settlement in the precise language of mathematics. Nor does the majority, in the Safe Deposit case, indicate the criteria for such valuation. The Board can do no more than guess.

The Power Must be General

An additional avenue of tax avoidance is presented by the statutory requirement that the power must be general to render the appointed property taxable. The statute does not define a general power. But courts have been known to hear voices when others have been oppressed by

78. Compare Robinette v. Helvering, 63 Sup. Ct. 540 (U. S. 1943). This problem is probably even more difficult than that raised by contemplation of death cases, where the court's task is merely to determine the dominant or substantial motive for the transfer. See 1 PAUL, op. cit. supra note 4, § 6.06.
79. Compare discussion infra at 329.
80. See Humes v. United States, 276 U. S. 487, 494 (1928). According to Judge Frank, value in tax law "as almost always . . . involves a conjecture, a guess, a prediction, a prophecy." But a guess as such does not necessarily disclose value; it must, at least, be "educated." Commissioner v. Marshall, 125 F. (2d) 943, 946 (C. C. A. 2d, 1942). Compare United States v. State Street Trust Co., 124 F. (2d) 948 (C. C. A. 1st, 1942), requiring the Board to consider the contingency of remarriage as a valuation factor, with Robinette v. Helvering, 63 Sup. Ct. 540 (U. S. 1943), holding that the contingency of marriage is beyond the actuarial art, ignoring Brotherhood v. Pinkston, 293 U. S. 96 (1934), which held that the expectancy of remarriage could be valued and "the law of averages applies in respect of that event, as it does in respect of death and of other events." It may be that for valuation purposes there is some significant distinction between marriage and remarriage.
81. A statute so limited seems to reflect a basic attitude toward powers which permeates all thought on the subject. This attitude may be summarized as follows: (1) a power is general or special [but see Gold, The Classification of Some Powers of Appointment (1942) 40 Mich. L. Rev. 337]; (2) this differentiation "is no technician's formalism but represents a profound difference of attitude in the donor;" (3) a donee of a general power enjoys "practical ownership" whereas a donee of a special power occupies a "quasi-fiduciary position" with respect to the appointive property; and (4) the foregoing difference in position requires a distinction in governing legal principles. See LEACH, op. cit. supra note 31, at 577; and also 3 RESTATEMENT, PROPERTY (1932) 1813. Compare Fidelity-Philadelphia Trust Co. v. McCaughn, 34 F. (2d) 600, 604 (C. C. A. 3d, 1929), cert. denied, 280 U. S. 602 (1929); Leser v. Burnet, 46 F. (2d) 756, 759 (C. C. A. 4th, 1931). See, in another connection, In re Bradshaw, [1902] 1 Ch. 436, 447.
legislative silence. The statute is obviously intended to convey some message to those who must apply it, and it is reasonable to assume that the drafters probably relied upon some prevailing common law notions to serve for tax purposes. Since they employed a conveyancer's term, it may be reasoned that "legislative intention" must receive "a property lawyer's interpretation." But since in the final analysis the search is for "intention," a term of art in the law of property may actually function as a cloak for some economic concept. Moreover, property concepts are not as clean-cut as is often supposed. Here, also, there are the inevitable twilight zones and concepts are fashioned in the light of the purpose they are intended to serve.

A general power is usually defined as a power to appoint to anyone, including the donee, in contrast to a special power, commonly defined as a power to appoint within a designated class or among designated individuals. In 1919 the regulations described a general power as "one to appoint to any person or persons in the discretion of the donee." They also declared that appointive property was not includible in the donee's gross estate if he "is required to appoint to a specified person or class of persons." A change was made in 1924 by prefacing the definition of a general power with the word "ordinarily." And in 1937 a further...
change was effected by providing that a power is general, "however limited as to the persons or objects in whose favor the appointment may be made," if it "is exercisable in favor of the donee, his estate, or his creditors."  

This definition has been continued in the latest regulations, which have recently been amended to provide, in addition, that "a power of appointment exercisable to meet the estate tax, and any other taxes, debts, or charges which are enforceable against the estate is included within the meaning of a power of appointment exercisable in favor of the decedent's estate or the creditors of his estate."  

The Supreme Court has observed that under a general power, as usually understood, "the donee may appoint to anyone, including his own estate or his creditors, thus having as full dominion over the property as if he owned it." This statement is adequate for federal estate tax purposes in at least two types of cases. First, a power is considered general when the donee is unrestricted in his choice of appointees even though it is exercisable only by will. A donee of such a power obviously cannot appoint the property to himself during his lifetime, but at the moment of death his power to route the property is as great as that of a testator disposing of his individual property. Second, a power to appoint to any

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92. U. S. Treas. Reg. 80, Art. 24 (1937 ed.). Simultaneously the following language was dropped: "If the donee is required to appoint to a specified person or class of persons, the property should not be included in his gross estate."


94. T. D. 5239, approved March 10, 1943. This Treasury decision also makes a number of verbal changes in section 81.24 as a result of section 403 of the 1942 Act, and adds new provisions interpreting this section.


97. Compare, in another connection, Kales, General Powers and the Rule Against Perpetuities (1912) 26 Harv. L. Rev. 64, 67, 69; Thorneike, General Powers and Per-
person the donee selects is general although the appointive interest is less than a fee. This conclusion is not affected by a local rule of property treating such a power as nongeneral.

Unfortunately, the term "general power" falters where firmness is of the essence. Although it is commonly assumed that a power is either general or special, the matter does not necessarily boil down to one of mutually exclusive categories. There are powers which do not fit snugly into the traditional groupings of "general" and "special." The incompleteness of the prevailing two-fold classification is indicated by the Restatement, which fondly embraces the traditional dogmas relating to powers. The Restatement observes that a power is general if "(a) being exercisable before the death of the donee, it can be exercised wholly in favor of the donee, or, (b) being testamentary, it can be exercised wholly in favor of the estate of the donee." On the other hand, a power is considered special if "(a) it can be exercised only in favor of persons, not including the donee, who constitute a group not unreasonably large, and (b) the donor does not manifest an intent to create or reserve the power primarily for the benefit of the donee." If these definitions are read in pari materia, it is clear that they are not all-inclusive. For example, a donee may possess a testamentary power to appoint to anyone other

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98. See Morgan v. Commissioner, 309 U. S. 78 (1940); Fidelity-Philadelphia Trust Co. v. McCaughn, 34 F. (2d) 600 (C. C. A. 3d, 1929), cert. denied, 280 U. S. 602 (1929); Camden Safe Deposit & Trust Co., 30 B. T. A. 287 (1934), rev'd on other grounds, C. C. A. 6th, June 12, 1935. In United States v. Field, 255 U. S. 257 (1921), discussed supra at 300, the appointive property was an income interest and the power was regarded as general. But cf. 3 TIFFANY, REAL PROPERTY (3d ed. 1939) § 678, stating that a power is "ordinarily referred to" as general if the donee can "appoint to any person, including himself, and is not restricted as to the estate or interest which he may appoint . . . ."


100. See 2 JARMAN, WILLS (7th ed. 1930) 763. But compare the apparent assumption in Leser v. Burnet, 46 F. (2d) 756 (C. C. A. 4th, 1931), and Charles J. Hepburn, 37 B. T. A. 459 (1938), that a power is either general or special.

101. See McDougal, supra note 1, at 1104 et seq.

102. 3 RESTATEMENT, PROPERTY (1940) § 320.

than himself, his estate or his creditors. To denominate such a power as special because the exception creates an appointive class designated by the donor is to drain the word "class" of any sensible meaning.

The Restatement describes the powers which are excluded by its definitions as "hybrids," and dismisses them with the comment that "they are so rare that it would not be useful to state the rules applicable to them in situations where the distinction between general and special powers is significant." But the estate tax cannot indulge in a similar luxury of ignoring the "hybrid" power. Once a traditional category becomes too fuzzy at the edges, the route to avoidance is opened. In the ordinary private law cases there is rarely any need to worry about the "hybrid" power and to correlate it with traditional concepts, as the strictly dispositive purposes of donors may be readily fulfilled via the accepted categories. The estate tax context is otherwise, for the non-typical power may be most desirable from the tax point of view, and the language of the statute is clearly no match for such powers if the cases to date are to be our guide.

The Board has indicated that a power excluding one or more persons from its benefits is nongeneral if the excepted person or a member of the excepted group is living at the date of the donee's death. There is also a faint hint that a power to appoint to any person other than a business corporation is nongeneral. Undoubtedly a donee's capacity to route the appointive property is formally circumscribed if, for example, he may designate anyone except A and his descendants as appointees. Nevertheless, does the exception really constitute a significant limitation upon the


106. 3 RESTATEMENT, PROPERTY (1940) § 320, comment a.

107. Compare LEACH, op. cit. supra note 31, at 577: "One may imagine a power to appoint among a class where the class is so large that the scope of appointment is practically unlimited, but freak notions are seldom indulged by persons creating powers."


109. Compare Gold, supra note 81, at 337.


donee's discretion? It has been intimated that the exception should be evaluated in terms of real effectiveness. If the excepted person or persons are natural objects of the decedent's bounty, the power should not be regarded as general; on the other hand, if the limitation is merely formal, excluding persons who obviously have no claim on the decedent's bounty, the power should be considered general. However, this approach would overlook an important aspect of powers of appointment. While the excluded group may not be benefited directly by the power, the donee enjoys greater freedom to use his individual property for their benefit since the appointive property may be routed to the other objects of his bounty. At any rate, the distinction does not point to a line which is feasible from a tax standpoint, for taxability is made to depend upon the pattern disclosed by a variety of familial and financial circumstances.

In contrast to the Board's position, it is the theory of the present regulations that a power is general, regardless of restrictions in the choice of appointees, if it is exercisable in favor of the donee or his estate. There is obviously no question but that a power to appoint to one's self, no matter how narrow the eligible class, is in substance a power to appoint as one sees fit; "it can make no difference that this can only be done by two steps instead of by one—namely, by an appointment to himself, followed by a subsequent gift or disposition, instead of by a direct appointment to the object or objects of his bounty." The regulations apparently proceed one step further in providing that a power is general if exercisable in favor of the estate. A power seems to fall within this category if the donee's estate may derive economic benefits through an exercise of the power. Such benefits are represented by the satisfaction of claims against the estate, administration expenses, and federal estate and other death taxes. The regulations, accordingly, would pass beyond the usual conception of a general power as an authority to appoint property to any person selected by the donee.

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112. The English courts have treated such a power as general for some purposes and nongeneral for others. Compare Platt v. Routh, 6 M. & W. 756 (Ex. 1840), aff'd, 3 Beav. 256 (Rolls Ct. 1841), aff'd sub nom. Drake v. Attorney General, 10 Cl. & F. 257 (H. L. 1843) (legacy tax); Edie v. Babington, 3 Ir. Ch. R. 568 (Rolls Ct. 1854) (rights of donee's creditors); with In re Byron's Settlement, [1891] 3 Ch. 474 (Wills Act, s. 27). Cf. In re Wilkinson, [1910] 2 Ch. 216.

113. See 1 Paul, op. cit. supra note 4, at 438. Cf. Surrey and Aronson, supra note 41, at 1361-2; Gold, supra note 81, at 357.


117. The Restatement, like the regulations, indicates that a testamentary power is general if it is exercisable in favor of the estate [3 Restatement, Property (1940)
A testamentary power to appoint to anyone other than the donee's creditors has, however, proven extremely troublesome. In *Leser v. Burnet* 118 the Fourth Circuit held that such a power is not general.110 The donor framed his grant of authority in terms which commonly create a general power as usually understood, but the court decided that under the law of Maryland the language employed was not sufficiently broad to include the donee's creditors.120 Although the opinion is correct in asserting that local law determines the scope of one's appointive authority,121 it is not

§ 320], but the word “estate,” as used by the Restatement, seems to clothe a different concept, namely, a power to render the appointive property subject to such distribution as the donee decides or to such distribution as he permits under the laws of intestacy. And one element of such a power seems to be the authority to dispose of the property to such persons as one sees fit to select. The Restatement, at one point (p. 1814) speaks of a general testamentary power as a power to appoint to the donee's “estate or to any other person whomsoever after his death.” However, property concepts, whatever they may be, are not necessarily final in interpreting a tax statute. See discussion supra at 310. Professor Simes seems to imply that a power is exercisable in favor of the donee's estate even though certain individuals are ineligible as objects. Simes, *op. cit. supra* note 27, at 469.


118. 46 F. (2d) 756 (C. C. A. 4th, 1931).

119. There is a similar assumption in Legg's Estate v. Commissioner, 114 F. (2d) 760, 764 (C. C. A. 4th, 1940). The Board has referred to such a power as special in character. Christine Smith Kendrick, 34 B. T. A. 1040, 1043 (1936). See also Surrey and Aronson, *supra* note 41, at 1361. *Cf.* 1 Simes, *op. cit. supra* note 27, § 246, to the effect that a power to appoint to anyone except the donee or his estate might be deemed special.

120. If there are no creditors it seems that *Leser v. Burnet* is inapplicable since there is no existing excepted group at the date of death. *Cf.* Christine Smith Kendrick, 34 B. T. A. 1040 (1936). On the other hand, if a power is exercisable only in favor of creditors and there are none, it seems that there is no tax since there is no power. *Cf.* Schuyler, *supra* note 40, at 793, n. 110.

121. See Merwin v. Safe Deposit & Trust Co. of Baltimore, 171 Md. 346, 188 Atl. 803 (1937), (1938) 2 Md. L. Rev. 155, wherein it is assumed without any discussion that a remainder to “such person or persons, in such shares and proportions, and upon and for such estates and interests” as the donee should appoint gave rise to a general power. *Cf.* Comment (1940) 4 Md. L. Rev. 297.
necessarily correct in its interpretation of the term "general," especially since the rule that creditors may reach property appointed under a general power apparently applies even if the donor provides that the donee shall in no circumstances appoint to the latter's creditors. More important, however, is the practical result of the decision. The power considered in *Leser v. Burnet* is theoretically narrower than a general power as usually conceived, but it may, economically speaking, be much more valuable. Property subject to a completely unrestricted power may be reached by the donee's creditors, depending upon the particular rule of local law. Yet the power in the *Leser* case is apparently immune from creditors' claims and bestows an identical freedom to distribute property among the objects of the donee's bounty. The economic advantages are even greater under a statute which is confined to exercised general powers. Exercise of such a power incurs the peril of death tax, yet the *Leser* power may be freely exercised without any fear of tax.

The leaky character of the term "general" is further evidenced in the case where a donor provides that the effective exercise of the donee's power requires the consent of another person. For example, an unrestricted power to appoint, vested in a life tenant, may be exercisable with the approval of a trustee. The Board has held such a power to be non-general, emphasizing that the consent of the trustees is not "a mere perfunctory, administrative act." There are very few non-tax decisions which cast light one way or the other. The English courts have attempted to draw a neat line between a power in the other person to veto an appointment and a power in the other person to exercise discretion in the choice of appointees. A rule poised upon such delicate distinc-

122. See 3 RESTATEMENT, PROPERTY (1940) § 329, comment c.
123. See note 27 supra. A Leser power should not be confused with a power to appoint to anyone where the property cannot be reached by the donee's creditors under the English rule. The donee of the latter power may nevertheless appoint the property to his creditors if he so desires. *Leser v. Burnet*, 46 F. (2d) 756, 762 (C. C. A. 4th, 1931). However, in *Whitlock-Rose v. McCaughn*, 21 F. (2d) 164, 165 (C. C. A. 3d, 1927), the court seems to have the erroneous impression that a power is not general if the donee's creditors cannot reach the appointive assets. See 1 PAUL, op. cit. supra note 4, at 431, n. 9.
124. See Griswold, supra note 8, at 957, n. 126.
125. Charles J. Hepburn, 37 B. T. A. 459, 466 (1938). At various times trustees effectively interfered with the donee's plans. A similar view is indicated in Farmers' Loan & Trust Co. v. Bowers, 29 F. (2d) 14 (C. C. A. 1st, 1928), which builds upon a fundamentally erroneous point of view. See note 38 supra, and criticism in 1 PAUL, op. cit. supra note 4, at 435. Cf. 1 STANES, op. cit. supra note 27, at 432: "The power may be general, but to be exercised only with the consent of another person."
127. See *In re Watts*, [1931] 2 Ch. 302.
tions is extremely impracticable from a tax standpoint and encourages the requirement of approval by others in order to avoid tax. The decision of the Board, however, may be a temporary aberration in view of the Supreme Court’s opinion in Morgan v. Commissioner, where it was held that the authority of trustees to withhold property from an appointee, pursuant to a spendthrift clause, did not render a power nongeneral. But it may still be argued that a donee possessed of a power exercisable with the consent of another is hardly in the position of an owner, to whom the donee of a general power was compared by the House in proposing the 1918 statute.

A court sufficiently tax-wise might adopt the following approach. While the statute speaks only of general powers, there was obviously no intention to absorb all the subtleties of classification, including so-called “hybrid” powers. The more sensible view seems to be that the drafters assumed the categories of “general” and “special” to embrace all possible powers of appointment. In other words, while a particular power might not, technically speaking, be deemed either “general” or “special,” it should be regarded as one or the other in the light of the basic desire to reach powers approximating ownership. Hence a testamentary power to appoint to anyone except certain persons might be deemed general.

128. Compare (1939) 83 Sol. J. 67, (1935) 79 Sol. J. 447. See in addition, In re Dilke, [1921] 1 Ch. 34, 124 L. T. R. 229 (C. A. 1921). It has even been suggested that “The opposite results of the cases [In re Phillips and In re W'att's] may well be caused by the presence of different policies in each; that behind the rule favoring creditors, and that against tying up property for too long a period.” Developments in the Law—Future Interests—1932-1934 (1935) 48 Harv. L. Rev. 1202, 1240. Cf. 1 Sines, op. cit. supra note 27, at 432; Schuyler, Book Review (1942) 36 Ill. L. Rev. 891, 893. If such a power is deemed general where creditors are concerned, it may be argued that the Government should not be treated worse than creditors. Cf. Schuyler, supra note 40, at 780.

129. But see 1 Paul, op. cit. supra note 4, at 435. See further Schuyler, Book Review (1942) 36 Ill. L. Rev. 801, 803. Cf. Charlton v. Attorney General, 4 App. Cas. 427, 446 (1879), holding that a joint power is not a general power for succession tax purposes. Lord Selborne states that “general power” refers “to that kind of absolute power which is practically equivalent to property, and which may reasonably be treated as property, for the purpose of taxation. That is the case with a general power exercisable by a single person in any way which he may think fit. But it is not the case when a power cannot be exercised without the concurrence of two minds; the one donee having, and the other not having, an interest to be displaced by its exercise . . . .”

130. Compare Schuyler, supra note 40, at 780.

131. 309 U. S. 78 (1940).


134. See Platt v. Routh, 6 M. & W. 756 (Ex. 1840), aff'd, 3 Beav. 257 (Rolls Ct. 1841), aff'd sub nom. Drake v. Attorney General, 10 Ch. & F. 257 (H. L. 1843), wherein...
result would follow if a testator used such a device as a power to appoint within a class including all citizens of the United States. Similar reasoning would also justify a decision that a power to appoint to anyone except the donee, his estate and his creditors be treated as general in character.\textsuperscript{135} The reasoning would not run counter to the definitions advanced in the Morgan case, since the Court was not required to do more than refer to the "usual" definition of a general power.\textsuperscript{136} Such reasoning, moreover, would be allied to the fundamental consideration that the classification of a power should be determined by the purpose of the classification.\textsuperscript{137} If the power may reasonably, for tax purposes, be considered the equivalent of a power to appoint to anyone, it should be classified as general.\textsuperscript{138}

\textit{The Property Must "Pass"}

The loopholes and uncertainties considered thus far are essentially legislative in origin. The courts, however, have faithfully cooperated in adding their own quota of defects by concentrating upon a particular portion

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\textsuperscript{135} Lord Abinger employs an analogous line of reasoning. However, he places emphasis upon the donee's capacity to execute the power in payment of his debts.

\textsuperscript{136} Compare 3 Restatement, Property (1940) § 320, comment \textit{d}, suggesting that such powers are not special. The Restatement also suggests (§ 320, comment \textit{a}): "It may be that they [hybrid powers] should be treated as general for some purposes and special for others." This suggestion is broad enough to embrace classification for tax purposes. But cf. 1 Simes, \textit{op. cit. supra} note 27, at 435: "... if the donee may appoint to any person except himself or the executor or administrator of his own estate, it would seem that the power might well be classed with special powers." In Porter v. Commissioner, 288 U. S. 436, 441 (1933), a power in a settlor to modify a trust for any persons other than the settlor and his estate was considered "the substantial equivalent" of a general testamentary power.

\textsuperscript{137} See \textit{note 98 supra}.

\textsuperscript{138} See \textit{note 117 supra}. The characterization is not all-inclusive. The committees were desirous of providing appropriate exception for existing special powers, and it seems that all powers other than those exercisable in favor of the donee, his estate, his creditors, or creditors of his estate were treated together because of the difficulty of making any other workable distinction.
of the statute. Since property is taxable if "passing under a general power" exercised by the decedent, the courts have concluded that a general power may be exercised and yet nothing "pass." This result has been achieved by combining the word "passing" with a spurious property concept, thus adding an additional measure of unrealism to a provision already sufficiently unrealistic. The foundation of the doctrinal structure was provided by the Supreme Court in Helvering v. Grinnell. Speaking through Mr. Justice Sutherland, the Court held that property subject to a general power exercised by the decedent was not includible in his gross estate where the property was appointed to persons who renounced their interests under the appointment and received identical interests under the donor's will as the takers in default. The Justice reasoned that the tax did not fall upon a mere shifting of economic benefit but upon a shifting by a particular method, i.e., a transmission of the property by the donee himself. There is no difference, it was observed, between a refusal to take property and an election to take property under a distinct title.

Prior to the Grinnell case it had generally been held that property passed under the exercise of a power even if the donee appointed to the takers in default the very interests they would have received in the absence of an appointment. This result was justified on the ground that the appointment confirmed a title which prior to the appointment had been defeasible. In these cases no mention was made of any renunciation by the appointees, and it was therefore possible to draw a line between them and the Grinnell situation. The Supreme Court, however, refused to draw the line, for it considered the previous decisions in conflict with the conclusion.

139. Compare Schuyler, supra note 40, at 774.
140. For other discussions of "passing" see 1 PAUL, op. cit. supra note 4, §§9.17-9.22; Griswold, supra note 8, at 933.
143. The Board, however, held similarly even where there was an election to take from the donor. Edward J. Haney, 17 B. T. A. 464 (1929). Cf. Cortlandt F. Bishop, 23 B. T. A. 920 (1931).
144. For other discussions of "passing" see 1 PAUL, op. cit. supra note 4, §§9.17-9.22; Griswold, supra note 8, at 933.
finally reached in the Grinnell case.\textsuperscript{144} Hence it is a reasonable inference that the renunciation was not the dominating factor in the decision.\textsuperscript{145} The Court rather seemed to fasten on the thought that the donor was the source of the property since the donee had failed to affect its devolution.

The Grinnell opinion, upon close analysis, indicates that the Court barely dipped into the questions involved. Undoubtedly the Court was impressed with the fact that the remaindermen were in the very position they would have occupied if the power had not been exercised. Professor Griswold has observed that “it would indeed be an incongruous application of the statute which would make the question of taxability turn solely on whether the donee had in fact exercised the power, when the interests which followed the donee’s death were in no way affected by the fact that it was exercised or not.”\textsuperscript{146} But, he indicates, the interpretation accorded a statute is not necessarily erroneous simply because it entails incongruous results. Statutory lines are not always sensible lines.\textsuperscript{147} If the renunciation was the vital factor, it is necessarily true that the property “passed” at the date of death. Why should events occurring at a later date affect the taxability of the property?\textsuperscript{148} On the other hand, if the renunciation was irrelevant why is it not equally correct to say that the property passes under the exercised power rather than the donor’s will?\textsuperscript{149}

The Court had to rationalize its interpretation, and it did so by quoting at some length from \textit{Matter of Lansing},\textsuperscript{150} described by Mr. Justice Sutherland as a “well considered case.”\textsuperscript{151} This case dealt with a factual pattern similar to that in \textit{Helvering v. Grinnell}, but in connection with the New York transfer tax,\textsuperscript{152} a levy upon succession. The sole appointee, who

\begin{itemize}
\item \textsuperscript{144} 294 U. S. at 158. In his brief the taxpayer suggested that the \textit{Wear} and \textit{Lee} decisions might be distinguished because they did not involve an election, and because, as regards the \textit{Lee} case, the appointment altered the scheme of distribution. See Brief for Respondent, p. 12, Helvering v. Grinnell, 294 U. S. 153 (1935).
\item \textsuperscript{146} Griswold, \textit{supra} note 8, at 935. \textit{Cf.} Matter of Langdon, 153 N. Y. 6, 10; 46 N. E. 1034, 1035 (1897).
\item \textsuperscript{147} Compare Helvering v. Wood, 309 U. S. 344, 347 (1940).
\item \textsuperscript{148} Compare (1905) 19 Harv. L. Rev. 139, 140. \textit{But cf.} (1941) 54 Harv. L. Rev. 1406, 1407. See p. 306 \textit{supra}.
\item \textsuperscript{149} See note 142 \textit{supra}.
\item \textsuperscript{150} 182 N. Y. 238, 74 N. E. 882 (1905), 19 Harv. L. Rev. 139.
\item \textsuperscript{151} 294 U. S. at 156.
\item \textsuperscript{152} N. Y. Laws 1897, c. 284, § 220(5).
\end{itemize}
was also sole taker in default, opposed the tax assessment on the ground that she elected to receive the property under the donor's will. The statute imposing the levy had been enacted after the death of the donor but prior to that of the donee, and taxed property subject to a power as if the donee were owner thereof, whether or not the power was exercised. A majority of the New York Court of Appeals held that the property was constitutionally immune from tax because the transfer of the remainder was effected under the donor's will prior to the effective date of the taxing statute.

The prevailing opinion in the Lansing case moves in several directions and is hardly enlightening where Mr. Justice Sutherland is obscure. At first the opinion is devoted to the proposition that there was no transfer since the purported exercise of the power neither increased nor diminished the share of the taker in default. The so-called exercise was a mere form "because it did nothing." 153 Then the opinion shifts to the theory that there was no transfer from the donee because an effective exercise is dependent upon the appointee's consent to receive the property from the donee and the appointee had consistently rejected title under the donee's will. Thereafter the opinion briefly dismisses that portion of the statute imposing tax where the power is not exercised as obviously invalid if applied to the devolution involved. Finally, it is observed that the result is the same whether the remainder in default of appointment was vested or contingent prior to the donee's death. 154 The dissenting opinion, 155 which is surprisingly "modern" in tone, asserts that the taker in default had a contingent remainder and that the right of succession finally accrued at the donee's death. Furthermore, the exercise is deemed effectual because it created a new estate, although the extent thereof was identical with that of the estate in default. It is argued, in addition, that there was no binding election because the appointee had merely opposed the tax assessment. In this connection it is asserted that the appointee had to rely

153. The Court of Appeals uses the following expressions in referring to the exercise: the power "as formally exercised;" "the attempt to exercise the power;" "the power was exercised in form;" the exercise was "a mere form;" the exercise was "a mere formality." The same court in Matter of Slosson, 216 N. Y. 79, 110 N. E. 169 (1915), seems to hold that the donee's designation of takers in default is not an exercise even if their interests are less under the designation. In Estate of Rees, 233 Wis. 635, 644, 290 N. W. 167, 170 (1940), the court speaks of a "professed" exercise. Cf. Arnold v. Southern Pine Lumber Co., 58 Tex. Civ. App. 186, 197, 123 S. W. 1162, 1167 (1909), where the alleged exercise is characterized as "a futile act—one which could confer no benefit whatever."

154. Compare Matter of McKelway, 221 N. Y. 15, 19, 116 N. E. 348, 349 (1917). As Mr. Paul has observed, "It is a poor argument that cannot be used by both sides." PAUL, STUDIES IN FEDERAL TAXATION, THIRD SERIES (1940) 399. Compare In re Murphy's Estate, 182 Cal. 740, 190 Pac. 46 (1920), where the Lansing case is cited in support of taxability.

155. 182 N. Y. at 249, 74 N. E. at 886.
upon the donee's will because the interest in default was subject to an exercise of the power.

Although the donee's demise could not constitutionally effect a "transfer" in the Lansing case, Mr. Justice Sutherland indicated in Helvering v. Grinnell, with the brevity born of the obvious, that the donee's death marked a transmission from the dead to the living which a legislature could treat as a taxable event. The only question was whether the legislature had done so. Obviously, if the Lansing decision is "well considered," its merit inheres in its constitutional exegesis. But no one immersed in the mysteries of federal tax law would seriously claim that the case deserves recognition on this score. Congress may tax unexercised general powers, and a fortiori it may tax such powers when exercised regardless of the fact that the persons appointed are the takers in default. Nor does merit emerge if the reasoning of the Lansing decision is confined to cases where the creation of the power precedes the enactment of the taxing statute. For one must still explain why a "transfer" concept, fashioned to avoid the retroactive application of a state tax measure, is relevant in ascertaining the scope of a federal statute; especially when the borrowed doctrine would be rejected as "bad law" by the Supreme Court if advanced on a constitutional level. There must be some limit to what an imaginative court may attribute to a legislature.

The reasoning in the Grinnell case does not gain in cogency if we overlook its borrowing of poor constitutional law. It is still a reflection of the

156. 294 U. S. at 156. Cf. Griswold, supra note 8, at 934, n. 25.


158. Compare Matter of Hoffman, 161 App. Div. 836, 839-840, 146 N. Y. Supp. 889, 901 (1st Dep't 1914), aff'd, 212 N. Y. 604, 106 N. E. 1034 (1914); Matter of Backhouse, 110 App. Div. 737, 738, 96 N. Y. Supp. 466, 467 (2d Dep't 1906), aff'd, 185 N. Y. 544, 77 N. E. 1181 (1906), where some importance seems to be placed on the fact that the remainders in default had vested before the taxing statute was enacted.

159. Compare I Paul, op. cit. supra note 4, at 114.
The Lansing doctrine is essentially two-pronged: an appointment which leaves the remainderman's interest intact is not an "exercise" which constitutes a transfer from the donee; and a power is not effectively exercised if the appointee elects to receive the property under the donor's will. Mr. Justice Sutherland quoted excerpts from the Lansing case which justified each of these propositions, thus similarly failing to focus upon a single rationale and neglecting to note a basic inconsistency in the Lansing case. For there is nothing to renounce, in a proprietary sense, if the donee transfers nothing. Nor does the Grinnell case indicate that the Justice was aware of the fact that an "election" under the Lansing case had come to mean merely a refusal to pay tax where the donee "formally" exercises his

160. In the Lansing case the court managed to get its concept of "transfer" into the statute via the word "exercise." It was held that there was no real exercise because nothing really passed under the power. In the Grinnell case, however, it was flatly held, without any discussion, that the power was exercised but that nothing "passed." The taxpayer conceded that the power was "exercised." See Brief for Respondent, p. 4, Helvering v. Grinnell, 294 U. S. 153 (1935). At another point, Brief for Respondent, supra at 8, it is indicated that "passing" requires an "effectual exercise." If an exercise is a transfer of an interest in property (see discussion supra at 304), then it would seem that something must have passed from the donee.

161. It has been thought (Griswold, supra note 8, at 934) that the Supreme Court, in quoting liberally from the Lansing case, approached the question of statutory interpretation "from the old-line property point of view"—"the dogma of the common law," that the appointee takes from the donor of the power not from the donee, even though the power is general. However, it seems more correct to observe that the Court borrowed a spurious property doctrine from the Lansing case, which had been fashioned for another purpose. The faithful absorption of legal doctrine is often conspicuous for a peculiar lack of discrimination.

162. The following New York decisions have applied the Lansing doctrine where there was an identity of interests without invoking the principle of election: Matter of Haight, 152 App. Div. 228, 136 N. Y. Supp. 557 (2d Dep't 1912) (reserved power); Matter of Spencer, 119 App. Div. 883, 107 N. Y. Supp. 543 (1st Dep't 1907), appeal dismissed, 199 N. Y. 517, 83 N. E. 1132 (1907); Matter of Backhouse, 110 App. Div. 737, 96 N. Y. Supp. 466 (2d Dep't 1906), aff'd, 185 N. Y. 544, 77 N. E. 1181 (1906); Matter of Morgan, 164 App. Div. 854, 149 N. Y. Supp. 1022 (1st Dep't 1914) (one of the powers was reserved); Matter of Schell, 134 Misc. 242, 234 N. Y. Supp. 305 (Surr. Ct. 1926) (reserved power). In the Matter of Chapman, 133 App. Div. 337, 117 N. Y. Supp. 679 (2d Dep't 1909), appeal dismissed, 196 N. Y. 561, 90 N. E. 1157 (1909), it is observed that the taker's position with respect to tax liability is a sufficient election if any is necessary. Other decisions have relied upon the disclaimer aspect of the Lansing case as well: Matter of Hoffman, 161 App. Div. 836, 146 N. Y. Supp. 898 (1st Dep't 1914), aff'd, 212 N. Y. 604, 105 N. E. 1034 (1914); Matter of Haggerty, 128 App. Div. 479, 112 N. Y. Supp. 1017 (1st Dep't 1908), aff'd, 194 N. Y. 550, 87 N. E. 1120 (1909); cf. Matter of Morrison, 122 Misc. 162, 203 N. Y. Supp. 367 (Surr. Ct. 1923). It seems to be "a common practice" for appointees formally to elect to take the property from the donor. See 3 Restatement, Property (1940) § 369, comment c.

163. See Rothensies v. Fidelity-Philadelphia Trust Co., 112 F. (2d) 758, 761 (C. C. A. 3d, 1940); Estate of Rees, 233 Wis. 635, 644, 250 N. W. 167, 171 (1940).
power. Finally, and most significantly, the Lansing case does not represent property doctrine. In a number of instances it has been decided that an appointment in favor of the taker in default creates a new interest in him, and is not simply an ineffective reaffirmation of the donor's will. The best evidence that the Lansing case does not mirror established property law seems to be provided by the Restatement, which declares that creditors cannot avail themselves of appointive assets if the property is appointed to the taker in default. This principle is derived primarily from the Lansing and Grinnell cases, although creditors have repeatedly been allowed to reach assets regardless of whether the appointee is also a taker in default.

The essential frailty of the Lansing rationale is revealed from another vantage point; for the same court which decided the Lansing case simultaneously passed upon Matter of Cooksey, where victory went the other way. In the latter case the donee had a power to appoint among her children and the issue of deceased children. The remainder, in the event

164. See Matter of Chapman, 133 App. Div. 337, 117 N. Y. Supp. 679 (2d Dep't 1909), appeal dismissed, 196 N. Y. 561, 90 N. E. 1157 (1909); cf. Matter of King, 217 N. Y. 358, 111 N. E. 1060 (1916); Matter of Hoffman, 161 App. Div. 836, 146 N. Y. Supp. 898 (1st Dep't 1914), aff'd, 212 N. Y. 604, 106 N. E. 1034 (1914). In Matter of Backhouse, 110 App. Div. 737, 96 N. Y. Supp. 466 (2d Dep't 1906), aff'd, 185 N. Y. 544, 77 N. E. 1181 (1906), the court states that there is no evidence whether the takers could elect to take under the appointment, "if it can be called such." Obviously, if resistance to tax is an election, "the requirement of election is illusory, since it will always exist whenever an issue is raised which could depend upon it." RESTATEMENT, PROPERTY (Proposed Final Draft No. 2, 1938) 154.

165. See discussion in Farrow, op. cit. supra note 88, at 275 et seq.; 1 Paul, op. cit. supra note 4, §§ 9.18, 9.19. But compare Schuyler, supra note 40, at 774-75: "The Congress chose to use a word of art, a property lawyer's word, importing considerations of legal title, and it can but expect a property lawyer's interpretation."

166. The Lansing and Grinnell cases are approved in 3 RESTATEMENT, PROPERTY (1940) § 369.

167. Id. § 327, comment a, illustration 4; § 369, comment b. The Restatement, § 369, comment a, is of the opinion that "to whatever extent a donee purports to appoint to a person an interest already held in default of appointment he does not exercise his power to alter the donor's disposition but merely declares his intention not to alter it."

168. Compare (1938) 15 Proc. A. L. I. 296 and RESTATEMENT, PROPERTY (Proposed Final Draft No. 2, 1938) 151, with RESTATEMENT, supra at 155 (Memorandum in support of dissent by Messrs. Powell and Simes). But see Arnold v. Southern Pine Lumber Co., 58 Tex. Civ. App. 186, 197, 123 S. W. 1162, 1167 (1909). The court's position that the takers in default received identical interests under the appointment is contrary to the legal effect of the instruments involved. The takers in default seem to have received less under the appointment than they would otherwise have received. Boyce v. Waller, 9 Dana 478, 483-84 (Ky. 1840), which supports the Restatement position, has in effect, been rendered irrelevant by St. Matthews Bank v. De Charette, 259 Ky. 802, 83 S. W. (2d) 471 (1935).

169. 182 N. Y. 92, 74 N. E. 880 (1905). The opinion was written by Judge Haight, who wrote the dissenting opinion in the Lansing case.
of a failure to appoint, was given to the same group, with discretion in
the trustees to make payments from the appointive property to the re-
spective takers, in certain proportions not exceeding stated amounts with
respect to specified ages, until each should attain a designated age and
thereupon be entitled to an allocable portion of the property. The donee
in exercising her power substantially adopted the disposition in default
of appointment with two exceptions: the payments of the trust fund to
be made at the specified ages were set at the maximum amounts desig-
nated by the donor, thus depriving the trustees of their discretion; and
the trustees under the donee's will, in lieu of the guardian, were given
authority to determine amounts necessary for the maintenance of the
beneficiaries during minority. In sustaining the tax assessment, the Court
of Appeals reasoned that the remainder in default could vest only if the
donee died intestate and that if the donee did exercise the power, the
appointees were required to take under the appointment. Furthermore,
the court explained, the exercised power effected material changes in
the disposition of the remainder, and hence the exercise could not be treated
as a nullity. 170

The significant distinguishing factor between this opinion and the
Lansing case seems to be whether the appointment effects a change in
interest. 171 But in the Cooksey case the court advanced as a separate rea-

Orr v. Gilman, 183 U. S. 278 (1902) and Matter of Delano, 176 N. Y. 486, 68 N. E.
871 (1903), aff'd sub nom. Chanler v. Kelsey, 205 U. S. 466 (1907). In the Dows case
the donee could appoint among his children and issue of deceased children, who were
also the takers in default. He exercised his power in favor of his three sons, so that each
received the income from one-third of the property and one-third of the corpus attribut-
able to a brother's income share when such brother died. As a result each son acquired
one-third of the property absolutely. In including the property in the donee's estate, the
court remarked that "whatever be the technical source of title of a grantee under a power
of appointment, it cannot be denied that in reality and substance it is the execution of the
power that gives to the grantee the property passing under it." In the Delano case the
donee could appoint within a class consisting of her brothers, her sister and their issue.
She appointed the property to her nephew, who would have received less under the
donor's will as taker in default. In sustaining the tax, the court held that the nephew's
title to most of the property depended on the donee's will as well as upon the donor's
creation of the power. Compare note 47 supra. See, in addition, Matter of Vanderbilt,
50 App. Div. 246, 63 N. Y. Supp. 1079 (1st Dep't 1900), aff'd, 163 N. Y. 597, 57 N. E.
1127 (1900), wherein the donee could appoint among her issue, who were also the takers
in default. The donee appointed a specified portion to one son and divided the balance
of the property among the others. The court drew a distinction between the technical
source of the appointees' title and the specified shares received as of the date the power
was executed. Note that the shares appointed were either smaller or greater than the
interests in default of appointment.

Ct. 1909), holding that the appointees may elect to take from the donor only if the exer-
cise is "a mere formality confirming the title previously acquired."
son for its conclusion the theory that the remainder in default did not vest unless the donee failed to exercise the power.\textsuperscript{172} And here "exercise" was apparently not being employed in the \textit{Lansing} sense. Otherwise the court in the \textit{Cooksey} case would not refer to the "material changes" made by the donee as an additional basis for its decision. Thus in short, the court inferentially repudiated its own "transfer" concept in an effort to reconcile the results of both cases.

While the \textit{Grinnell} case may be weak in reasons, it may still be sturdy in result. A donee who appoints to takers in default shares identical with those they would receive in the absence of appointment may well be regarded as entitled to the treatment accorded a donee who remains silent. The conclusion is at least sufficiently reasonable to avoid charges of undue judicial tampering with legislation. Unfortunately, however, there has been a tendency to expand the \textit{Grinnell} rule to include situations which do not call for similar judicial intervention. This tendency focuses, in turn, upon Mr. Justice Sutherland's failure to indicate whether the identity of interests or the election constituted the core of his opinion.\textsuperscript{172}

\textsuperscript{172} Situations in which a donee fails to exercise his power may also result in his failing to vest the remainder in default. Compare Estate of Rees, 233 Wis. 635, 643, 290 N. W. 167, 170 (1940), which states that the \textit{Lansing} decision involved a remainder subject only to a power of change in the donee. In Matter of Ripley, 122 App. Div. 419, 106 N. Y. Supp. 844 (2d Dep't 1907), \textit{aff'd}, 192 N. Y. 536, 84 N. E. 574 (1908), the court indicates that there is a tax difference between a gift to remaindermen if the donee fails to exercise his power, and a gift to remaindermen unless the property is otherwise disposed of by the donee. Compare Edward J. Hancy, 17 B. T. A. 464 (1929), with Estate of Helen M. W. Grant, 13 B. T. A. 174 (1928).


\textsuperscript{173} Compare Estate of Carrie L. Jones, 41 B. T. A. 1279 (1940), where the appointee elected to take under the donor's will but the Board sustained the taxpayer's position on the ground that the exercise itself was a mere form because it left "everything
tions where the appointed interest differs from the interest in default indicate the subtle rationalism induced by the Grinnell case.

The appointed interest is less than the interest in default. If the taker in default receives a lesser interest by appointment than he would have by disposition in default, several cases have held that there is no tax upon the lesser share.\textsuperscript{174} Thus, where the donee's four children were entitled as takers in default to equal shares in the corpus of a trust fund, and each received by appointment a life interest in one-fifth of the corpus, the value of the four life interests was deemed exempt from tax.\textsuperscript{175} These decisions are apparently rooted in the thought that under local law the greater estate is received from the donor and that the power, when exercised, merely divests the taker in default of a part of such estate.\textsuperscript{176} The latter's failure to renounce his appointed interest and elect to take from the donor is considered entirely irrelevant.\textsuperscript{177}

The doctrine of these cases appears to be quite attractive if the difference between the respective shares is merely quantitative. For example, if the gift in default is $100,000 and the appointed share is $60,000, the property does not "pass" to the extent of the $60,000, since the status of this amount has not been disturbed. The cases, however, go further, for similar theorizing is indulged where the difference between the two interests is as it was before." In Fifth Avenue Bank of New York, 32 B. T. A. 203 (1935), the renunciation was emphasized.

\textsuperscript{174} Legg's Estate v. Commissioner, 114 F. (2d) 760 (C. C. A. 4th, 1940); Rothensies v. Fidelity-Philadelphia Trust Co., 112 F. (2d) 758 (C. C. A. 3d, 1940); Lewis v. Rothensies, 46 F. Supp. 705 (E. D. Pa. 1942); Estate of Gertrude Bucknell Day, 44 B. T. A. 524 (1941); Lewis Spencer Morris, 39 B. T. A. 570 (1939); James C. Webster, 38 B. T. A. 273 (1938); Estate of Mildred S. A. Platt, C. C. H. 1942 Fed. Tax Serv. ¶ 12,903-N (BTA mem.); Estate of Henry H. Rogers, C. C. H. 1941 Fed. Tax Serv. ¶ 12,230-A (BTA mem.). But cf. Monks v. Driscoll, C. C. H. 1943 Fed. Inh. Tax Serv. ¶ 10,037 (W. D. Pa. 1943). See Central Hanover Bank & Trust Co. v. Commissioner, 118 F. (2d) 270 (C. C. A. 2d, 1941). In the Legg case, supra at 765, the court states that if it were not for the Grinnell decision it would be inclined to hold that extinguishment of a possibility of defeasance was a sufficient "passing." In Estate of Mary Adele Morris, 38 B. T. A. 408 (1938), it was held that the appointee had elected to take under the power. The same theory reappears in Estate of Cassius E. Wakefield, 44 B. T. A. 677 (1941). But see 3 Restatement, Property (1940) § 369, comment e.

\textsuperscript{175} Rothensies v. Fidelity-Philadelphia Trust Co., 112 F. (2d) 758 (C. C. A. 3d, 1940).

\textsuperscript{176} It makes no difference whether the gift in default is vested or contingent. Lewis Spencer Morris, 39 B. T. A. 570 (1939). But cf. Estate of Mary Adele Morris, 38 B. T. A. 408, 418 (1938), pointing to a distinction between vested remainders in default of appointment and remainders contingent upon failure to appoint, while conceding that "this may be a narrow distinction and one in all probability not always easy to apply."

ests is also qualitative; and in these situations the divestment theory fully reveals its over-refinements. Thus, the interest in default may be an absolute remainder and the appointed interest a life estate, or the interest in default may be an indefeasibly vested remainder whereas the appointed interest is a contingent remainder. While the quality of the respective interests may be similar, the contingencies upon which enjoyment depends may vary. Again, a qualitative difference may be combined with a change in contingency determining enjoyment, as where a taker entitled to an outright fee in default of exercise receives via exercise an income interest until majority, when the fee ripens in possession.

178. See 3 Restatement, Property (1940) § 369, wherein tax immunity for the lesser appointed interest is advocated if the difference is merely quantitative, but no position is taken where the variation by appointment is qualitatively different. Compare Powell, supra note 10, at 249, apparently approving the Restatement view where the appointed interest is less in quantum, but suggesting that the federal decisions involving qualitative differences may have gone too far.

179. In Legg's Estate v. Commissioner, 114 F. (2d) 760 (C. C. A. 4th, 1940), the appointed interest was a life estate in two-thirds of the property, plus a successor life estate in the other third, while the interest in default was the entire corpus; in Rothensies v. Fidelity-Philadelphia Trust Co., 112 F. (2d) 758 (C. C. A. 3d, 1940), the appointed interest was a life estate in one-fifth of the corpus and the interest in default was one-fourth of the corpus; in Estate of Gertrude Bucknell Day, 44 B. T. A. 524 (1941), the appointed interest was a life estate to be augmented upon the death of the taker's father and the interest in default was the entire corpus; in Lewis Spencer Morris, 30 B. T. A. 570 (1939), two of the appointed interests were life estates whereas the interests in default were portions of the corpus; in Estate of Mildred S. A. Platt, C. C. H. 1942 Fed. Tax Serv. ¶12,903-N (BTA mem.) the appointed interest was a life estate while the gift in default was a fee; in Estate of Henry H. Rogers, C. C. H. 1941 Fed. Tax Serv. ¶12,230-A (BTA mem.) the interest appointed to each of two takers in default consisted of 6,667 percent of one-third of the property given outright and a life estate in the balance of the one-third, with a reduction in trust corpus in the case of one of the life tenants in the event of remarriage and a contingent remainder in such corpus for the benefit of the other life tenant, whereas the interest in default consisted of one-third of the corpus for each of the two takers. In Monks v. Driscoll, C. C. H. 1943 Fed. Inh. Tax Serv. ¶10,007 (W. D. Pa. 1943), the entire value of property received by default takers under the donee's disposition was taxed under the following circumstances: the appointed interest of each taker in default consisted of a right for a ten year period to the income yielded by slightly over one-sixth of the corpus, and outright ownership of such share of the corpus thereafter, with a power in the taker to dispose of the corpus in the event of death during the ten-year period; the gift in default of appointment was fee ownership of one-fourth of the corpus.

180. See, e.g., Lewis v. Rothensies, 46 F. Supp. 706 (E. D. Pa. 1942). Cf. Lee v. Commissioner, 57 F. (2d) 399 (App. D. C. 1932), cert. denied, 286 U. S. 563 (1932), where the remainder in default was immediately effective upon the termination of a life estate, and the remainder under the appointment was preceded by an additional life estate.

The metaphysical refinements of the divestment theory are revealed by another consideration. Assume that $A$ and $B$ are each entitled to one-half the property in default of appointment, and that the donee appoints the entire income from the property to $A$ for life, with remainder to $B$. Although the value of $A$'s life estate should be less than the value of one-half the fee, it would not follow that the entire life estate is not taxable. Nor would $B$'s entire appointed share be free from tax if the present value of $B$'s remainder under the appointment should be less than the value of one-half of the fee allotted to him in the absence of appointment. Under the divestment theory the appointive property does not pass under the power “if the share of a particular appointee would have passed to him irrespective of the exercise of the power.” Certainly this rationale is inapplicable, in the examples given, to one-half the value of $A$'s life estate and one-half the value of $B$'s remainder under the appointment. Yet under the divestment theory the other halves would be regarded as not passing, although the entire scheme of distribution derives from the donee’s disposition of the property. Here are “gossamer distinctions” in dire need of another Hallock case.

There is still another factor to be considered: the difficult valuation problems generated by the extension of the Grinnell principle to the factual patterns under discussion. The decision in Central Hanover Bank & Trust Co. v. Commissioner provides an outstanding example. The donor had bequeathed her property to the decedent in trust for the benefit of her four sons as income recipients, and at the death of each son his respective share of corpus was to pass to the decedent or, if he predeceased the particular son, to the appointees of the decedent. All four sons survived the decedent, and at the latter’s death were aged respectively, 54, 51, 49, 48, the eldest son dying soon after. At that time the 49 year old son had two infant children, and no additional issue were born to the sons subsequent to the decedent’s demise. The decedent appointed each share of principal to the children of the particular income beneficiary or, in the event that a son died without leaving issue surviving, to his brothers and/or the issue of a deceased brother, with a contingent remainder to charity. The sons renounced their interests under the appointment, electing to share in the donor’s estate under the rules of intestacy, and claimed...
that the value of such interests received by inheritance from the donor was immune from tax. 186

The Board 187 determined that all the appointive property was includible in the decedent's gross estate regardless of the renunciation. While the reasoning was not too clear, the following considerations were apparently dominant: in order to obtain tax immunity it had to be shown that "the entire remainder was appointed to the sons and that they each had the same title by inheritance as was appointed to them"; 188 even if immunity was justified because the sons renounced the appointments to them or the property failed to pass, it was impossible to determine the respective portion each son would take in view of the possible contingencies; other appointees would receive the property if certain contingencies occurred; and the remainder interests appointed to the sons were "vastly different in character and scope" from the intestate interests and depended upon the provisions of the appointment. Failing to find these considerations persuasive, the Second Circuit held that the value of the appointive property was exempt to the extent that it passed from the donor, regardless of the fact that the appointment specified the contingencies upon which the receipt of the intestate shares depended. 189 Hence the issue boiled down to a problem of valuation. The court indicated, for example, that if all the sons were to die in the order of their respective ages, leaving only the two offspring surviving, one half of the corpus would pass in intestacy from the donor and the other half under the appointment. In view of the ages of the sons and issue, said the court, it might not be unreasonable to treat only the remainder interests in the trusts for the two youngest sons as property passing from the donee. It is obvious, however, that the sequence of respective deaths is subject to a number of variations. It is equally apparent that the determination of present values of interests which will probably vest as a result of a succession of deaths is a neat problem in actuarial computation. The court, however, was not unduly troubled, but it simply remanded the case to the Board to determine the value of the interests passing after weighing the possible contingencies in the light of actuarial and other expert testimony. However complicated this case may be, it hardly probes the depths of complexity inherent in the current interpretation of the Grinell case. 190

The valuation problems raised by the divestment theory are similarly complex in determining the relative worth of alternative interests. For

186. Although this case involved a renunciation, the valuation difficulty deriving from variable contingencies is equally relevant to the divestment theory.
188. 40 B. T. A. at 1218.
189. See (1941) 54 HARV. L. REV. 1406, 1407.
190. The Board apparently is saddled with all the practical difficulties occasioned by bad law. Cf. discussion at p. 309 supra.
example, as taker in default one may be entitled to the remainder in fee, but as appointee one may actually receive a life estate. It is therefore arguable that the life estate is a lesser interest than the remainder in default since a fee includes all the lesser interests which may be carved out of it. Suppose, however, a person who is entitled, in default of appointment, to an equitable life estate in a spendthrift trust receives a legal estate for life from the donee. Does the appointment bestow a greater or lesser estate? The legal estate allows him greater freedom with his income, but the equitable estate affords him greater protection from the claims of creditors. Or, assume that the donee appoints to a taker in default a life estate plus a power of appointment, whereas in the absence of appointment he is entitled to the remainder in fee. How is one to measure the comparative values of the two interests? Assume, again, that certain remaindermen who are each entitled to one-fourth of the property in default of appointment receive under the power a one-third share subject to a life interest in a fourth person. The gifts to the remaindermen by appointment certainly bestow a greater fee interest, but the possibility of enjoying such interest may be rather remote due to the intervening life estate. Is the greater interest determined by the comparative possibilities of enjoyment during life, or is the determinative factor the greater fee interest which the remainderman may bequeath upon his death, or, finally, are the values of the alternative gifts to be ascertained by some combination of both and other factors?

A good deal of this confusion would be obviated by recognizing that the divestment theory is not a necessary corollary of the Grinnell case. In contrast to the Grinnell situation, the divestment case is not one of two minds running in the same channel. The donee has actively fashioned a new disposition in accordance with his understanding of relative needs, and the appointment is no longer analogous to a non-exercise which assures tax immunity. It is necessary to resort to the donee's

192. In Monks v. Driscoll, C. C. H. 1943 Fed. Inh. Tax Serv. ¶ 10,097 (W. D. Pa. 1943), involving a similar fact pattern, there was no need to consider the problem because the appointed property was included in its entirety.
194. This is true even if a renunciation of the appointed interest is not considered a factor vital to the Grinnell decision. But see discussion at p. 334 infra.
will in order to determine the taker's title and interest. The divestment theory is predicated upon the assumption that a portion of the appointive property passes from the donor while another portion passes from the donee. The artificial character of this reasoning is emphasized where there are differences other than quantitative between the appointed estate and the estate in default. But only a faithful disciple of Coke would detect the donor's hand in the ultimate devolution if the taker receives a life interest in lieu of a fee, or an income interest until the age of 21 to be succeeded by outright fee ownership instead of immediate ownership of the fee. Furthermore, where an appointment is in trust for those who would take in default of appointment, the legal title passes to a stranger having no interest under the donor's will. In the Lansing case the court underlined the fact that the exercise did not effectively transfer the property because "nothing was added to or taken away from the gift" by the donee's will. In other words, an exercise effects a transfer from the donee when it does something different, and the difference may be produced by reducing the benefits flowing to the taker in default. The significant element, as the Cooksey opinion indicates, is change in the scheme of distribution, which apparently would also include the appointment of another person to administer income payments. Finally there is the very practical consideration, disregarded by the divestment theory, that the exercise of a power commonly reshuffles the interests of takers in default. It is nevertheless assumed that the statute was intended to be largely ineffective where a typical exercise occurs.

The logic of the divestment theory is not appreciably assisted by invoking local law. In considering the identity of interests, aside from election, the Supreme Court in the Grinnell case did not look to the Lansing decision in order to determine whether local law regarded the property as "passing" under the power. Its conclusions would have been the

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199. See (1941) 41 Col. L. Rev. 149, 154.
same in a state such as Rhode Island, where the rationale of the Lansing case has been disapproved, if the remainder interests and the appointed interests were identical. Hence there is no compulsion to apply the divestment theory even if the courts of a particular jurisdiction subscribe to it. This is especially true with respect to New York, where the theory represents tax law rather than property law. Since the only reasonable justification for the Grinnell decision is the economic equivalence of a non-exercise and the appointment of identical shares to the takers in default, such equivalence should not be affected by local whimsies concerning


204. But cf. the line of reasoning in Grinnell v. Commissioner, 70 F. (2d) 705 (C. C. A. 2d, 1934), aff'd, 294 U. S. 153 (1935); and Estate of Zachary Smith Reynolds, 42 B. T. A. 145, 157 (1940), aff'd sub nom. Helvering v. Safe Deposit and Trust Co. of Baltimore, 121 F. (2d) 307 (C. C. A. 4th, 1941), rev'd on other grounds, 316 U. S. 56 (1942). Obviously, state law determines the substance of one's proprietary rights. But the Grinnell decision is based on the identity of the appointed interest and the interest in default, and it is immaterial whether the interest received is attributed by local law to the donor or the donee.

If creditors of the donee are enabled to reach a portion of the assets passing to the taker in default, there is no longer an identity of interests and it seems entirely proper to hold that an effective change in disposition, through the agency of the donee, has rendered the Grinnell case inapplicable. But here again a federal standard is applied once the substantive effect of the appointment is ascertained.

205. The following New York decisions disallow tax upon a transfer attributable to the donee where the appointed interest is less than the interest in default: Matter of Slosson, 216 N. Y. 79, 110 N. E. 165 (1915); Matter of Canda, 197 App. Div. 597, 189 N. Y. Supp. 917 (1st Dep't 1921); Matter of Ripley, 122 App. Div. 419, 106 N. Y. Supp. 844 (2d Dep't 1907), aff'd, 192 N. Y. 536, 84 N. E. 574 (1908); Matter of Lichtenstein, 177 Misc. 320, 30 N. Y. S. (2d) 455 (Surr. Ct. 1941); Matter of Vanderbilt, 163 Misc. 667, 297 N. Y. Supp. 554 (Surr. Ct. 1937), aff'd, 281 N. Y. 297, 22 N. E. (2d) 379 (1939), aff'd sub nom. Whitney v. State Tax Commission, 309 U. S. 530 (1940); Matter of Irvin, 137 Misc. 666, 244 N. Y. Supp. 198 (Surr. Ct. 1930); Matter of Tucherman, 130 Misc. 806, 224 N. Y. Supp. 604 (Surr. Ct. 1927); Matter of Ryncar, 130 Misc. 804, 224 N. Y. Supp. 606 (Surr. Ct. 1927). But cf. Matter of Lowndes, 60 Misc. 506, 113 N. Y. Supp. 1114 (Surr. Ct. 1908); see note 200 supra. In all the cases overruling the claim for tax, except the Tucherman case, the theory of election apparently intrudes. However, the Ryncar and Tucherman cases were decided by the same judge. In the Ripley case the appellate division relied on the alternative theory that the power was exercisable only in favor of those who did not take as remaindermen in default, and the Court of Appeals affirmed on this ground. In the Slosson, Ripley, Vanderbilt, Tucherman, and Ryncar cases the differences were quantitative. In the Canda case the difference was apparently qualitative, and in the Irvin case the nature of the difference is not clear. The Lichtenstein decision involved a postponement of the receipt of the principal and relied upon the federal decisions. The court stated, 177 Misc. at 326, 30 N. Y. S. (2d) at 461: "If the appointment is to one who would take on failure to appoint but the estate granted is less than the gift under the donor's will the right to elect is not clear under the cases in this State."
title. Moreover, one may properly assume that the statute was intended
to produce uniform results on a nationwide basis.

We have yet to consider the perhaps basic assumption of the divestment
theory, namely, that the Grinnell case applies in the absence of a renun-
ciation of the appointed interest and an election to take from the donor.
This principle seems to have become quite respectable. Although the Central Hanover Bank & Trust Company case involved a renounced ap-
pointment, the court seemed to accept decisions in the Third and
Fourth Circuits applying the Grinnell case in the absence of a renuncia-
tion. The Board, however, has vacillated on the subject—and with
some justification in view of the Supreme Court's opinion in the recently
decided Safe Deposit & Trust Company of Baltimore case. This case
did not involve the problem here considered, but in the course of its
opinion the Court made the following significant statement concerning
the Grinnell case:

"Whatever may be the general rule in this respect, this Court
has clearly recognized, in Helvering v. Grinnell, . . . that events
subsequent to the decedent's death, events controlled by his bene-
ficiaries, can determine the inclusion or not of certain assets within
the decedent's gross estate under section 302(f) [Section 811(f) of
the Code]. In that case, the decedent had exercised a general testa-
mentary power of appointment, an act which under section 302(f)
brings the property subject to the power within the gross estate. The
subsequent renouncement by the appointees of the right to receive
by appointment and their election to take as remaindermen in de-
fault of appointment were held by this Court to place the property
subject to the power outside the scope of section 302(f)."

This quotation is a fairly clear indication that the present Court regards
the principle of the Grinnell case as dependent upon a renunciation by the
appointees. As a matter of fact, this language announces the general
proposition that it is the exercise of the power which renders the appoint-
itive property taxable. If the renunciation is the decisive factor, the divest-
tment theory disintegrates and the mere appointment of a lesser interest

206. Compare 1 Paul, op. cit. supra note 4, at 455.
207. See Legg's Estate v. Commissioner, 114 F. (2d) 760 (C. C. A. 4th, 1940); Roth-
208. Compare Estate of Mary Adele Morris, 38 B. T. A. 408 (1938), with James
C. Webster, 38 B. T. A. 273 (1938). See (1939) 52 Harv. L. Rev. 531.
209. For other aspects of the case see discussion at p. 306 supra.
210. 316 U. S. at 65.
1943). While the quoted language appears in that portion of the opinion which failed to
command unanimous consent, there is no dissent from the language itself insofar as it
states the rationale of the Grinnell case. See 316 U. S. at 68. Cf. Davison v. Commis-
sioner, 81 F. (2d) 16, 18 (C. C. A. 2d, 1936).
to takers in default would not result in tax immunity to the extent of the lesser interest appointed. 212 On the other hand, the *Central Hanover* decision, with its attendant complexities, would not necessarily be discarded. 213 But even a renunciation should not remorselessly signify tax immunity to the extent of the renounced interest. For example, the renounced interests may still pass as part of the residuary bequest in the donee's will, or the appointive property may have been so appropriated by the donee as to pass as part of his estate, 214 even though the particular appointment fails. 215 If the taker in default receives merely a life estate under the appointment, his renunciation of the appointed interest may cause the acceleration of the remainder, thus leaving no vestige of the gift in default. 216 Moreover, the renunciation should not be merely formal in character. Where the appointee of a life estate, who would have received a fee interest in default of appointment, continues to enjoy the income from the property pursuant to the donee's trust arrangement, there is no renunciation in substance and the life estate should be taxed. The courts should reasonably proceed one step further. When the contingencies upon which enjoyment depends are determined by the donee's disposition, as in the *Central Hanover Bank & Trust Company* case, the property may fairly be regarded as "passing" under the exercised power, since the renunciation has failed to restore the donor's pattern of devolution in the absence of appointment. 217

The appointed interest is greater than the interest in default. Another variation from the *Grinnell* pattern is provided by the appointment of an interest of greater value than that bestowed by the gift in default. The estate tax consequences of such an appointment have never been adjudicated under the *Grinnell* case. 218 A further extension of the logic applied

212. This implication from the *Safe Deposit* case is not fatally affected by the Court's citation of *Rothensies v. Fidelity-Philadelphia Trust Co.*, 112 F. (2d) 758 (C. C. A. 3d, 1940). 316 U. S. at 62. This citation is joined with that of *Helvering v. Grinnell* in support of the assertion that courts would not be interested in whether property passed under a power if unexercised powers were taxable. See discussion infra at 338. But cf. *Lewis v. Rothensies*, 46 F. Supp. 706 (E. D. Pa. 1942), which fails to discern the implication. 213. See discussion at p. 329 supra.

214. See 3 *Restatement, Property* (1940) § 365(3); Notes (1934) 93 A. L. R. 957.


216. See 2 *Restatement, Property* (1936) § 231; 3 *Simes, op. cit. supra* note 27, § 775 et seq. The renounced trust income may pass to those entitled to the next eventual estate. See, e.g., Matter of Matthiessen, 175 Misc. 465, 23 N. Y. S. (2d) 802 (Surv. Ct. 1940).


218. This type of case may tie in with the variation considered above. For example, the remainder in default may be given in equal shares to *A* and *B*. However, the donee
where the interest in default is "cut down" might warrant the conclusion that there is a taxable interest measured by the difference in value between the appointed interest and the lesser interest in default.\textsuperscript{219} This is the position taken by the Restatement where the differences are solely quantitative.\textsuperscript{220} Thus, if $A$, $B$, and $C$, the children of the donee of a general power, are entitled to equal shares of the property in the absence of appointment, and the donee appoints the entire property to $A$, only two-thirds of the estate would be taxable as "passing" under the power. But the New York courts have held that where the interest received as appointee is greater than the interest in default, the value of the entire property is taxable.\textsuperscript{221} The \textit{Lansing} case yields to the \textit{Cooksey} case.\textsuperscript{222}

An effort to confine the estate tax to the excess is resisted as an attempt to secure something under a power in conjunction with an attempt to avoid tax by renouncing the appointment to the extent that the appointee could receive a portion of the property from the donor.\textsuperscript{223} However, this rationale is hardly convincing if the divestment theory, applied where the appointed interest is less than that in default, continues to enjoy judicial favor. For example, assume that $A$ and $B$ share equally in the property in default of appointment, and that the donee appoints one-third to $A$ and two-thirds to $B$. It is extremely incongruous to hold that in the case of $B$ the donee's disposition is the source of his interest whereas in the case of $A$ the property is attributable to the donor. But the incongruity derives essentially from the divestment theory, which should be repudiated.\textsuperscript{221}


219. See Powell, \textit{supra} note 10, at 248; Thompson, \textit{supra} note 8, 26 Iowa L. Rev. 549, 562.

220. \textit{3 Restatement, Property (1940) \S 369(c).} There is consequently no need to consider the problem of comparative valuations discussed in connection with lesser appointed interests, and also applicable where the variation derives from greater appointed interests.

221. See Matter of Delano, 176 N. Y. 486, 68 N. E. 871 (1903); Matter of Taylor, 209 App. Div. 299, 204 N. Y. Supp. 367 (1st Dep't 1922), aff'd, 239 N. Y. 582, 147 N. E. 204 (1924); Matter of Potter, 51 App. Div. 212, 64 N. Y. Supp. 1013 (2d Dep't 1900); Matter of Chauncey, 102 Misc. 378, 168 N. Y. Supp. 1019 (Surr. Ct. 1918), aff'd, 187 App. Div. 952, 175 N. Y. Supp. 897 (1st Dep't 1919). \textit{Cf.} Matter of King, 217 N. Y. 358, 111 N. E. 1060 (1916), to the effect that appointees cannot defeat the tax where their title is not equally good under the donor's will. In Matter of Morrison, 122 Misc. 162, 203 N. Y. Supp. 367 (Surr. Ct. 1923), the \textit{Lansing} rule was applied where the appointee was the taker in default although the trust corpus included at the donee's death 49 additional shares of stock which were treated as an increment.


The appointment excludes takers in default. An additional problem is presented where a donee appoints to one remainderman an interest equal in value to that of his interest in default of appointment, and appoints the balance to a non-taker in default. For example, assume that \( A \) and \( B \) are the takers in default of equal portions of the property, and that the donee appoints one half of the property to \( A \) and the other half to \( C \). If there is no renunciation and it is assumed that the Grinnell case nevertheless applies, it would seem to follow that the portion appointed to \( A \) is immune from tax and that the portion appointed to \( C \) is taxable. But this result disregards the effect of the appointment, for if \( A \) refused to take his appointed share, it would pass in equal portions to \( A \) and \( B \) as remaindermen in default,\textsuperscript{225} and hence only one-fourth of the property would pass to \( A \) under the donor's will in comparison with one-half under the appointment.

In New York the Court of Appeals has held that since the Lansing case is not dependent upon a renunciation, the share appointed to the taker in default is entirely exempt under a set of facts similar to those discussed.\textsuperscript{226} According to the court, "the true rule to be applied can be reached only by an entire disregard of any intention to elect or of what has been termed an election, and may be stated to be that where a person named under the exercise of the power takes the same or less than he would have taken under the original will, if the power of appointment had not been exercised, his interest is taxable in the estate of the donor and not in the estate of the donee."\textsuperscript{227} The Board of Tax Appeals has reached a similar result under the federal statute, deeming itself bound


\textsuperscript{227} 277 N. Y. at 318, 14 N. E. (2d) at 372. The court seems to presume that the donee intended to give to the appointed remainderman the very share that the latter would have received in default of appointment. The concept of "election" does not die easily. See Matter of Lichtenstein, 177 Misc. 330, 326, 30 N. Y. S. (2d) 455, 461 (Surr. Ct. 1941). Cf. opinion in Matter of Chauncey, 102 Misc. 378, 163 N. Y. Supp. 1019 (Surr. Ct. 1918), aff'd, 187 App. Div. 952, 175 N. Y. Supp. 897 (1st Dep't 1919), distinguishing between a "renunciation" in the sense of an actual rejection of property offered by another, and an "election" or "disclaimer" whereby the taker simply requires the court to examine the effect of the appointment on his interest in default of appointment. In short, the election becomes a mere fiction.
by New York "property" law.\textsuperscript{228} The reasoning in the \textit{Lansing} case in connection with the appointee's election thus becomes mere excess verbiage.\textsuperscript{229} As indicated above,\textsuperscript{230} however, the Supreme Court now seems to consider the Grinnell doctrine as inherently dependent upon a renunciation of the appointed interest, and thus the appointee's entire share should be taxable if he fails to renounce his rights under the appointment.\textsuperscript{231}

\textbf{THE FAILURE OF THE CLIFFORD CONCEPT}

The ineffectiveness of the provision expressly dealing with powers of appointment finally caused the Government to turn to another provision of the basic section defining the gross estate.\textsuperscript{232} It selected subsection (a), which requires the inclusion in the gross estate of all property "to the extent of the interest therein of the decedent at the time of his death." In the \textit{Field} case the Supreme Court had held that under the early version of this provision property appointed under a general power was not includible in the donee's estate.\textsuperscript{233} But the winds of doctrine had shifted since the \textit{Field} case, for the Supreme Court no longer interpreted the estate tax statute as if it were medieval property law.\textsuperscript{234} Moreover, in \textit{Helvering v. Clifford}\textsuperscript{235} it had held that under section 22(a), the general provision defining taxable income, a grantor of a trust was taxable on its income yield although he no longer owned the property in the technical property sense and despite the fact that other provisions of the income tax statute contained specific provisions taxing the income of certain trust arrangements to the grantor.\textsuperscript{236} The Court had thus evolved a concept of substantial ownership for income tax purposes which might be carried over to the estate tax statute. Also, on various occasions the Court

\textsuperscript{228} James C. Webster, 38 B. T. A. 273 (1938), (1939) 52 HARV. L. REV. 531. But see discussion at p. 332 supra.

\textsuperscript{229} But \textit{cf.} Estate of Elston, 32 Cal. App. (2d) 652, 657, 90 P. (2d) 608, 611 (1939).

\textsuperscript{230} See discussion at p. 334 supra.

\textsuperscript{231} Compare 1 PAUL, \textit{op. cit. supra} note 4, at 461; Griswold, \textit{supra} note 8, at 936; (1941) 41 Col. L. Rev. 149, 152.

\textsuperscript{232} Revenue Act of 1926, § 302; INT. REV. CODE § 811 (1939).

\textsuperscript{233} See discussion at p. 300 supra.


\textsuperscript{235} 309 U. S. 331 (1940). See also Helvering v. Horst, 311 U. S. 112 (1940); Harrison v. Schaffner, 312 U. S. 579 (1941); Helvering v. Stuart, 63 Sup. Ct. 140 (1942).

\textsuperscript{236} For commentaries on this decision see PAUL, STUDIES IN FEDERAL TAXATION, THIRD SERIES (1940) 200; Pavenstedt, \textit{The Broadened Scope of Section 22(a)}; \textit{The Evolution of the Clifford Doctrine} (1941) 51 YALE L. J. 213; Ray, \textit{The Income Tax on Short Term and Revocable Trusts} (1940) 53 HARV. L. REV. 1322, 1348; Note (1940) 49 YALE L. J. 1305.
had indicated that the provisions defining the gross estate were not necessarily mutually exclusive in subject matter.  

The Government relied, though without success, upon a similar concept of substantial ownership in the *Safe Deposit* case, involving the estate of a decedent who was the beneficiary of three trusts. Under one of the trusts he was entitled to a portion of the income until he became 28, at which time he was to receive the entire trust property as absolute owner; under the others he enjoyed a life estate subject to specified restrictions before he became 28. In addition, he had a general testamentary power of appointment over the property in all the trusts, with remainder, in default of appointment, in favor of his descendants, or, if he had none, to his brother and sisters. The decedent died at the age of 20 and a purported exercise of his power was accordingly held invalid. It was argued that although the power was not exercised the property was nevertheless taxable under subsection (a) because the rights possessed by the decedent were attributes of ownership substantially equivalent to a fee simple title, subject only to specified restrictions on alienation and the use of income.  

In rejecting this argument, the Court marshalled legislative history, administrative construction, and judicial precedents, particularly the *Field* case, in support of the result. The *Field* case was clearly a formidable obstacle, unless its basic thought that subsection (a) refers to property owned by the decedent was to be abandoned.  

This the Court refused to do on the ground that the language of the statute and the guides to its proper interpretation barred the application of the *Clifford* principle “that the realities of the taxpayer’s economic interest rather than the niceties of the conveyancer’s art” are indicators of statutory meaning.  

It is obvious that there are limits to statutory interpretation and that a point is finally reached where the desirable and the enacted can no longer be honestly identified as one. Yet it is difficult to say that the legislative materials were more indicative of meaning here than the legislative data in the *Clifford* case, in which Mr. Justice Douglas, concentrating upon the allegedly broad language of section 22(a), refused to allow such data to undermine the broad concept of ownership discovered in the interstices of the statute.  

239. The opinion also quoted Burnet v. Guggenheim, 288 U. S. 220, 228 (1933). There was no mention of Porter v. Commissioner, 288 U. S. 436, 442 (1933), which seems to have some relevance.  
241. Compare Commissioner v. Beck, 129 F. (2d) 243, 245 (C. C. A. 2d, 1942); 1 Paul, *op. cit. supra* note 4, at 44. See also the stimulating discussion in FRIEHL, IF MEN WITH ANGELS (1942) 346.  
242. See 309 U. S. at 337.
Safe Deposit cases was probably little affected by meticulous regard for legislative intention or the lack of it. The vital distinction was one of tax context. In the Clifford case the Court had to deal with an obvious attempt by a full-fledged owner of property to shift the incidence of tax by making certain innocuous legal gestures. The Safe Deposit case, on the other hand, involved an "innocent" decedent who had never attained the full dignity of ownership and, nevertheless, without specific Congressional authorization, was being saddled with its tax consequences.

The Government's defeat in the Safe Deposit case constituted additional evidence of the need for statutory change. Even victory would not have enabled the Government to deal in thoroughgoing fashion with powers of appointment, and there would be an unfortunate penumbra of uncertainty. For example, if a power were not general, the question would remain whether the donee had sufficient contacts with the appointive property to warrant its inclusion in his gross estate. Then again, a donee might not have enjoyed a life estate prior to death, and the problem would arise whether such an interest was a necessary ingredient of "substantial ownership." A clean-cut legislative operation was the only appropriate remedy for ridding the estate tax of property anachronisms which have been "productive of litigation but not of revenue." (This article will be concluded in a subsequent issue)


245. One might also add law review articles.

246. Compare statement of Mr. Paul in Hearings before Committee on Ways and Means on Revenue Revision of 1942, 77th Cong., 2d Sess. (1942) 91.

The need for legislative amendment does not imply that the courts are helpless to correct improper interpretations of the old statute. A legislative change does not call for judicial paralysis as to the past. Cf. Higgins v. Smith, 308 U. S. 473, 479 (1940). Courts may still correct bad law superimposed judicially upon a statute, especially where the Supreme Court has failed to speak upon an issue. Statutory changes, for example, do not represent approval of all the refinements feeding on the Grinnell case. On the other hand, legislative action provides the only method of immediately removing evils as to the future. It is obviously not practical to wait many years until the courts straighten out difficulties, assuming they finally do so.

Various collateral problems, such as appointments to charity and the gift tax, will be discussed in connection with the new statute.