

THE CONFLICT OF LAWS AND POWERS OF APPOINTMENT

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Frequently, property is given by a testator or by the settlor of a trust to one person for life, with a power to name by appointment the persons who are to take the property after his death. What state has jurisdiction over property subject to such a power of appointment, and what law governs the creation and the exercise of such a power? The two problems raised by these cases have been troubling the courts of common-law countries for exactly one hundred years¹ since the situs of the property and the domiciles of the donor of the power (i. e., the settlor or the testator), the donee (i. e., the person, generally the life tenant, who is to exercise the power), and the appointee often do not coincide. The growing prevalence of trusts, both inter vivos and testamentary, and of the use of the device of a power of appointment in trust deeds and in wills, and the attempts of various states and countries to tax both the creation of such powers and their exercise or the failure to exercise them, render timely the collection of the cases involving these questions and an attempt to develop the principles which have moved the courts in deciding them.

It seems logical to take up first the jurisdictional question, which has been considered by the courts chiefly in connection with inheritance tax cases; other types of cases, however, such as those dealing with the rights of the donee's "forced heirs" and creditors, should be treated from the same viewpoint. In the light of the results of this jurisdictional study, one can then consider the authorities on the problem of what law governs documents creating and exercising powers with respect to both real estate (a comparatively easy question under the authorities) and personalty. This latter problem, dealt with in numerous cases, may in turn be subdivided into three questions: namely, what law governs (a) the construction of the donor's will or deed, (b) the validity (formal and "essential") of the donee's exercise of the power, and (c) the construction of the will or deed in which the donee exercised it.

Nearly all questions of conflict of laws concerning property, as well as other matters, can be considered from the two angles indicated

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1. The earliest case found dealing with this problem is *Tatnall v. Hankey*, 2 Moore P. C. C. 342 (1838) (what law governs the formal validity of the exercise of a power).

above: what state has jurisdiction or power to determine who owns or is entitled to the property, and what state's law will be applied to determine the construction, validity, and effect of acts or documents dealing with the property. For example, a testator domiciled in State *A* may die bequeathing to *X* property situated in State *B*. One may consider the success of an attempt by either State *A* or State *B*, or perhaps by another state, *C* (the domicil of *X*, or, in cases involving corporate stock or evidences of indebtedness, the domicil of the corporation or of the debtor), to provide by its laws who shall get that property. Any of these states might attempt to confiscate all or a part of it by applying their escheat laws or by taxing its transfer; or they might refuse to allow *X* to receive it, on the ground, perchance, that *X* is a foreign corporation or an alien. Likewise, any of these states might attempt to give a part of the property to the testator's widow as a part of her dower rights, or to give it to his creditors in payment of his debts.

From another viewpoint, one may attempt to determine the laws of which state will be applied by the courts to determine the validity and effect of the disposition of the property made by the testator. The intimate connection between the answers to the two problems is clear. If State *A* has jurisdiction to give the property to whom it will, its law, unless as part of its own law it chooses to apply the law of some other state, will govern the validity and effect of the deeds or wills of the parties involved, who are in cases of powers of appointment the donor and the donee. Those cases determining which state has the requisite jurisdiction prove which law actually controls all such questions.

To consider first, therefore, this jurisdictional question, it has often been pointed out that the privilege of inheritance is one that may be granted or withheld by the government at will.² The "government" referred to is the sovereign power having jurisdiction. Since this government can withhold the privilege entirely, it, and it alone, can withhold it in part by taxing the property or the right to inherit it. It follows that the same government can (though it may not always do so) determine who shall get the property not taken away by taxation. These factors indicate the importance of determining which government has this power.

In cases not involving powers of appointment, it is now settled (after much uncertainty) that the situs of real and tangible personal property and the situs alone can properly levy such a tax.³ Likewise the state of domicil of a decedent, and that state alone, can properly

2. See *Stebbins v. Riley*, 268 U. S. 137, 140 (1925).

3. *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 204 (1905); *Frick v. Pennsylvania*, 298 U. S. 473, 489, 492 (1925); *City Bank Farmers Trust Co. v. Schnader*, 293 U. S. 112, 118 (1934).

levy such a tax on the decedent's intangible property,⁴ to which for this purpose is applied a fictional situs at that domicil.

Before considering the tax cases involving property subject to a power of appointment, a problem peculiar to such property must be discussed. In dealing with intangible property in the preceding discussion, there was only one possible owner and, consequently, only one possible situs of the property for the purposes of the questions here involved—the domicil of the testator or decedent. In the case of property subject to a power of appointment, however, there are two possible owners, the donor and the donee, who must be considered in determining what place corresponds to the domicil of the testator in the ordinary case. The donor, of course, originally owns the property. Usually he gives it to the donee for life. If the donor had named a specific remainderman (instead of giving a power of appointment), his would be the testator's domicil; and the property would go to the remainderman from him. When there is a special power of appointment, giving the donee the power to appoint the remainder among a class, it is likewise clear that it is the donor's property which is involved. The donee cannot do what he wills with it but can only distribute it among the members of the class which is specified by the donor. When the power of appointment, however, is a general power and is exercisable by deed or will, the donee (if he is also the life tenant) has practically all the attributes of ownership. It has been suggested that it is a mere fiction to hold that he is not in fact the owner.⁵ Where the power is exercisable only by will (as is usually the case), however, the donee cannot consume the property and hence lacks an essential attribute of ownership; and it certainly is no fiction where the donee is not the life tenant. Moreover, at least until the donee makes an appointment (usually by will effective only on his death), the property is still the donor's; for, in default of appointment, it would pass as provided in the donor's will. The mere fact that the donee does appoint the property to whomsoever he wishes makes no difference. The reason that the appointee takes the property is that the donor wished an appointee of the donee to get the property, and not merely that the donee wished him to get it. Ac-

4. *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204 (1930); *Baldwin v. Missouri*, 281 U. S. 586 (1930); *Beidler v. South Carolina Tax Comm.*, 282 U. S. 1 (1930); *First Nat. Bank of Boston v. Maine*, 284 U. S. 312 (1932). Intangible property subject to a power of appointment will rarely or never become "integral parts of some local business" and, hence, taxable where the documents are located. *Nashville Trust Co. v. Stokes*, 118 S. W. (2d) 228 (Tenn. 1938).

5. See Notes (1922) 35 HARV. L. REV. 326, 327, (1935) 48 HARV. L. REV. 1202, 1239. Cf. *Matter of Fearing*, 200 N. Y. 340, 93 N. E. 956 (1911); *Matter of Kissell*, 142 App. Div. 934, 127 N. Y. Supp. 1127 (1st Dep't, 1911), *aff'g*, 65 Misc. 443, 121 N. Y. Supp. 1088 (Surr. Ct. 1909).

cordingly, it is well settled that it is the donor's property,⁶ and that the appointee takes the property from the donor and not from the donee.⁷ The donee is merely an agent to complete the will or deed of the donor, and his disposition of the property must be read into the donor's will as if it had been written there originally by the donor himself.⁸

It is now time to consider the actual tax cases involving the power to appoint. In view of the preceding discussion, the answer to the question in the case of real estate is easy. That state where the real estate is located alone has jurisdiction to levy an inheritance tax on the property or its transfer through the exercise of or the failure to exercise a power of appointment. It has been so held both where the donee and not the donor,⁹ and where the donor and not the donee,¹⁰ was domiciled at the situs; and even though the state of the situs may, in fact, not tax it,¹¹ no other state may levy such a tax.¹² Since a mortgage is an interest in land, the same rules should apply to mortgages.¹³

6. *McMurtry v. State*, 111 Conn. 594, 151 Atl. 252 (1930); *Sewall v. Wilmer*, 132 Mass. 131 (1882); *Walker v. Treasurer*, 221 Mass. 600, 109 N. E. 647 (1915); *Matter of Thomas*, 39 Misc. 136, 78 N. Y. Supp. 981 (Surr. Ct. 1902); *Commonwealth v. Duffield*, 12 Pa. 277 (1849); *Cotting v. DeSartiges*, 17 R. I. 668, 24 Atl. 530 (1892); *Rhode Island Hospital Trust Co. v. Anthony*, 49 R. I. 339, 142 Atl. 531 (1928); *Tatnall v. Hankey*, 2 Moore P. C. C. 342 (1838); see *MacClurkan v. Bugbee*, 105 N. J. L. 89, 143 Atl. 757, 758 (1928), *rev'd on other grounds*, 106 N. J. L. 192, 150 Atl. 443 (1930).

7. *Lederer v. Pearce*, 266 Fed. 497 (C. C. A. 3d, 1920), *aff'g*, 262 Fed. 993 (E. D. Pa. 1919); *Estate of Bowditch*, 189 Cal. 377, 208 Pac. 282 (1922); *Bartlett v. Sears*, 81 Conn. 34, 70 Atl. 33 (1908); *In re Estate of Higgins*, 194 Iowa 369, 189 N. W. 752 (1922); *Liggett v. Fidelity & Col. Trust Co.*, 274 Ky. 387, 118 S. W. (2d) 720 (1938); *Matter of Canda*, 197 App. Div. 597, 189 N. Y. Supp. 917 (1st Dep't, 1921); *Hollister v. Hollister*, 85 Ore. 316, 166 Pac. 940 (1917); *Manning v. Board of Tax Comm'rs*, 46 R. I. 400, 127 Atl. 865 (1925); see BEALE, *THE CONFLICT OF LAWS* (1935) § 113 E.2; MINOR, *CONFLICT OF LAWS* (1901) § 150; 2 WHARTON, *CONFLICT OF LAWS* (3d ed. 1905) § 590a; Note (1927) 12 CORN. L. Q. 379, 382.

8. *Bartlett v. Sears*, 81 Conn. 34, 70 Atl. 33 (1908); *Matter of Bradford*, 159 Misc. 482, 288 N. Y. Supp. 153 (Surr. Ct. 1936); see *Matter of Burling*, 148 Misc. 835, 842, 266 N. Y. Supp. 482, 490 (Surr. Ct. 1933). See also MINOR, *loc. cit. supra* note 8; Notes (1911) 24 HARV. L. REV. 654, (1925) 38 HARV. L. REV. 661, 662. Compare the analogous rule used in determining whether the appointment violates the rule against perpetuities. GRAY, *RULE AGAINST PERPETUITIES* (3d ed. 1915) § 515.

9. *Matter of Brett*, 206 App. Div. 746, 200 N. Y. Supp. 915 (1st Dep't, 1923); see *State v. Probate Ct.*, 124 Minn. 508, 511, 145 N. W. 390, 392 (1914).

10. *Manning v. Board of Tax Comm'rs*, 46 R. I. 400, 127 Atl. 865 (1925); see *Commonwealth v. Kuhn*, 2 Pa. C. C. 248, 253 (1886). But *cf. Matter of Fearing*, 200 N. Y. 340, 93 N. E. 956 (1911).

11. *In re Estate of Higgins*, 194 Iowa 369, 189 N. W. 752 (1922); *Matter of Fearing*, 200 N. Y. 340, 93 N. E. 956 (1911); *Manning v. Board of Tax Comm'rs*, 46 R. I. 400, 127 Atl. 865 (1925).

12. The contrary was held in *Matter of Hull*, 186 N. Y. 586, 79 N. E. 1107 (1906), *aff'g without opinion*, 111 App. Div. 322, 97 N. Y. Supp. 701 (2d Dep't, 1906). However, it seems clear that this case will not be followed in view of the later Supreme Court cases mentioned *supra* note 3.

13. *Matter of Warden*, 94 Misc. 563, 157 N. Y. Supp. 1111 (Surr. Ct. 1916); see *Commonwealth v. Kuhn*, 2 Pa. C. C. 248, 253 (1886); GOODRICH, *CONFLICT OF LAWS* (2d ed. 1938) § 57. But *cf. Matter of Fearing*, 200 N. Y. 340, 93 N. E. 956 (1911); *Matter of Burch*, 160 Misc. 342, 289 N. Y. Supp. 966 (Surr. Ct. 1936); *State v. Probate Ct.*, 124 Minn. 508, 145 N. W. 390 (1914).

The same rules do apply to tangible personal property subject to a power of appointment. Its permanent situs,¹⁴ and that alone,¹⁵ can levy an inheritance tax on it.

In the case of intangible property, as has been pointed out, only recently has the law been settled even as to property which is not subject to a power of appointment. Consequently, the earlier cases dealing with property that is subject to such a power were in a considerable state of confusion. The domicile of the donee,¹⁶ the situs of the security (in the case of debts)¹⁷ and the corporate domicile (in the case of corporate stock),¹⁸ even though the domicile of the donor was different in each case, were allowed to levy such a tax; and it has been held that the domicile of the donor could not tax it.¹⁹ Apparently it is now clear, however, that only the domicile of the owner can levy an inheritance tax on intangible property,²⁰ and that where such property is subject to a power of appointment, that owner is the donor.²¹ The United States Supreme Court has accordingly denied validity to a tax attempted to be levied by the domicile of the donee,²² thus approving the cases which upheld taxes by the domicile of the donor²³ and others which denied the

14. See *Wachovia Bank & Trust Co. v. Doughton*, 272 U. S. 567, 575 (1926), 40 HARV. L. REV. 652 (1927); *State v. Probate Ct.*, 124 Minn. 508, 512, 145 N. W. 390, 392 (1914); *Estate of Bowditch*, 189 Cal. 377, 380, 208 Pac. 282, 283 (1922); I BEALE, *loc. cit. supra* note 7; Note (1922) 35 HARV. L. REV. 326.

15. See *Wachovia Bank & Trust Co. v. Doughton*, 272 U. S. 567 (1926). This seems the inevitable conclusion from the Supreme Court decisions cited *supra* note 3. The contrary was apparently held, however, in *State v. Probate Ct.*, 124 Minn. 508, 145 N. W. 390 (1914); *cf.* Note (1922) 35 HARV. L. REV. 326.

16. *State v. Probate Ct.*, 124 Minn. 508, 145 N. W. 390 (1914) (bonds); *In re Frazier's Estate*, 188 N. Y. Supp. 189 (Surr. Ct. 1912) (personalty of unspecified type); *In re Seaman's Estate*, 187 N. Y. Supp. 254 (Surr. Ct. 1913) (a "fund"); *Matter of Shepherd*, 150 Misc. 653, 271 N. Y. Supp. 120 (Surr. Ct. 1934) (a "fund").

17. *Matter of Warden*, 94 Misc. 563, 157 N. Y. Supp. 1111 (Surr. Ct. 1916). In this case, bonds "located" in New York and secured by mortgages on New York property, were held taxable there. The donor, the donee, and the trustees were all domiciled and resided outside of New York.

18. *Clark v. Treasurer*, 218 Mass. 292, 105 N. E. 1055 (1914) (donor's domicile was corporate domicile); *Gardiner v. Treasurer*, 225 Mass. 355, 114 N. E. 617 (1916) (same—*semble*); and a number of New York lower court decisions, cited in Note (1929) 64 A. L. R. 740.

19. *Clark v. Treasurer*, 218 Mass. 292, 105 N. E. 1055 (1914); *Matter of Fearing*, 200 N. Y. 340, 93 N. E. 956 (1911).

20. See cases cited *supra* note 4.

21. See cases cited *supra* notes 6-8.

22. *Wachovia Bank & Trust Co. v. Doughton*, 272 U. S. 567 (1926), *rev'g*, 189 N. C. 50, 126 S. E. 176 (1925). It should be noted that neither the situs of the securities nor the corporate domicile nor the place of business of the trustee coincided with the domicile of the donee. The importance of this case is indicated by the numerous student notes on it, among which are the following: (1927) 40 HARV. L. REV. 652, 25 MICH. L. REV. 786, 75 U. OF PA. L. REV. 372, 36 YALE L. J. 716.

23. *Bonds and similar obligations*: *Clark v. Treasurer*, 218 Mass. 292, 105 N. E. 1055 (1914) (upholding tax only as to bonds "located" at donor's domicile); *Gardiner*

right of any other jurisdiction to levy such a tax.²⁴ These cases must be taken, therefore, as establishing the law,²⁵ and the earlier cases must be considered as overruled.²⁶

Three tax cases where the power was created by deed have arisen and support this conclusion. They have held that the state where the grantor of the trust was domiciled at the time of its creation, which was

v. Treasurer, 225 Mass. 355, 114 N. E. 617 (1916); *Matter of the Trusts of the Will of Wallop*, 1 DeG., J. & Sm. 656 (Ch. 1864). *Stock*: Such a tax has been upheld by the donor's domicil where it coincided with the corporate domicil, although it was not the donee's domicil. *Clark v. Treasurer, supra* (denying tax on foreign corporate stock); *Gardiner v. Treasurer, supra (semble)*; *Matter of Kissell*, 65 Misc. 443, 121 N. Y. Supp. 1088 (Surr. Ct. 1909) (denying tax as to bonds and as to foreign corporate stock). *Miscellaneous*: *Nashville Trust Co. v. Stokes*, 118 S. W. (2d) 228 (Tenn. 1938) (securities); see *Estate of Bowditch*, 189 Cal. 377, 381, 208 Pac. 282, 283 (1922); 1 BEALE, *loc. cit. supra* note 7. In *Matter of Davison*, 236 App. Div. 684, 258 N. Y. Supp. 42 (2d Dep't, 1932), it was held that a non-resident donee would have to pay a tax on the "trust fund" involved at the domicil of the donor.

24. The domicil of the donee cannot tax intangibles. *Estate of Bowditch*, 189 Cal. 377, 208 Pac. 282 (1922); *McMurtry v. State*, 111 Conn. 594, 151 Atl. 252 (1930), discussed in *Developments in the Law—Future Interests* (1935) 48 HARV. L. REV. 1202, 1247; *Walker v. Treasurer*, 221 Mass. 630, 109 N. E. 647 (1915); *Matter of Brett*, 206 App. Div. 746, 200 N. Y. Supp. 915 (1st Dep't, 1923) (upholding, however, a tax on stock of corporations domiciled at the donee's domicil); *Matter of Burch*, 160 Misc. 342, 289 N. Y. Supp. 966 (Surr. Ct. 1936) (securities located at donee's domicil, where trustee resided); *Matter of Sandford*, 277 N. Y. 323, 14 N. E. (2d) 374 (1938) (same); *Commonwealth v. Duffield*, 12 Pa. 277 (1849). See *MacClurkan v. Bugbee*, 105 N. J. L. 89, 93, 143 Atl. 757, 758 (1928); 1 BEALE, *loc. cit. supra* note 7. In *Nashville Trust Co. v. Stokes*, 118 S. W. (2d) 228 (Tenn. 1938), the state of the trustee's residence where the securities were located was denied the right to tax them.

25. This decision has been approved by text writers and editors. See recent case notes cited *supra* note 22. See also 1 BEALE, *loc. cit. supra* note 7; 61 C. J. 1606, 1608, 1635, 1667; Note (1926) 24 MICH. L. REV. 176. In Note (1922) 35 HARV. L. REV. 326, it is stated that the donor's domicil might levy such a tax, but that the donee's domicil should also be able to do so, on the ground that it determines whether the donee's will is a "will" within the meaning of the donor's will, authorizing the donee "to appoint by will". This suggestion is untenable, in view of the authorities holding that a will is a valid exercise of the power, if it is valid as under the law of the donor's domicil, although it is not valid under the law of the donee's domicil. See cases cited *infra* notes 96 and 98. These authorities show that the appointee's privilege of inheriting such property is not granted by the donee's domicil, although the contrary has been suggested as the basis for a tax by the domicil of the donee. See *Matter of Kissell*, 65 Misc. 443, 445, 121 N. Y. Supp. 1088, 1089 (Surr. Ct. 1909); *Matter of Fearing*, 200 N. Y. 340, 344, 93 N. E. 956, 957 (1911). The suggestion in (1927) 75 U. OF PA. L. REV. 372, that the donee's domicil could levy a tax on the act of exercising a power by a local will is likewise untenable. It would measure the tax by property out of the jurisdiction of the state levying the tax, and, as appears from the cases cited *infra* notes 64, 93, 96 and 98, the donee's will is not required to be valid under the law of the donee's domicil or to be probated there. The fact that the will is usually probated at the donee's domicil is also immaterial, and furnishes no ground for a tax. *Matter of Brett*, 206 App. Div. 746, 200 N. Y. Supp. 915 (1st Dep't, 1923); *Matter of Sandford*, 277 N. Y. 323, 14 N. E. (2d) 374 (1938). But see *Matter of Hull*, 97 App. Div. 258, 89 N. Y. Supp. 939 (3d Dep't, 1904); *Matter of Canda*, 197 App. Div. 596, 607, 611, 614, 189 N. Y. Supp. 917, 924, 926, 928 (1st Dep't, 1921).

26. See (1927) 40 HARV. L. REV. 652, 11 MINN. L. REV. 371; Note (1927) 12 CORN. L. Q. 379. In the *Matter of Shepherd*, 150 Misc. 653, 271 N. Y. Supp. 120 (Surr. Ct. 1934), the earlier rule was followed and the domicil of the donee was allowed to tax a "fund physically located" at the donor's domicil. The *Wachovia* case is not cited. Presumably it and similar cases were not called to the court's attention. But see *In re Simond's Estate*, 188 Wash. 211, 61 P. (2d) 1302 (1936).

also, apparently, the seat of the trust²⁷ (the equivalent of the domicil of the donor in the case of a testamentary trust) can levy an inheritance tax on such property. Moreover, this conclusion was reached despite the fact that the donee, who was also the grantor, died domiciled elsewhere and appointed the property to aliens,²⁸ and despite the fact the trustees, after receiving local property, invested it in foreign stocks and bonds.²⁹ The Supreme Court of Washington, however, in a somewhat

27. There has been considerable discussion as to what law governs a trust created *inter vivos* or a "living trust". Beale, *Living Trusts of Moveables in the Conflict of Laws* (1932) 45 HARV. L. REV. 969; Cavers, *Trust Inter Vivos and the Conflict of Laws* (1930) 44 HARV. L. REV. 161; Swablenland, *The Conflict of Laws in Administration of Express Trusts of Personal Property* (1936) 45 YALE L. J. 438. This question is beyond the scope of this article. That law, however, whatever it is, takes the place of the law of the donor's domicil in the case of powers created by will, and the phrase "donor's domicil" must be understood here to mean the domicil of the testator in the case of a power created by will or the law governing the trust in the case of a power created *inter vivos*, as the case may be. That phrase also includes the law governing the creation by contract of a power of appointment, as in the purchase of annuities. See, e. g., Harlow v. Duryea, 48 R. I. 234, 238, 107 Atl. 98, 99 (1919), and Northwestern Masonic Aid Ass'n v. Jones, 154 Pa. 99, 106, 26 Atl. 253, 254 (1893).

Where it has been a question of powers of appointment created *inter vivos*, generally the domicils of the donor and trustee and the situs of the property at the time of the creation of the power have clearly or apparently coincided, and that law, although different from the law of domicil of the donee, has been held to govern matters which, in the case of a power created by will, would be governed by the law of the donor's domicil. Old Colony Trust Co. v. Commissioner, 73 F. (2d) 970 (C. C. A. 1st, 1934); Prince de Bearn v. Winans, 111 Md. 484, 74 Atl. 626 (1909); Boston Safe Deposit & Trust Co. v. Prindle, 290 Mass. 577, 195 N. E. 793 (1935); Chase Nat. Bank v. Chicago Title & Trust Co., 271 N. Y. 602, 659, 3 N. E. (2d) 205, 472 (1936); McCreary's Estate, 328 Pa. 513, 196 Atl. 25 (1938); *In re Lewal's Settlement Trusts* [1918] 2 Ch. 620. Cf. Russell v. Joys, 227 Mass. 263, 116 N. E. 549 (1917); Harlow v. Duryea, *supra* (annuities). The residence, as distinguished from the domicil, of the donee of such a power, is, of course, immaterial. *Re Daly's Settlement*, 25 Beav. 456 (Rolls Ct. 1858). In some cases the law of the trustee's domicil (though it was not the donor's or the donee's) is applied, that being apparently the situs of the property at the time of the creation of the power. Johnstone v. Commissioner, 76 F. (2d) 55 (C. C. A. 9th, 1935), *cert. denied*, 296 U. S. 578 (1935); *In re Simpson* [1916] 1 Ch. 502. Cf. Greenough v. Osgood, 235 Mass. 235, 126 N. E. 461 (1920). Other cases, where the donor's domicil did not clearly appear, apply to such matters the law of the trustee's domicil (apparently the situs of the property at the time of the creation of the power) though it is not the domicil of the donee. Tudor v. Vail, 195 Mass. 18, 80 N. E. 590 (1907); *In re Anziani* [1930] 1 Ch. 407; *Re Wilkinson* [1934] 1 D. L. R. 544 (Ont. Sup. Ct. 1933). Cf. Guaranty Trust Co. v. Harris, 267 N. Y. 1, 195 N. E. 529 (1935), 44 YALE L. J. 308. Other cases apply to these matters the law of the domicil of the donee though it is neither the situs nor the domicil of either the donor or the trustee. Radford v. Fidelity & Col. Trust Co., 185 Ky. 453, 215 S. W. 285 (1919); Maynard v. Farmers Loan & Trust Co., 238 N. Y. 592, 144 N. E. 905 (1924), *aff'g without opinion*, 208 App. Div. 112, 203 N. Y. Supp. 83 (1st Dep't, 1924). Cf. *Re Ross Marriage Settlement*, 16 Ont. W. R. 327 (1910); *In re Askew* [1930] 2 Ch. 259. The law stipulated by the parties to the deed of trust may govern such matters. White v. Holly, 80 Conn. 438, 68 Atl. 997 (1908); cf. Guaranty Trust Co. v. Harris, *supra*. RESTATEMENT, CONFLICT OF LAWS (1934) § 284: "The creation *inter vivos* of a power to appoint chattels is determined by the law of the state in which the chattels are at the time of the creation of the power." A later change in the domicil of the donor or donee is immaterial. White v. Holly, *supra*; Tudor v. Vail, *supra*; see Barret v. Berea College, 48 R. I. 258, 262, 137 Atl. 145, 147 (1927). But cf. *Re Ross Marriage Settlement*, *supra*. As to the effect of the change of trustees, see Wilmington Trust Co. v. Wilmington Trust Co., 186 Atl. 903 (Del. Ch. 1936), 37 COL. L. REV. 125 (1937); Guaranty Trust Co. v. Harris, *supra*.

28. In the Matter of Lovelace's Settlement, 4 DeG. & J. 340 (Ch. 1849).

29. *In re Cigala's Settlement Trusts*, 7 Ch. D. 351 (1878).

similar case has, erroneously it would seem, upheld a tax by the domicile of the donee.³⁰

No cases involving a conflict of laws have been found where there was an attempt to tax the exercise of a power by deed, but it seems clear that the same rules would apply—allowing the state of the donor's domicile, and it alone, to tax intangibles, while the situs alone could tax tangible personalty and real estate.

One of the rare cases concerning the conflict of laws and powers of appointment which was considered from the jurisdictional viewpoint involved successive appointments. A Massachusetts donor gave a Rhode Island donee a power which was exercised by an appointment to a New Yorker for life with a further power to appoint the ultimate remainderman. It was held that New York had no jurisdiction over the property.³¹ In such cases it seems that the first donee merely delegates his authority to appoint; the property remains the original donor's, from whom the ultimate remaindermen take it. Its transfer would thus be taxable, just as though there had been no third party intervening, by the state of the situs or, in the case of intangibles, by the state of the domicile of the original donor.³²

Most of the cases just discussed were decided on the ground that the particular state involved did or did not have jurisdiction over the property in question. It has since been held by the Supreme Court that the limitations formerly worked out were not jurisdictional but only constitutional.³³ Hence they did not apply to the Federal Government, which has jurisdiction to tax bonds and stock certificates representing debts of and stock in foreign corporations, owned by a non-resident alien, if they were physically located in America.³⁴ Domicil, citizenship, situs, source of income, all may give jurisdiction to tax. So now the exercise by a non-resident alien of a power of appointment over stock in an American corporation, the certificates for which are held abroad, may be taxed by the Federal Government.³⁵ Consequently the earlier cases are not conclusive of what state can or cannot, as a jurisdictional

30. *In re Simond's Estate*, 188 Wash. 211, 61 P. (2d) 1302 (1936); see *Commonwealth v. Kuhn*, 2 Pa. C. C. 248, 253 (1886).

31. *Matter of Bradford*, 159 Misc. 482, 288 N. Y. Supp. 153 (Surr. Ct. 1936).

32. *Ibid.* But *cf.* *Bundy v. United States Trust Co.*, 257 Mass. 72, 153 N. E. 337 (1926).

33. *Burnet v. Brooks*, 288 U. S. 378 (1933). See Buchanan and Myers, *The Administration of Intangibles in View of First National Bank v. Maine* (1935) 48 HARV. L. REV. 911, 947.

34. *Burnet v. Brooks*, 288 U. S. 378 (1933).

35. *Commissioner v. Nevius*, 76 F. (2d) 109 (C. C. A. 2d, 1935), *cert. denied*, 296 U. S. 591 (1935); Note (1935) 48 HARV. L. REV. 1202, 1248.

matter and from a conflict of laws viewpoint, tax property subject to a power. Being decided largely on jurisdictional grounds, however, it is believed they are helpful in determining this question, and hence in determining what state has power to apply its own law to wills and deeds creating and exercising powers of appointment.

Another problem has sometimes been presented to the courts which should also be considered from a jurisdictional viewpoint. What state can restrict the capacity of a donee to appoint property subject to a power, or can give it, despite the donee's wishes, to his widow, children or other "forced heirs" or to his creditors?

This question has been little discussed by the text writers.³⁶ The rights of the donee's "forced heirs", it seems, are essentially similar to dower and curtesy rights, and are closely analogous to the rights of a donee's creditors to property subject to a power of appointment. One suggestion is that the statutes restricting testamentary capacity or giving a percentage of a decedent's property to his spouse, children, or parents, regardless of his will, should not apply to property subject to a power of appointment since this is not the donee's property. It has been so held in interpreting some statutes giving rights to "forced heirs" of the donee where the statute attempted to be invoked by such heirs was that of the donor's domicil.³⁷ But assuming that such statutes are construed to include property subject to a power of appointment, it remains to be decided which statute—that of the donor's or that of the donee's domicil—can effectively do so, and also whether a statute or rule of common law at either of those places or both can subject such property to the claims of the donee's creditors. The cases indicate that the law of the situs (the donor's domicil in the case of intangibles) has jurisdiction to give the property to "forced heirs" of the donee³⁸ or to his creditors.³⁹ The law of the donee's domicil should have nothing to do with this question and, it has been rightly held, cannot restrict the capacity of the donee (capable under the law of the donor's domicil) to

36. See 2 BEALE, *op. cit. supra* note 7, §§ 234.1, 235.1, 285.1; DICEY, *CONFLICT OF LAWS* (5th ed. 1932) Rules 198, 202, discussed *infra* p. 412; MINOR, *loc. cit. supra* note 7; Note (1911) 24 HARV. L. REV. 654, reviewing *In re Pryce* [1911] 2 Ch. 286, *rev'g*, 130 L. T. 415.

37. *Sewall v. Wilmer*, 132 Mass. 131 (1882); *Matter of Barnhart*, 137 Misc. 518, 244 N. Y. Supp. 130 (Surr. Ct. 1930); *Rhode Island Hospital Trust Co. v. Anthony*, 49 R. I. 339, 142 Atl. 531 (1928).

38. *Ibid.* (cases holding the statute gave forced heirs of the donee no right to the property subject to a power of appointment). Cf. 2 BEALE, *op. cit. supra* note 7, § 285.1. See also the English cases (now overruled) cited *infra* note 43.

39. *Seward v. Kaufman*, 119 N. J. Eq. 44, 180 Atl. 857 (Ch. 1935). See *Pearce v. Lederer*, 262 Fed. 993, 998, 1000 (E. D. Pa. 1919); *Whitlock-Rose v. McCaughn*, 21 F. (2d) 164, 165 (C. C. A. 3d, 1927); *Commonwealth v. Duffield*, 12 Pa. 277, 280 (1849). Cf. cases cited *infra* note 42.

execute a will appointing the property⁴⁰ nor can it give the property either to the donee's forced heirs⁴¹ or to his creditors.⁴²

In England, however, a different result has been reached in the case of a general power of appointment only. It has been held, contrary to earlier cases,⁴³ that the donee, by the exercise of the power, makes the property a part of his estate for all purposes: and that, being part of his estate, it is subject to the law of his domicile giving a proportion of it to his forced heirs.⁴⁴ Even in England, however, a contrary rule still prevails as to special powers.⁴⁵ The English rule is approved by Dicey, who contends that the donee in the case of a special power is expressing the donor's wishes, and that consequently,

40. Matter of Sloan's Estate, 7 Cal. App. (2d) 319, 46 P. (2d) 1007 (1935), discussed in Note (1937) 50 HARV. L. REV. 1119, 1155; Matter of Marsland's Estate, 142 Misc. 230, 254 N. Y. Supp. 293 (1931); *In re Mégret* [1901] 1 Ch. 547; *In re Mackenzie* [1911] 1 Ch. 578; RESTATEMENT, CONFLICT OF LAWS § 234. In effect the same rule was applied in the following cases where the forced heirs of the donee under the laws of his domicile attempted unsuccessfully to reach the property: Prince de Bearn v. Winans, 111 Md. 434, 74 Atl. 626 (1909); Matter of Marsland's Estate, *supra*; *In re Hernando*, 27 Ch. D. 284 (1884); Pouey v. Hordern [1900] 1 Ch. 492; *In re Mégret*, *supra*; *In re Mackenzie*, *supra*. *Contra*: *In re Pryce* [1911] 2 Ch. 286; *cf. In re Lewal's Settlement Trusts* [1918] 2 Ch. 391. The question whether a donee with testamentary capacity under the law of his domicile, but not under that of the donor's, can execute a will appointing the property depends on different considerations. See *infra* p. 421. See also 2 BEALE, *op. cit. supra* note 7, § 235.1 (situs alone governs capacity as to real estate); RESTATEMENT, CONFLICT OF LAWS § 234 (same); DICEY, *op. cit. supra* note 36, Rule 198 (the law of either domicile can give capacity). See also *In re Lewal's Settlement Trusts*, *supra*; *cf. Matter of the Will of Stewart*, 11 Paige 398 (N. Y. 1845).

41. See authorities cited *supra* note 40.

42. Rhode Island Hospital Trust Co. v. Anthony, 49 R. I. 339, 142 Atl. 531 (1928); Adger v. Kirk, 116 S. C. 298, 108 S. E. 97 (1921). See cases cited *supra* note 39. It was so held in *In re Bald*, 66 L. J. Ch. 524 (1897), but this case has apparently been overruled. *In re Pryce* [1911] 2 Ch. 286. It has been criticized as wrong. DICEY, *op. cit. supra* note 36, Rule 202. In *Art Students' League v. Hinkley*, 31 F. (2d) 469, 474 (D. Md. 1929), *aff'd*, 37 F. (2d) 225 (C. C. A. 4th, 1930), *cert. denied*, 281 U. S. 133 (1930), and in *Maynard v. Farmers Loan & Trust Co.*, 208 App. Div. 112, 203 N. Y. Supp. 83 (1st Dep't, 1924), the courts applied the law of its domicile to determine the capacity of the corporate appointee to take the property. However, when the latter case came up again, *sub nom. Matter of Thompson's Estate*, 245 N. Y. 565, 157 N. E. 859 (1927), the court without discussion applied the law of the donee's domicile, which was New York, to determine whether the donee had so blended the property subject to the power of appointment with his own property, that it should go to pay the general legacies instead of going in accordance with the residuary clause to the charitable corporation. This question, however, is a question of the donee's intention and of the construction of the donee's will, i. e., it is a question of to whom the donee intended to and did appoint the property. It is not a question of whether the law of the donee's domicile can, regardless of the donee's will, give the property to his forced heirs or creditors. A similar situation might occur in a state like Pennsylvania, where it has been held that the creditors take the property, if at all, because they are appointees and not because the law of the donee's domicile gives it to them. See *Pearce v. Lederer*, 262 Fed. 993, 998 (E. D. Pa. 1919).

43. *In re Hernando*, 27 Ch. D. 284 (1884); *In re Mégret* [1901] 1 Ch. 547; *In re Mackenzie* [1911] 1 Ch. 578; *In re Lewal's Settlement Trusts* [1918] 2 Ch. 391. These last three cases were not considered by the court in deciding *In re Pryce* [1911] 2 Ch. 286. See DICEY, *op. cit. supra* note 36, Rule 202.

44. *In re Pryce* [1911] 2 Ch. 286. This case also in effect overruled *In re Bald*, 66 L. J. Ch. 524 (1897), which dealt with the rights of creditors. It is criticized in Note (1911) 24 HARV. L. REV. 654.

45. Pouey v. Hordern [1900] 1 Ch. 492, distinguished in *In re Pryce* on this ground; *In re Mackenzie* [1911] 1 Ch. 578.

incapacity by the laws of the donee's domicil and the rights of the donee's forced heirs should be immaterial. In the case of a general power, however, the donee is said to be expressing his own will as to the disposition of the property so that the rights of his heirs, given by the law of his domicil, should govern.⁴⁶ This argument disregards the fact that it is the donor's property of which the donee is disposing, and that the appointees take from the donor and not from the donee.⁴⁷ It also disregards the fact that the appointees take the property because the donor wanted the appointees of the donee, whoever they might be, to have it, and not merely because the donee wished them to have it. The donee's domicil, of course, but for the power of appointment, would have no jurisdiction to take the donor's property and give it to the donee's forced heirs or creditors. The fact that the law of the donor's domicil allowed the final recipients of the donor's bounty to be designated by a person domiciled elsewhere does not subject the property to the jurisdiction of that person's domicil. Nor should it be sufficient to permit the law of that state to take the property away from the appointees and give it to the donee's forced heirs or creditors. Probably no one would argue that it could take the property from the appointees and give it to the state under escheat statutes. The situations are substantially the same.

These cases are more helpful than the tax cases in deciding what law governs wills of property subject to a power of appointment. But although the question involved, like that in the tax cases, is a matter of jurisdiction, usually the courts have considered it as a problem of determining what law governs the validity and effect of a will exercising such a power. One cannot lift oneself by one's bootstraps. Hence we must look further for a conclusive answer to the latter type of problem.

It is indicated by the foregoing that the law of the situs has exclusive jurisdiction at least over real estate. It alone can tax real estate or give it to a donee's forced heirs or creditors. The courts of the situs, therefore, have power to determine the validity and effect of the deeds or wills of the donor and donee by applying its own law, and they have done so. That law governs all matters concerning powers of appointment over realty.⁴⁸ This is the rule laid down both by the *Restatement*

46. See *DICEY, op. cit. supra* note 36, Rules 198, 202.

47. See authorities cited *supra* notes 6-8.

48. Many cases were found where the court referred to "property" or the like, without expressly stating whether it was personalty or real estate. It seems probable that in such cases personalty was involved, and they are, therefore, cited under appropriate notes dealing with such property. See, e. g., several of the cases cited *supra* notes 8, 27, 39. Others are: *Holloway v. Safe Deposit & Trust Co.*, 151 Md. 321, 134 Atl. 497 (1926), *writ of error dismissed*, 274 U. S. 724 (1927); *Camden Safe Deposit & Trust Co. v. Fitler*, 123 N. J. Eq. 245, 197 Atl. 249 (Ch. 1938); *City Bank Farmers*

of *Conflict of Laws*⁴⁹ and by the text writers.⁵⁰ In most of the cases, it so happened that the domicil of the donor was the same as the situs though that of the donee was different. Hence with respect to matters which the law of the donor's domicil would govern had it been personal property, these cases are not square holdings that the law of the situs governs although, with respect to those matters which would be governed in the case of personalty by the law of the donee's domicil the contrary is true. Thus, it has been held that the law of the situs, which was also the donor's domicil, but not the donee's, governs the following: the validity of a power of appointment as a matter of law and public policy,⁵¹ the character of a power created over realty and the right of the donee to release it,⁵² the formal validity of the donee's will as an exercise of the power,⁵³ and the questions whether a general devise is an exercise of a power or whether the property or the power must be specifically referred to by the donee,⁵⁴ whether the appointment violates the rule against perpetuities and the effect of such viola-

Trust Co. v. Whiteing, 136 Misc. 416, 241 N. Y. Supp. 398 (Sup. Ct. 1930); Rhode Island Hospital Trust Co. v. Anthony, 49 R. I. 339, 142 Atl. 531 (1928); Crookenden v. Fuller, 1 Swa. & Tr. 441 (Prob. 1859); In the Goods of Hallyburton, L. R. 1 P. D. 29 (1865); In re Kerwan's Trusts, 25 Ch. D. 373 (1883); Milnes v. Foden [1890] 59 L. J. Pro. Div. & Ad. 62; Hummel v. Hummel [1898] 1 Ch. 642; In re Baker's Settlement Trusts [1908] W. N. 161; Murphy v. Deichler [1909] A. C. 446; In re Wilkinson's Settlement [1917] 1 Ch. 620; In re Strong, 95 L. J. Ch. 22 (1925); Velasco v. Coney [1934] P. 143, 83 U. OF PA. L. REV. 279 (1935), Note (1935) 48 HARV. L. REV. 1241.

49. RESTATEMENT, CONFLICT OF LAWS §§ 234-236.

50. See GOODRICH, *op. cit. supra* note 13, §§ 171-173; MINOR, *loc. cit. supra* note 7; 2 BEALE, *op. cit. supra* note 7, §§ 234.1-236.1.

51. Matter of Sloan's Estate, 7 Cal. App. (2d) 319, 46 P. (2d) 1007 (1935) (donor domiciled in California—situs of realty apparently California).

52. Newton v. Hunt, 59 Misc. 633, 112 N. Y. Supp. 573 (Sup. Ct. 1908).

53. Topham v. Portland, 1 DeG., J. & Sm. 517 (1863) (validity of charge on land). Applying this rule, the will of the donee has been held a valid exercise of the power: In the Goods of Trefond [1899] P. 247; In the Goods of Vannini [1901] P. 330 *semble*; Murphy v. Deichler [1909] A. C. 446. The exercise was held invalid under this rule in Blount v. Walker, 28 S. C. 545, 6 S. E. 558 (1888), *writ of error dismissed*, 134 U. S. 607 (1889). See Ward v. Stanard, 82 App. Div. 386, 81 N. Y. Supp. 906 (2d Dep't, 1903). A different rule prevails in Scotland, however, where a will, valid by the law of the donee's domicil but not by the law of the situs, which was also the donor's domicil, for lack of witnesses, has been held to be a valid execution of a power. Brack v. Johnston, 5 Wils. & S. 61 (1831).

54. Power held not exercised: In re Kelley's Will, 161 Misc. 255, 291 N. Y. Supp. 860 (Surr. Ct. 1936), Note (1937) 50 HARV. L. REV. 1119, 1155. Power held exercised: Art Students' League v. Hinkley, 37 F. (2d) 225 (C. C. A. 4th, 1930) *semble*; Security Trust & Safe Deposit Co. v. Ward, 10 Del. Ch. 408, 93 Atl. 385 (1915); Sewall v. Wilmer, 132 Mass. 131 (1882); Russell v. Joys, 227 Mass. 263, 116 N. E. 549 (1917); Bundy v. United States Trust Co., 257 Mass. 72, 153 N. E. 337 (1926). But see In re Harman [1894] 3 Ch. 607. In that case, an English donor by will left English personal property and real estate to English trustees to pay the income to the donee for life, with a power of appointment. The trustees sold the real estate and bought personal property. The donee died domiciled in France, leaving a will which, by French law, passed all personal property over which she had a power of disposition. Kekewich, J., held that this will was an execution of the power. He did not consider the conflict of laws point, since it would have been an exercise under § 27 of the English Wills Act, but held that it was also an exercise in accordance with the French law.

tion,⁵⁵ whether an appointment to charity is void for indefiniteness of beneficiaries,⁵⁶ whether the donee's creditors or "forced heirs" are entitled to share in it, and whether the donee is capable of exercising the power.⁵⁷

In a few cases the situs was either clearly or apparently different from the domiciles of the donor and of the donee; in such cases its law has been held to govern the validity of an appointment in trust,⁵⁸ the formal validity of the exercise of the power,⁵⁹ the question whether a general devise is an exercise of the power,⁶⁰ and the question whether the appointment violates the rules against perpetuities or restraints on alienation,⁶¹ as well as the capacity of the donee to make a will.⁶² So the formal validity of the exercise of such a power by deed is governed by the law of the situs.⁶³ The will of the donee must be probated at the situs to be a muniment of title.⁶⁴ Probate at the donee's domicil is not decisive of its validity for this purpose.⁶⁵ However, the law of the corporate domicil and not that of the situs determines the capacity of a corporate appointee to take such property.⁶⁶

55. *Art Students' League v. Hinkley*, 37 F. (2d) 225 (C. C. A. 4th, 1930); *Bundy v. United States Trust Co.*, 257 Mass. 72, 153 N. E. 337 (1926); *Ligget v. Fidelity & Col. Trust Co.*, 274 Ky. 387, 118 S. W. (2d) 720 (1938); *Lawrence's Estate*, 136 Pa. 354, 20 Atl. 521 (1890). See also *In re Kelley's Will*, 161 Misc. 255, 291 N. Y. Supp. 860 (Surr. Ct. 1936).

56. *Art Students' League v. Hinkley*, 37 F. (2d) 225 (C. C. A. 4th, 1930) (also applying the law of the domicil of a corporate appointee to determine its capacity to take the property). *Contra*: *Bible Soc. v. Pendleton*, 7 W. Va. 79 (1873). The facts of this case, however, are not strictly in point so that it may possibly be distinguished on the ground that the donee was merely an agent of the donor instead of a donee with a power of appointment, and also on the theory that the direction in the donor's deed to sell the real property converted it at once to personalty. Such conversion should be immaterial however. *Murray v. Champernowne* [1901] 2 Ir. R. 232. But see *Ackerman v. Ackerman*, 81 N. J. Eq. 437, 86 Atl. 542 (Ch. 1913).

57. The cases on these questions are cited *supra* notes 38-45.

58. *Greenough v. Osgood*, 235 Mass. 235, 126 N. E. 461 (1920).

59. *Thrasher v. Ballard*, 33 W. Va. 285, 108 S. E. 411 (1889); *Murray v. Champernowne* [1901] 2 Ir. R. 232 (the court held that there was a valid exercise of the power, but stated that it would have been invalid if void by the law of the situs, though valid by the law of the donee's domicil). See *Lindsay v. Wilson*, 103 Md. 252, 63 Atl. 566 (1906).

60. *In re Kelley's Will*, 161 Misc. 225, 291 N. Y. Supp. 860 (Surr. Ct. 1936) (holding power not exercised); *Murray v. Champernowne* [1901] 2 Ir. R. 232 (holding power exercised); *Re Wilkinson* [1934] 1 D. L. R. 544 (Ont. Sup. Ct. 1933). *Contra*: *Ackerman v. Ackerman*, 81 N. J. Eq. 437, 86 Atl. 542 (Ch. 1913) *semble*.

61. *Greenough v. Osgood*, 235 Mass. 235, 126 N. E. 461 (1920); *Miller v. Douglas*, 192 Wis. 486, 213 N. W. 320 (1927). See also *In re Kelley's Will*, 161 Misc. 255, 291 N. Y. Supp. 860 (Surr. Ct. 1936).

62. *Matter of the Will of Stewart*, 11 Paige 398 (N. Y. 1845).

63. *Topham v. Portland*, 1 DeG., J. & Sm. 517 (1863) (the donor's but not the donee's domicil was the same as the situs). See *In re Hernando*, 27 Ch. D. 284 (1884) (same). Cf. *In re Anziani* [1930] 1 Ch. 407 *semble*.

64. *Goldsmith v. Petersen*, 159 Iowa 692, 141 N. W. 60 (1913). Cf. in the *Goods of Trefond* [1899] P. 247.

65. *Goldsmith v. Petersen*, 159 Iowa 692, 141 N. W. 60 (1913); *Thrasher v. Ballard*, 33 W. Va. 285 (1889).

66. *Art Students' League v. Hinkley*, 37 F. (2d) 225 (C. C. A. 4th, 1930). Cf. *Maynard v. Farmers Loan & Trust Co.*, 208 App. Div. 112, 203 N. Y. Supp. 83 (1924).

It has been suggested that, on the same logical grounds applicable to the case of personalty,⁶⁷ the law of the situs should not govern the form⁶⁸ and the interpretation of the donee's will, including such matters as whether a general devise is an exercise of the power.⁶⁹ But the law is now settled in accordance with the above cases to the contrary.⁷⁰ It should be noted that the governing law is determined by the state of facts arising at the creation of the power. Thus, the fact that the trustees sold real estate and purchased personal property with the proceeds has been held not to vary the determination of what law governs these matters.⁷¹ Conversely, if the trustees later invest in real estate in a jurisdiction other⁷² than that which first governed the power, this change has been held by courts of the latter jurisdiction immaterial.⁷³ Of course, that a power over real estate is created inter vivos and not by will makes no difference.⁷⁴

The problem is further complicated with respect to personal property. It is true that "the power to regulate transmission . . . and distribution of tangible personal property on the death of the owner rests with the State of its situs . . . the laws of other States have no bearing save as that State expressly or tacitly adopts them—their bearing then being attributable to such adoption and not to any force of

67. See *infra* p. 419.

68. See 2 WHARTON, *loc. cit. supra* note 7.

69. See MINOR, *loc. cit. supra* note 7; STORY, CONFLICT OF LAWS (8th ed. 1883) § 473 (a), n. (a).

70. See cases cited *supra* notes 53-54, 59-60. RESTATEMENT, CONFLICT OF LAWS § 236.

71. Matter of Sloan's Estate, 7 Cal. App. (2d) 319, 46 P. (2d) 1007 (1935); Russell v. Joys, 227 Mass. 263, 116 N. E. 549 (1917); Greenough v. Osgood, 235 Mass. 235, 126 N. E. 461 (1920); *In re Harman* [1894] 3 Ch. 607; *Re Wilkinson* [1934] 1 D. L. R. 544 (Ont. Sup. Ct. 1933). *Contra*: Bible Soc. v. Pendleton, 7 W. Va. 79 (1873).

72. Of course, an investment in real estate in the same jurisdiction has no effect on the governing law. Genet v. Hunt, 113 N. Y. 158, 21 N. E. 91 (1889); *In re Anziani* [1930] 1 Ch. 407.

73. Bartlett v. Sears, 81 Conn. 34, 70 Atl. 33 (1908) (rule against perpetuities—whether appointment was within terms of special power); Greenough v. Osgood, 235 Mass. 235, 126 N. E. 461 (1920); Genet v. Hunt, 113 N. Y. 158, 21 N. E. 91 (1889). It is doubtful whether the courts of the state where such real estate is located would apply this rule. In view of the general rule that the law of the situs governs all matters having to do with real estate, it seems that they could be correct in refusing to do so, although comity and convenience urge otherwise.

74. The following cases, involving powers of appointment over real estate created by deed, held that the law of the situs governs: Security Trust & Safe Deposit Co. v. Ward, 10 Del. Ch. 408, 93 Atl. 385 (1915); Russell v. Joys, 227 Mass. 263, 116 N. E. 549 (1917); Greenough v. Osgood, 235 Mass. 235, 126 N. E. 461 (1920); Bundy v. United States Trust Co., 257 Mass. 72, 153 N. E. 337 (1926); Newton v. Hunt, 59 Misc. 633, 112 N. Y. Supp. 573 (Sup. Ct. 1908); Thrasher v. Ballard, 33 W. Va. 285, 108 S. E. 411 (1889); Miller v. Douglas, 192 Wis. 486, 213 N. W. 320 (1927); Topham v. Portland, 1 DeG., J. & Sm. 517 (1863); *In re Hernando*, 27 Ch. D. 284 (1884); *In the Goods of Trefond* [1899] P. 247; *In the Goods of Vannini* [1901] P. 330; Murray v. Champernowne [1901] 2 Ir. R. 232; *Re Wilkinson* [1934] 1 D. L. R. 544 (Ont. Sup. Ct. 1933). *Contra*: Brack v. Johnston, 5 Wils. & S. 61 (1831); Bible Soc. v. Pendleton, 7 W. Va. 79 (1873).

their own".⁷⁵ Apart from statute, however, the courts of the situs of such property, instead of applying its law when asked to determine the effect or validity of a will concerning it, apply *as part of its own law*, the law of the decedent's last domicil.⁷⁶ There may be no particular reason, apart from convenience, why the rule that the law of the domicil of the testator governs these matters should be adopted today; but this question has long been settled, and having become established as a rule of property, it may not now be departed from.

It follows that, when the problem concerns the construction or effect of the will of the donor of a power of appointment, it is the law of the donor's domicil that is to govern. It has frequently been so held. Thus the meaning of the words used by the donor is governed by the law of the donor's domicil and not that of the donee so that the law of the donor's domicil determines whether the donee of a special power has appointed to persons within the terms of the power.⁷⁷ Likewise, it is not the law of the donee's domicil but that of the donor's which determines whether the donee of a special power can appoint in trust for those named in the power.⁷⁸ The same rule is applied in determining whether a power is exercisable by deed or will.⁷⁹ That law, likewise, governs the character of the power,⁸⁰ the ability of the donor and donee to terminate it,⁸¹ the right of the donee to release it,⁸² the right to revoke an appointment, and the effect of appointing by deed to unborn persons as divesting the interest of persons entitled to take

75. *Frick v. Pennsylvania*, 268 U. S. 473, 491 (1925). See also: RESTATEMENT, CONFLICT OF LAWS § 303; 2 BEALE, *op. cit. supra* note 7, §§ 303.1, 303.3; GOODRICH, *op. cit. supra* note 13, § 161.

76. As appears in 2 BEALE, *op. cit. supra* note 7, §§ 303.1, 303.3, a few states by statute apply their own law to determine the distribution of local chattels of an intestate decedent. Even these states agree with the others, however, in applying the law of a testator's last domicil to determine the validity and effect of his will. See RESTATEMENT, CONFLICT OF LAWS §§ 306-7; 2 BEALE, *op. cit. supra* note 7, §§ 303.3, 306.1-307.1; GOODRICH, *op. cit. supra* note 13, §§ 164-165. The same authorities show, however, that, as indicated by the quotation in the text, the courts of the situs apply such law *as part of their own law*.

77. *Bartlett v. Sears*, 81 Conn. 34, 70 Atl. 33 (1908); *McCreary's Estate*, 328 Pa. 513, 196 Atl. 25 (1938). Cf. RESTATEMENT, CONFLICT OF LAWS § 285. But if the power was to appoint among "children", the legitimacy of the child to whom the donee appointed the property is determined by the law of its or of its parents' domicil, regardless of the law governing the exercise or creation of the power. *Holloway v. Safe Deposit & Trust Co.*, 151 Md. 321, 134 Atl. 497 (1926), approved in (1927) 27 COL. L. REV. 91, 25 MICH. L. REV. 189; *In re Askew* [1930] 2 Ch. 259, 44 HARV. L. REV. 292. Cf. *Northwestern Masonic Aid Ass'n v. Jones*, 154 Pa. 99, 26 Atl. 253 (1893).

78. Cf. *Bartlett v. Sears*, 81 Conn. 34, 70 Atl. 33 (1908); *Greenough v. Osgood*, 235 Mass. 235, 126 N. E. 461 (1920).

79. *Ward v. Stanard*, 82 App. Div. 386, 81 N. Y. Supp. 906 (2d Dep't, 1903).

80. *Newton v. Hunt*, 59 Misc. 633, 112 N. Y. Supp. 573 (Sup. Ct. 1908); 12 C. J. 1260.

81. *Chase National Bank v. Chicago Title & Trust Co.*, 271 N. Y. 602, 659, 3 N. E. (2d) 205, 472 (1936); cf. *Guaranty Trust Co. v. Harris*, 267 N. Y. 1, 195 N. E. 529 (1935).

82. *Newton v. Hunt*, 59 Misc. 633, 112 N. Y. Supp. 573 (Sup. Ct. 1908).

in default of appointment.⁸³ It also governs the effect of an attempted appointment to such persons and of their renunciation and decision to take as in default, which may be of the utmost importance for tax purposes.⁸⁴

However, when the question is no longer one of merely construing the donor's will but of determining the validity and effect of the exercise of a power of appointment, an additional question is involved. It is necessary to analyze such powers further.⁸⁵ When the donor gives property to the donee for life with a power of appointment, he generally provides that after the donee dies it shall go as the donee shall "by will appoint". Since it is the donor's property which is being given by the donee, the donee being merely an agent of the donor,⁸⁶ the question whether the donee has validly appointed it depends upon his compliance with the authority given to him by the donor, i. e., whether the donee has "appointed" the property by "will".⁸⁷ Thus, it all comes down to a question of construing the donor's will or deed.

That this is true is shown by cases where the donor has expressly made certain formal requirements as to witnesses, or the like, in the document exercising a power, which would not otherwise be necessary under the applicable law. Whether such law be considered the law of the donee's domicil or that of the donor's domicil, such requirements must be met.⁸⁸ Conversely, if the donor stipulated that the donee's will should be considered a valid exercise of the power if it complied with certain requisites, it will be so considered although it is not executed in compliance with the law that would otherwise be applied to it.⁸⁹ This same fact, that the problem is here a question of construction, makes it constitutional for a court of the donor's domicil to refuse full faith and credit to a decision of the courts of the donee's domicil

83. *Guaranty Trust Co. v. Harris*, 267 N. Y. 1, 195 N. E. 529 (1935).

84. *Grinnell v. Commissioner*, 70 F. (2d) 705 (C. C. A. 2d, 1934), *aff'd*, 294 U. S. 153 (1935).

85. An excellent analysis of the problem appears in Note (1925) 38 HARV. L. REV. 661.

86. See authorities cited *supra* notes 7-9.

87. See *D'Huart v. Harkness*, 34 Beav. 324 (Rolls Ct. 1865); *In re Wilkinson's Settlement* [1917] 1 Ch. 620; Beale, *Progress of the Law (1918-19)—Conflict of Laws* (1919) 33 HARV. L. REV. 1, 16-17.

88. *Baretto v. Young* [1900] 3 Ch. 339. See 2 WHARTON, *loc. cit. supra* note 7; RESTATEMENT, CONFLICT OF LAWS § 287, comment c; Notes (1910) 23 HARV. L. REV. 222, (1900) 109 L. T. 339. But *cf.* DICEY, *op. cit. supra* note 36, Rule 200. It has been held, however, that, at least in the case of an attempted appointment to children of the donee, equity will aid an execution defective because it did not comply with the requirements of the donor's will. *In re Walker* [1908] 1 Ch. 560. See *Ward v. Stanard*, 82 App. Div. 386, 81 N. Y. Supp. 906 (2d Dep't, 1903); 2 BEALE, *op. cit. supra* note 7, § 287.1.

89. *White v. Holly*, 80 Conn. 438, 68 Atl. 997 (1908); *Aubert's Appeal*, 109 Pa. 447, 1 Atl. 336 (1885). But see DICEY, *op. cit. supra* note 36, Rule 199. This seems obviously correct since the donor could have made the power exercisable by deed.

refusing to probate,⁹⁰ or probating and holding valid,⁹¹ the donee's will. The courts of the donor's domicile, by so doing, are not holding that the donee's will is or is not valid as a will. They are merely deciding that it is or is not a "will" within the meaning of the donor when he provided that the property should go to the parties to whom the donee should appoint by "will". This is a very different question. Indeed, as a general rule, the donee's will in such cases must be probated at the donor's domicile, as well as at the donee's,⁹² and can be there probated although it has not been probated at the donee's domicile.⁹³

Since the formal validity of the donee's will as an exercise of the power is therefore to be governed by the meaning intended by the donor when he used the word "will", that meaning must be sought. It has been suggested that the donor, if he considered the matter at all, meant any legal instrument.⁹⁴ This goes too far; probably the donor meant a document valid as a testamentary disposition of the donee's own property. On this theory, since the law of a testator's domicile always governs the validity of his will as to personal property, the law of the donee's domicile should always govern the formal validity of a will exercising a power over personalty, and it has been often so suggested.⁹⁵ Accordingly, it is settled in England that a will, valid by the law of the donee's domicile, is a valid exercise of the power although it would be void for formal defects if the law of the donor's domicile were applied.⁹⁶

90. *In re Harriman's Estate*, 124 Misc. 320, 208 N. Y. Supp. 672 (Surr. Ct. 1924), Note (1925) 38 HARV. L. REV. 661. Cf. *Matter of Sloan's Estate*, 7 Cal. App. (2d) 319, 46 P. (2d) 1007 (1935). See *Chase Nat. Bank v. Chicago Title & Trust Co.*, 271 N. Y. 602, 659, 3 N. E. (2d) 205, 472 (1936).

91. *Blount v. Walker*, 134 U. S. 607 (1889); cf. *Goldsmith v. Petersen*, 159 Iowa 692, 141 N. W. 60 (1913). See *Chase Nat. Bank v. Chicago Title & Trust Co.*, 271 N. Y. 602, 659, 3 N. E. (2d) 205, 472 (1936).

92. *In re Harriman's Estate*, 124 Misc. 320, 208 N. Y. Supp. 672 (Surr. Ct. 1924); *Ex parte Limehouse Bd. of Works*, 24 Ch. D. 177 (1883).

93. *Matter of Sandford*, 277 N. Y. 323, 14 N. E. (2d) 374 (1938); *Tatnall v. Hankey*, 2 Moore P. C. C. 342 (1838); *In the Goods of Hallyburton*, L. R. 1 P. & D. 90 (1866); *In the Goods of Trefond* [1899] P. 247; Note (1927) 12 CORN. L. Q. 379. Cf. *D'Huart v. Harkness*, 34 Beav. 324 (Rolls Ct. 1868), applying the statute, 1 VICR. c. 26, § 9 (1837), which provided that a will of the donee of a power, not domiciled in England, was probatable in England if executed in accordance with the forms required by the law of his domicile. *Milnes v. Foden* [1890] 59 L. J. Pro. Div. & Ad. 62.

94. *Ward v. Stanard*, 82 App. Div. 386, 81 N. Y. Supp. 906 (2d Dep't, 1903). The court did not undertake to define the term "legal instrument", obviously almost an impossible task under its suggestion.

95. DICEY, *op. cit. supra* note 36, comment to Rules 198, 199; GOODRICH, *op. cit. supra* note 13, §§ 171-173; MINOR, *loc. cit. supra* note 7; Notes (1906) 19 HARV. L. REV. 122, (1922) 35 HARV. L. REV. 326, (1925) 38 HARV. L. REV. 661.

96. *D'Huart v. Harkness*, 34 Beav. 324 (Rolls Ct. 1865); *Milnes v. Foden* [1890] 59 L. J. Pro. Div. & Ad. 62 *semble*; *In re Price* [1900] 1 Ch. 442; *In re Walker* [1905] 1 Ch. 560; *In re Wilkinson's Settlement* [1917] 1 Ch. 620; *In re Lewal's Settlement Trusts* [1918] 2 Ch. 391; *In re Strong* [1925] 95 L. J. Ch. 22. See *In re Este's Settlement Trusts* [1903] 1 Ch. 893, 903; *In re Wernher* [1918] 2 Ch. 82, 92. Some of the above cases relied on an English statute which so provided under certain circumstances. The following two contrary cases must be considered overruled: *In re Kerwan's Trusts*,

Although there has been some dissent from this view in America,⁹⁷ the weight of American authority supports the English rule.⁹⁸ However, a document which, as to form, complies with the requirements of wills according to the law of the donor's domicil at the time of the creation of the power would also probably be a "will" within the donor's meaning; and it has long been settled that such a document is a valid exercise of the power even though it does not comply with the formal requirements of the law of the donee's domicil.⁹⁹ Hence, the courts have, at least in England, concluded that the donor meant (or would have meant had he thought of it) a document which was valid as a will either under the law of his domicil or under that of the donee's. In the case of successive appointments, no doubt a will valid under the law of either the original donor's domicil or the domicil of the person making the appointment would suffice.¹⁰⁰

The interesting question of what law governs the revocation of a will, valid by the laws of both the donor's and the donee's domicil, and executing a power of appointment, has arisen in England. Since the power can be exercised, at least in England, by a will valid by either law, it would seem that a revocation valid by either law should be effective because the donee must have intended it to be. The court so con-

25 Ch. D. 373 (1883); *Hummel v. Hummel* [1898] 1 Ch. 642. See DICEY, *op. cit. supra* note 36, Rule 199. But *cf.* Note (1900) 109 L. T. 339. Of course, a will invalid by the law of the donor's and the donee's domicil is ineffective as an exercise of the power although valid by the law of the donee's long-time residence. *Re Daly's Settlement*, 25 Beav. 456 (Rolls Ct. 1858).

97. *Blount v. Walker*, 134 U. S. 607 (1889), *aff'g*, 28 S. C. 545, 6 S. E. 588 (1888). But see *Adger v. Kirk*, 116 S. C. 298, 108 S. E. 97 (1921). See Note (1925) 38 HARV. L. REV. 661. Dicta to the same effect may be found in the following cases: *Pearce v. Lederer*, 262 Fed. 993, 998 (E. D. Pa. 1919); *Lindsay v. Wilson*, 103 Ms. 252, 270, 63 Atl. 566, 568 (1906).

98. *Betts v. Betts*, 4 Abb. N. C. 317 (N. Y. 1896); *Ward v. Stanard*, 82 App. Div. 386, 81 N. Y. Supp. 906 (2d Dep't, 1903); *Adger v. Kirk*, 116 S. C. 298, 108 S. E. 97 (1921). See *Sewall v. Wilmer*, 132 Mass. 131, 134 (1882); RESTATEMENT, CONFLICT OF LAWS § 287; 2 BEALE, *op. cit. supra* note 7, § 287.1; GOODRICH, *op. cit. supra* note 13, §§ 171-73; 2 WHARTON, *loc. cit. supra* note 7; Note (1906) 19 HARV. L. REV. 122. The same result has been reached with the aid of statutes: *Olivet v. Whitworth*, 82 Md. 258, 33 Atl. 723 (1896); *Matter of Marsland's Estate*, 142 Misc. 239, 254 N. Y. Supp. 293 (1931). *Cf.* *White v. Holly*, 80 Conn. 438, 68 Atl. 997 (1908).

99. *Tatnall v. Hankey*, 2 Moore P. C. C. 342 (1838); In the Goods of Alexander, 8 W. R. 451 (1860); In the Goods of Hallyburton, L. R. 1 P. & D. 89 (1866); In the Goods of Huber [1896] P. 209; *In re Merlin* [1898] W. N. 56; In the Goods of Trefond [1899] P. 247; *In re Baker's Settlement Trusts* [1908] W. N. 161; *Murphy v. Deichler* [1909] A. C. 446, (1910) 23 HARV. L. REV. 222; *In re Anziani* [1930] 1 Ch. 407 *semble*; *Murray v. Champernowne* [1901] 2 Ir. R. 232. See *McMurtry v. State*, 111 Conn. 594, 603, 151 Atl. 252, 255 (1930); *Sewall v. Wilmer*, 132 Mass. 131, 135 (1882); *Hogarth-Swann v. Weed*, 274 Mass. 125, 126, 174 N. E. 314, 315 (1931) *semble*; *D'Huart v. Harkness*, 34 Beav. 324, 328 (Rolls Ct. 1865); *In re Wilkinson's Settlement* [1917] 1 Ch. 620, 627. See also RESTATEMENT, CONFLICT OF LAWS § 287; 2 BEALE, *op. cit. supra* note 7, § 287.1; DICEY, *op. cit. supra* note 36, Rule 199; Notes (1900) 109 L. T. 309, (1911) 24 HARV. L. REV. 654. But see *Crookenden v. Fuller*, 1 Sw. & Tr. 441 (1859). The remarks made by the court in that case are corrected in accordance with the law as above stated in *In the Goods of Alexander, supra*. See Note (1906) 19 HARV. L. REV. 122.

100. *Cf.* cases cited *supra* notes 31, 32.

cluded, holding invalid a will which had been revoked properly according to the law of Italy, the donee's domicil, although such revocation would not have been effective according to the law of England, the donor's domicil. The will had been valid by the laws both of England and of Italy.¹⁰¹

As to the so-called "essential validity" of the exercise of a power, it would seem that the donor's meaning must have been the same as in the case of its formal validity. Probably, therefore, he meant a will which was valid by the law of either his or the donee's domicil insofar as matters such as capacity, undue influence and the like are concerned. It has been shown that the question of restrictions on capacity should be determined by different considerations. As to capacity, it has been held that, if the donee is capable by the law of his domicil to make a will, and if the donor stipulated that a will valid by such law would suffice as an exercise of the power, such a will is a valid exercise of the power although by the law of the donor's domicil the donee would have been incapable of writing a will.¹⁰² The same rule should apply in the absence of such a stipulation, which ought to be inferred in any event. Conversely, a will has been held valid where the donee was capable according to the law of the donor's domicil, although not according to the law of the donee's domicil;¹⁰³ the same rule has been applied in the case of undue influence.¹⁰⁴ The authorities are not unanimous, however, and there is some indication that the law of the donor always governs any such matter.¹⁰⁵

Another question of so-called "essential validity" arises when the exercise of powers of appointment may violate the rules against perpetuities, restraints on alienation, gifts to indefinite charities, and the like. It has been pointed out that these are problems of administration, of concern only to the state where the property is to be held or the trust administered, as distinguished from problems of validity. Therefore, they should be governed by the law in force at the "seat" of the trust. This is usually the domicil of the donor in testamentary trusts; while in trusts inter vivos its determination depends on many factors, such as the intention of the parties, the place of business or the domicil of

101. *Velasco v. Coney* [1934] P. 143, criticized in (1934) 83 U. OF PA. L. R. 279. The criticism is in part based on the erroneous statement that the power could be exercised only by a will complying with English law. The case is approved in Note (1935) 48 HARV. L. REV. 1202, 1241.

102. *In re Lewal's Settlement Trusts* [1918] 2 Ch. 391.

103. See *supra* note 40. See especially *Matter of the Will of Stewart*, 11 Paige 398 (N. Y. 1845).

104. *In re Harriman's Estate*, 217 App. Div. 733, 216 N. Y. Supp. 842 (1926).

105. *In re Harriman's Estate* was decided on this ground. See also *Minor*, *loc. cit. supra* note 7.

the trustee or the situs of the property.¹⁰⁶ The problem is complicated in connection with personalty by the fact that the donor may have set up a trust in one jurisdiction, and the donee may appoint the property to trustees in another jurisdiction. In any event, no such rule is applied in cases dealing with powers of appointment.¹⁰⁷ Where real estate is concerned, the law of the situs¹⁰⁸ governs such matters (except possibly where the trustees have after the creation of the trust invested in real estate in another jurisdiction)¹⁰⁹ regardless of the "seat" of the trust. As to personal property the law of the domicile of the donor,¹¹⁰ not the law of the donee's domicile,¹¹¹ is generally held to govern. Usually, the court did not even consider where the "seat" of the donor's trust (let alone that of the donee's) would be, and sometimes no trust is involved. The few cases do not show that the courts are astute to uphold such trusts.

Assuming, however, that the will of the donee is in proper form and violates no requirement of the law of either the donee's or the donor's domicile, a further question remains. The property was, in accordance with the will of the donor, to go to whomever the donee should by will "appoint". To meet this requirement of the donor's will, an intentional act of the donee is necessary. He must make a will disposing of the property subject to the power. Very frequently, there is a dispute on the grave question of law as to whether a particular will is an exercise of a power of appointment, and the courts and legislatures have laid down, in the different jurisdictions, varying rules of construction for ascertaining the donee's intentions. This being

106. See Beale, *supra* note 27, at 972; Cavers, *supra* note 27, at 163, and authorities there cited; Swabenland, *loc. cit. supra* note 27. Cf. Chase Nat. Bank v. Chicago Title & Trust Co., 271 N. Y. 602, 659, 3 N. E. (2d) 205, 472 (1936) (allocation of stock dividends between principal and income governed by laws of donor's domicile, where trustee resided).

107. *Wilmington Trust Co. v. Wilmington Trust Co.*, 186 Atl. 903 (Del. Ch. 1936). But see Note (1937) 50 HARV. L. REV. 1119, 1156.

108. See cases cited *supra* notes 55, 56, 61.

109. See cases cited *supra* note 74.

110. As to the meaning of this phrase, see *supra* note 27.

111. Art Students' League v. Hinkley, 37 F. (2d) 225 (C. C. A. 4th, 1930) (also holding that, where there is an appointment to a charitable corporation, the law of that corporation's domicile governs its capacity to take the property); *Bartlett v. Sears*, 81 Conn. 34, 70 Atl. 33 (1908) *semble*; *Ligget v. Fidelity & Col. Trust Co.*, 274 Ky. 387, 118 S. W. (2d) 720 (1938); *Genet v. Hunt*, 113 N. Y. 158, 21 N. E. 91 (1889) *semble*; *In re Burling's Estate*, 148 Misc. 835, 266 N. Y. Supp. 482 (Surr. Ct. 1933); *McCreary's Estate*, 328 Pa. 513, 196 Atl. 25 (1938); *Miller v. Douglas*, 192 Wis. 486, 213 N. W. 320 (1927). See MINOR, *loc. cit. supra* note 7; 2 WHARTON, *loc. cit. supra* note 7. Cf. *Greenough v. Osgood*, 235 Mass. 235, 126 N. E. 461 (1920) *semble*; *In re Kelley's Will*, 161 Misc. 255, 291 N. Y. Supp. 860 (Surr. Ct. 1936); *Wilmington Trust Co. v. Wilmington Trust Co.*, 186 Atl. 903 (Del. Ch. 1936); *Bible Soc. v. Pendleton*, 7 W. Va. 79 (1873). But cf. *Radford v. Fidelity & Col. Trust Co.*, 185 Ky. 453, 215 S. W. 285 (1919) (holding a trust inter vivos governed by the law of the donee's domicile); *Maynard v. Farmers Loan & Trust Co.*, 238 N. Y. 592, 144 N. E. 905 (1924). In most of these cases the "seat" of the donor's trust, and the place of its administration, had they been considered, would probably have been found to be the donor's domicile.

a pure question of construction of the donee's and not of the donor's will,¹¹² the law of the donee's domicile should be controlling.¹¹³ But the rule is settled to the contrary as to what law determines, by applying its rule of construction, whether a general bequest or devise is an exercise of a power. If it is an exercise by the law of the donor's domicile but is not by the law of the donee's domicile, it is held that the power is exercised.¹¹⁴ Conversely, if it is not an exercise by the law of the donor's domicile, but is by the law of the donee's domicile, it is held that the power is not exercised.¹¹⁵ The same rule is applied to determine

112. It has been suggested that statutes at the donor's domicile, providing that a general bequest shall be construed to be an exercise of a power of appointment, changed the meaning of the word "appoint" in the donor's will so as to include a will containing merely a general bequest, and that they should, therefore, be applied in such cases. *In re Lewal's Settlement Trusts* [1918] 2 Ch. 391; 2 BEALE, *op. cit. supra* note 7, § 287.1; *cf.* 2 WHARTON, *loc. cit. supra* note 7. This theory would seem to be untenable, since the appointment requires an affirmative intention of the donee and to determine whether the donee had such intention, the law of or the usage at his domicile should apply. See *Chase Nat. Bank v. Chicago Title & Trust Co.*, 271 N. Y. 602, 659, 3 N. E. (2d) 205, 472 (1936). In *Sewall v. Wilmer*, 132 Mass. 131 (1882), it is suggested that the donee intended the law of the donor's domicile (the only place where the will could be operative as an execution of the power) to govern this matter. It seems obvious, however, that, if the donee had considered the matter in such detail, he would have mentioned the power in his will.

113. GOODRICH, *op. cit. supra* note 13, §§ 171-73; MINOR, *loc. cit. supra* note 7; STORY, *loc. cit. supra* note 69; 2 WHARTON, *loc. cit. supra* note 7; Note (1906) 19 HARV. L. REV. 122; (1897) 10 HARV. L. REV. 310. *Cf.* *Matter of Thompson's Estate*, 245 N. Y. 565, 157 N. E. 859 (1927) and discussion thereof, *supra* note 42. The untenable suggestion is made in Note (1925) 38 HARV. L. REV. 661, that the donee did not intend to and, hence, did not "appoint" the property by a general bequest or devise unless the law of the donee's domicile so provides; and that, even if it does so provide, such an appointment is not a valid exercise since it is not authorized by the donor's will unless the law of the donor's domicile also has a similar provision.

114. *Old Colony Trust Co. v. Commissioner*, 78 F. (2d) 970 (C. C. A. 1st, 1934); *Johnstone v. Commissioner*, 76 F. (2d) 55 (C. C. A. 9th, 1935); *Sewall v. Wilmer*, 132 Mass. 131 (1882); *Tudor v. Vail*, 195 Mass. 18, 80 N. E. 590 (1907); *Russell v. Joys*, 227 Mass. 263, 116 N. E. 549 (1917) *semble*; *Camden Safe Deposit & Trust Co.*, 123 N. J. Eq. 245, 197 Atl. 249 (Ch. 1938); *In re New York Life Ins. & Trust Co.*, 209 N. Y. 585, 103 N. E. 315 (1913); *Matter of Burling*, 148 Misc. 835, 266 N. Y. Supp. 482 (Surr. Ct. 1933); *Chase Nat. Bank v. Chicago Title & Trust Co.*, 271 N. Y. 602, 659, 3 N. E. (2d) 205, 472 (1936); *Hollister v. Hollister*, 85 Ore. 316, 166 Pac. 940 (1917); *Aubert's Appeal*, 109 Pa. 447, 1 Atl. 336 (1885); *Norris' Estate*, 9 Pa. D. & C. 101 (1927); *Rhode Island Hospital Trust Co. v. Dunnell*, 34 R. I. 394, 83 Atl. 858 (1912); *In re Baker's Settlement Trusts* [1908] W. N. 161; *In re Strong*, 95 L. J. Ch. 22 (1925), 69 Sol. J. 693; *Murray v. Champernowne* [1901] 2 Ir. R. 232; *Re Wilkinson* [1934] 1 D. L. R. 544 (Ont. Sup. Ct. 1933), 48 HARV. L. REV. 1202, 1241. See RESTATEMENT, CONFLICT OF LAWS § 288; BEALE, *op. cit. supra* note 7, §§ 118E.2, 288.1; DICEY, *op. cit. supra* note 36, Rule 201. *Cf.* *Wilmington Trust Co. v. Wilmington Trust Co.*, 186 Atl. 903 (Del. Ch. 1936) (trustee's change of domicile to foreign jurisdiction immaterial). *Contra: In re D'Este's Settlement Trusts* [1903] 1 Ch. 898; *In re Scholefield* [1905] 2 Ch. 408, Note (1905) 19 HARV. L. REV. 122.

115. *Lane v. Lane*, 4 Pen. 368, 55 Atl. 184 (Del. 1903); *Boston Safe Deposit & Trust Co. v. Prindle*, 290 Mass. 577, 195 N. E. 793 (1935); *Ackerman v. Ackerman*, 81 N. J. Eq. 437, 86 Atl. 542 (Ch. 1913) *semble*; *Farnum v. Pennsylvania Co.*, 87 N. J. Eq. 652, 101 Atl. 1053 (1917); *In re Campbell's Estate*, 138 Misc. 800, 248 N. Y. Supp. 344 (1930); *Chase Nat. Bank v. Chicago Title & Trust Co.*, 271 N. Y. 602, 659, 3 N. E. (2d) 205, 472 (1936); *In re Kelley's Will*, 161 Misc. 255, 291 N. Y. Supp. 860 (Surr. Ct. 1936); *Bingham's Appeal*, 64 Pa. 345 (1870); *Cotting v. DeSartiges*, 17 R. I. 668, 24 Atl. 530 (1892). See RESTATEMENT, CONFLICT OF LAWS § 288; 2 BEALE, *op. cit. supra* note 7, § 288.1. *Contra: Re Ross Marriage Settlement*, 16 Ont. W. R. 327 (1910). *Cf. In re Harman* [1894] 3 Ch. 607. See DICEY, *op. cit. supra* note 36, Rule 201.

whether or not the donee intended to give his appointees a fee in the property,¹¹⁶ and similar questions.¹¹⁷ There should be no difference in the case of successive appointments; under the foregoing doctrine the law of the original donor's domicile should be applied to determine whether a general bequest constituted an exercise of the second power as well as of the first.¹¹⁸

There is practically no authority on the question of what law governs the exercise of the power of appointment by deed. Such an exercise is governed by the law of the situs as to real estate.¹¹⁹ As to personal property the law of the donor's domicile should govern¹²⁰ on the analogy to the exercise of the power of appointment by will. Since the property is still the donor's, though the power is exercised by deed, and since it still is in effect a testamentary disposition of property of and by the donor, it seems proper to apply the law of his domicile in the case of a power created by will. In the case of a power created *inter vivos*, the same rule should apply, so that the law governing the trust¹²¹ would also govern the exercise of the power.

It may therefore be concluded that, where property is subject to a power of appointment, the situs alone has jurisdiction over and can constitutionally levy an inheritance tax on the transfer of real estate and tangible personal property by the exercise of the power. On the other hand, the donor's domicile (meaning the law governing the creation of the trust in the case of a power created *inter vivos*) alone can so tax intangibles, a number of states having jurisdiction over such property. The laws of the situs (as to real estate) and of the donor's domicile, respectively, govern the creation of the power by will.¹²² As

116. *City Bank Farmers Trust Co. v. Whiteing*, 136 Misc. 416, 241 N. Y. Supp. 398 (Sup. Ct. 1930). But *cf.* *Radford v. Fidelity & Col. Trust Co.*, 185 Ky. 453, 215 S. W. 285 (1919) (holding a trust *inter vivos* governed by the law of the donee's domicile). See *MINOR, loc. cit. supra* note 7.

117. *Matter of Masland's Estate*, 140 Misc. 230, 254 N. Y. Supp. 293 (Surr. Ct. 1931); *Barret v. Berea College*, 48 R. I. 258, 137 Atl. 145 (1927); *Boston Safe Deposit & Trust Co. v. Prindle*, 290 Mass. 577, 195 N. E. 793 (1935). But *cf.* *Maynard v. Farmers Loan & Trust Co.*, 208 App. Div. 112, 203 N. Y. Supp. 83 (1st Dep't, 1924).

118. *Cf.* *Matter of Bradford*, 159 Misc. 382, 288 N. Y. Supp. 153 (Surr. Ct. 1936). But see *Bundy v. United States Trust Co.*, 257 Mass. 72, 153 N. E. 337 (1926).

119. *Topham v. Portland*, 1 DeG. J. & S. 517 (Ch. 1863); *In re Hernando*, 27 Ch. D. 284 (1884). *Cf.* *In re Anziani* [1930] 1 Ch. 407. See *RESTATEMENT, CONFLICT OF LAWS* § 235.

120. *Guaranty Trust Co. v. Harris*, 267 N. Y. 1, 195 N. E. 529 (1935). *Cf.* *Newton v. Hunt*, 59 Misc. 633, 112 N. Y. Supp. 573 (Sup. Ct. 1908); *Chase Nat. Bank v. Chicago Title & Trust Co.*, 271 N. Y. 602, 659, 3 N. E. (2d) 205, 472 (1936); *In re Hernando*, 27 Ch. D. 284 (1884); *In re Anziani* [1930] 1 Ch. 407. But see *RESTATEMENT, CONFLICT OF LAWS* § 286 (law of situs governs as to chattels).

121. See *supra* note 27.

122. See general statements to the effect that the laws of the donor's domicile govern powers of appointment: *Pearce v. Lederer*, 262 Fed. 993 (E. D. Pa. 1919); *Whitlock-Rose v. McCaughn*, 21 F. (2d) 164 (C. C. A. 3d, 1927); *McMurtry v. State*, 111 Conn. 594, 151 Atl. 252 (1930); *Prince de Bearn v. Winans*, 111 Md. 434, 74 Atl. 626 (1909); *Hogarth-Swann v. Weed*, 274 Mass. 125, 174 N. E. 314 (1931); *Farnum v. Pennsyl-*

to its exercise by will, a power is validly exercised if the instrument exercising it is valid under the law of either the donor's domicile (in the case of realty and tangibles, the situs) or the donee's, unless it has been revoked in accordance with either of these laws. But the situs or the donor's domicil alone can restrict the capacity of the donee or give any rights in the property to the donee's forced heirs or creditors. It seems that questions of the rule against perpetuities and the like are also governed by the law of the situs or the donor's domicil alone. The rule has become settled, illogical though it may be, that the law of the situs or the donor's domicil likewise governs the construction of the donee's will and determines whether the power has, in fact, been exercised.

There has been much criticism in recent years of the practice of laying down definite rules in the field of conflict of laws.¹²³ It has been suggested, in effect, that problems in this field should not be capable of decision before they reach the highest court, and that at that time the judges should consider all the facts involved, and, having concluded from the "demands of justice"¹²⁴ which side should win the case, should decide the conflicts question in such a way that that side prevails. The difficulties of administration of such a "rule" render it of doubtful appeal to judges. Moreover, should this "rule" be adopted, the practising lawyer will simply have to confess to clients who consult him as to the preparation of documents that what is the governing law will depend entirely on which side of their beds the judges (perhaps yet unborn) of an undeterminable court will get out of on the morning (many years later) when they decide the case involving the document (in the light of subsequent and unforeseeable events).¹²⁵ It is not expected that this article will produce settled and definite rules for the decision of cases involving the conflict of laws and powers of appointment, but at least it will enable practitioners to consider the relevant authorities and to present them to the courts. If it should be of any use along these lines, it will have served its purpose. "It is something to dot an 'i' in perpetuity."¹²⁶

vania Co., 87 N. J. Eq. 652, 101 Atl. 1053 (1917); Seward v. Kaufman, 119 N. J. Eq. 44, 180 Atl. 857 (Ch. 1935); Fidelity Union Trust Co. v. Ackerman, 121 N. J. Eq. 497, 191 Atl. 813 (1937), modified, 123 N. J. Eq. 556, 199 Atl. 379 (1938); Matter of Barnhart, 137 Misc. 518, 244 N. Y. Supp. 130 (Surr. Ct. 1930); Barret v. Berea College, 48 R. I. 258, 137 Atl. 145 (1927); Note (1927) 12 CORN. L. Q. 379.

123. See, e. g., Cavers, *A Critique of the Choice-of-Law Problem* (1933) 47 HARV. L. REV. 173, and authorities there cited.

124. *Id.* at 187 (quoting with approval from Professor Lorenzen). Cf. Note (1937) 47 YALE L. J. 282, 285.

125. "Persons who write wills must know whereof they speak." Opperman's Estate, 319 Pa. 455, 462, 179 Atl. 729, 733 (1935).

126. Mildew, L. J., in *Rex v. Badger*, quoted by the Lord Chancellor in *Chicken v. Ham*, 1 HERBERT, MISLEADING CASES IN THE COMMON LAW (1927) 109, 110.