objections of the minority. This is perhaps the fault of the statute. A statute providing that a majority of the jury may make the recommendation to mercy might solve these difficulties.[15] A more effective measure, however, would be to make the punishment for first degree murder life imprisonment unless the jury recommends the death penalty.[16] It should be explicitly provided that a disagreement as to the punishment should result in a sentence of life imprisonment,[17] in order to avoid the application of the interpretation of the majority in the instant case. This, it is submitted, would achieve the purpose of the New York statute by making conviction easier where the jury is agreed as to the fact of guilt, while giving the defendant the benefit of what doubt does exist and no more.

Future Interests—Powers of Appointment—Revocability of Informal Appointment by Letter to Trustee—[Ohio].—A settlor transferred securities to the plaintiff trust company under a revocable and amendable trust agreement providing an annuity for his daughter and an income for his wife. On the death of the settlor's wife, the income was to be accumulated until the principal equalled $50,000. The principal was then to be paid to the "ultimate beneficiary," who was to be named by the settlor during his life, or, if he failed to do so, by the settlor's wife after his death, with a gift over in default of appointment to Dartmouth College to provide for scholarships. The settlor died without naming any beneficiary, although shortly before his death he wrote his wife that he did not intend to bind her in any way but that he wished Dartmouth to be the ultimate beneficiary. He set forth details of the purposes for which the college was to administer the fund. After the settlor's death, his wife sent a letter to the plaintiff to which she appended the letter of the settlor, stating that it represented her wishes and adding that she might change "the students and persons, who are to receive the benefit [of the education]." Several years later, the settlor's wife notified the plaintiff by a second letter that she wished to name Berea College as the ultimate beneficiary. After the settlor's wife died, the plaintiff sought instruction from the court. The common pleas court held[1] that the settlor's wife, in her first letter, reserved the right to revoke the appointment and that the second letter was effective in appointing the fund to Berea College. The court of appeals, after stating that the

[15] Such a provision is found in the Florida statute. Fla. Comp. Gen. Laws Ann. (Skillman, 1927) § 8401.

[16] The courts have held, under the New York statute, that the recommendation to mercy is not binding on the court. People v. Ray, 172 Misc. 1004, 16 N.Y.S. (2d) 224 (S. Ct. 1939); People v. Ertel, 283 N.Y. 519, 29 N.E. (2d) 70 (1940). Contra: People v. De Renna, 166 Misc. 582, 2 N.Y.S. (2d) 694 (Co. Ct. 1938). It is submitted that a revision of the statute should incorporate a provision making the recommendation binding upon the court. Without such a provision, a juror could not rely on the recommendation to keep the defendant from being sentenced to death.

[17] This is the result arrived at by the Oklahoma court under a statute providing that the jury must determine the punishment of a defendant whom they find guilty, where the trial court had accepted a verdict of guilty, with disagreement on the question of punishment. Davis v. State, 51 Okla. Crim. 386, 1 P. (2d) 824 (1931). It is also to be noted that Wilbur, J., dissenting in Smith v. United States, 47 F. (2d) 518, 521 (C.C.A. 9th 1931), notes 13 and 14 supra, suggested that such a statute would more truly reach the result desired by the court.

[1] Central Trust Co. v. Watt, 31 Ohio L. Abst. 467, 17 Ohio Ops. 456 (1940).

effect of the wife's first letter was to make Dartmouth a trustee for the benefit of its students, affirmed the judgment.[2] On appeal to the supreme court, *held*, the trust itself is valid, even though the document creating it does not satisfy the wills act.[3] The wife's first letter made Dartmouth College the ultimate beneficiary, and, since no right of revocation was expressly reserved in it, the power of appointment was exhausted and Dartmouth should receive the fund. Judgment reversed, three justices dissenting. *Central Trust Co. v. Watt.*[4]

Revocable and amendable trusts becoming absolute on the settlor's death have been attacked because they bear a superficial resemblance to testamentary acts,[5] but do not satisfy the formal requirements of wills statutes. They may be more realistically described, however, as immediate gifts on condition subsequent,[6] whereas a will involves no gift at all until the death of the testator. The court in the instant case stated that as long as it is the intent of the settlor to exercise his amendatory power in the interest of the beneficiary, the gifts made under the trust are not ambulatory.[7] Such "living trusts" have also been attacked on the ground that they actually create an agency instead of a trust, despite the language of the agreement. This argument has been rejected,[8] however, on the ground that the settlor is not dealing with his own property, since his amendatory power is not a substantial interest in the property.[9]

The widespread use of inter vivos trusts with powers of appointment in order to obtain tax benefits[10] has resulted in an increasing number of adjudications on powers

[2] There is apparently no published report of the appellate court's decision.

[3] The validity of the trust and the power of appointment was not argued in the two lower courts.

[4] 38 N.E. (2d) 185 (Ohio 1941).

[5] 1 Simes, Future Interests § 249 (1936).

[6] Cramer v. Hartford-Connecticut Trust Co., 110 Conn. 22, 147 Atl. 139 (1929); 1 Bogert, Trusts and Trustees § 103 (1935).

[7] Central Trust Co. v. Watt, 38 N.E. (2d) 185, 190 (Ohio 1941). The instant case would seem to settle the doubts as to Ohio law raised by Union Trust Co. v. Hawkins, 121 Ohio St. 159, 167 N.E. 389 (1929), and not completely settled by Cleveland Trust Co. v. White, 134 Ohio St. 1, 15 N.E. (2d) 627 (1938).

[8] Bear v. Millikin Trust Co., 336 Ill. 366, 168 N.E. 349 (1929); Goodrich v. City Nat'l Bank, 270 Mich. 222, 258 N.W. 253 (1935); 1 Bogert, Trusts and Trustees § 104 (1935); 1 Rest., Trusts § 57 (2), comment (g) (1935).

[9] Van Stewart v. Townsend, 176 Wash. 311, 28 P. (2d) 999 (1934); Jones v. Clifton, 101 U.S. 225 (1880). These cases deal with the rights of creditors of a bankrupt settlor to property transferred under revocable agreements. See 4 Bogert, Trusts and Trustees § 994 (1935). The view adopted as to the unexercised right of revocation is inconsistent with the equity doctrine that an insolvent donee of a general power will be presumed to appoint in favor of creditors. Shattuck v. Burrage, 229 Mass. 448, 118 N.E. 889 (1918); 1 Simes, Future Interests §§ 263–67 (1936). As to the effect of recent statutes on this inconsistency, see 3 Scott, Trusts § 330.12 (1939). An analogous problem arises with the application of the rule against perpetuities to general testamentary powers. Kales, Estates §§ 692–95 (1920).

[10] The flexibility of such trusts and the advertising campaigns of corporate trustees have made them popular. Smith, Trust Companies in the United States 65–75 (1928). But the federal tax authorities have refused to recognize them until they are made absolute. 1 Paul, Federal Estate and Gift Taxation § 7.08 (1942), citing Reinecke v. Northern Trust Co., 278 U.S. 339 (1929) (revocable inter vivos trust subject to estate tax); 2 Bogert, Trusts and Trustees §§ 273, 281; 4 ibid., at 2901 n. 77 (1935). Since tax avoidance is probably the major

of appointment, a field of our case law previously rather undeveloped.[11] The Ohio court in the instant case followed the usual rule that a remainder to a definite person in default of appointment is a vested interest subject to divestment by the exercise of the power of appointment.[12] Since the reserved power of the settlor to appoint the ultimate beneficiary was part of his conceded general power to revoke or amend the trust agreement,[13] no problem faced the court in regard to the validity of the settlor's power of appointment. On the other hand, there were no precedents in Ohio as to the validity of the power given to the settlor's wife.[14] The English authorities are agreed that a primary power in a donee may be followed, in default of exercise by the first donee, by a secondary power in a second donee.[15] In the instant case, since the first power was a reserved rather than a donated power, the life tenant was the first donee although the second holder. This situation, although not precisely that covered by the English rule, is closely analogous, and hence the court in the instant case upheld the life tenant's power to designate the ultimate beneficiary.[16]

The letter of the settlor's wife to the trustee adopting her husband's expressed wishes as her own operated as an appointment to Dartmouth College and modified the terms of the original gift.[17] The court held that the appointment could not be re-

---

objective of the settlors of such trusts, the future of this part of the law may be practically determined by the revenue administrator. See 1 Paul, Federal Estate and Gift Taxation § 9.07 (1942), discussing Morgan v. Com'r, 309 U.S. 78 (1940); 2 Paul, op. cit., at §§ 17.09–17.13; James, Family Trusts and Federal Taxes, 9 Univ. Chi. L. Rev. 427 (1942).

[11] "As late as the beginning of the twentieth century .... there was no .... American law of powers of appointment. Cases were few..... Even at the present time (1940) the American case authority [on powers] is distinctly thin in quantity—so thin that .... there are many important matters upon which local decisions are not yet conclusive, and in many states practically the entire field remains free for future development. However, the number of cases .... is rapidly increasing, due largely to .... tax advantages [which can be obtained by using such trusts with powers]." 3 Rest., Property 1810 (1940). The instant case seems to be the first Ohio decision on the validity of a donee's power and on successive appointments.

[12] Central Trust Co. v. Watt, 38 N.E. (2d) 185, 191 (Ohio 1941); see 1 Simes, Future Interests § 80 (1936).

[13] Note 7 supra. For a comparison of the power to appoint with the power to revoke or modify, see 2 Rest., Trusts §§ 330, 331 (1935); 4 Bogert, Trusts and Trustees § 996 (1935).

[14] Note 11 supra.

[15] This doctrine was established by Mapleton v. Mapleton, 4 Drew. 515 (Ch. 1859). See Farwell, Powers 189 (3d ed. 1916); cf. Ryan v. Daly, 99 N.J. Eq. 585, 134 Atl. 546 (1926), aff'd 101 N.J. Eq. 305, 137 Atl. 918 (1927).

[16] Central Trust Co. v. Watt, 38 N.E. (2d) 185, 191 (Ohio 1941).

[17] The trust agreement was vague in its instructions as to the recipients of the income of the fund. The settlor's letter, which was adopted by his wife, contained details of preference in the choosing of the students to receive aid. The appellate court held that Dartmouth was made the trustee and the students the beneficiaries. But because funds are to be kept separate and only the income used, it does not follow that a charitable trust is created. St. Joseph's Hospital v. Bennett, 281 N.Y. 115, 22 N.E. (2d) 305 (1939). Nor do mere directions as to the application of the fund create a trust. 2 Rest., Trusts 1093 (1935); Blackwell, Charitable Corporations and the Charitable Trust, 24 Wash. U.L.Q. 1 (1938). The fact that the students are the ones to receive the real benefits does not make them beneficiaries; all gifts to charities must benefit someone besides the administrators; if they do not, the recipients are not charities.

voked unless the right to do so was expressly reserved in the appointing instrument.[18] This rule of irrevocable exercise, known as the doctrine of *Hele v. Bond*,[19] originated in England as an expression of the common law hostility to restraints on the alienation of land.[20] Traditionally it applied even where the instrument creating the power specified that it might be exercised more than once. Although the rule now finds its principal application in the law of trusts, the policy behind the rule is not equally applicable to the intangible wealth which makes up the subject matter of the usual trust. Originally the rule operated on the exercise of an inter vivos power to appoint interests in land and it reflected the desire for security of title, always a strong factor in the law of real property. But the appointment of a beneficial interest can be made informally unless the trust provides otherwise, since it need not be in conformity with any recording act or strict requirement of the common law of real property.[21] In the instant case the appointment was to be made by a letter to the trustee.[22] Moreover, no question of justifiable reliance faced the court, since neither Dartmouth nor Berea knew of the trust until the plaintiff sought instruction.

The rule as to the irrevocability of appointments may operate harshly to defeat the intent of the settlor and the donee[23] in many cases. Insofar as it does, it is contrary to the traditional trust doctrine of enforcing the intent of the settlor[24] and the contemporary tendency to give effect to the intentions of the authors of most instruments. A recent Massachusetts decision noted this conflict and held that the doctrine of *Hele v. Bond* should be strictly limited; the court construed the words "at any time" in an instrument creating a power of appointment to mean "from time to time" when applied to the exercise of the power.[25] A similar result should be reached in cases where the settlor has expressed no intention, because powers of appointment are created to

[18] Central Trust Co. v. Watt, 38 N.E. (2d) 185, 193 (Ohio 1941); Wilmington Trust Co. v. Wilmington Trust Co., 21 Del. Ch. 102, 180 Atl. 597 (1935); Farwell, Powers 303 (3d ed. 1916). This rule applies only to powers to appoint or revoke by deed or other non-testamentary instrument. Since a will is by nature revocable, any appointment made in it can be revoked by a subsequent will. 3 Rest., Property § 366, comment (a) (1940).

[19] Prec. Ch. 474 (1717). For cases and authorities see 41 Col. L. Rev. 155, 157 n. 7 (1941). Conversely, even if the donor states that a general power is irrevocable, the donee can effectively reserve the right to revoke. 3 Rest., Property § 366, comment (c) (1940).

[20] 7 Holdsworth, History of English Law 184 (1926).

[21] 3 Tiffany, Real Property § 698 (3d ed. 1939); 1 Sugden, Powers *247 (3d Am. ed. 1856).

[22] Central Trust Co. v. Watt, 38 N.E. (2d) 185, 186 (Ohio 1941).

[23] In the instant case, the apparent intention of the donee in stating, "I may make some changes in the students and persons . . . . [to receive aid]," was to reserve the right to make further modifications of the terms of the gift to Dartmouth. But since any modification had to be made by re-appointment (the right to modify not having been granted by the settlor) it is doubtful whether, under the rule of Hele v. Bond, note 19 supra, she could even have altered the provisions of her first appointment to Dartmouth.

[24] 2 Scott, Trusts § 164.1 (1939).

[25] State Street Trust Co. v. Crocker, 306 Mass. 257, 263, 28 N.E. (2d) 5, 8 (1940). The court distinguished the rule of Hele v. Bond, note 19 supra, from the case of successive powers in successive groups of donees. But in so doing the court really ignored the rule. 41 Col. L. Rev. 155 (1941); 20 Boston U.L. Rev. 736 (1940).

give flexibility to the trust and discretion to the donee;[26] a donee would seldom wish his appointment to be irrevocable, even though he might foresee no need for revocation. These considerations apply to the instant case and should have created a presumption in favor of revocability.

Interstate Commerce—Restraint of Trade—Dividends from Oil Pipe Line Subsidiaries Rebates under Elkins Act—[Federal].—On September 30, 1940, the Anti-Trust Division of the Department of Justice brought suits in the name of the United States under the Elkins Act[1] against certain shipper-owner oil companies and subsidiary pipe line companies.[2] The shipper-owner oil companies were receiving dividends or profits from their subsidiary common carrier pipe line companies or from the operation of common carrier pipe line departments, which, the complaints alleged, were prohibited by the Interstate Commerce Act[3] and the Elkins Act as rebates from the rates filed by the common carrier with the ICC.[4] The United States asked that the defendant pipe lines and shippers be enjoined from granting and receiving the alleged rebates and that the defendant shippers be required, as provided by Section 1(3) of the Elkins Act,[5] to pay the United States three times the total amount of rebates found to have been illegally paid since January 1, 1939. A consent decree was entered into on December 23, 1941, in a new action filed for this purpose by the United States against twenty major oil companies and fifty-nine pipe line companies. The decree provided that no defendant shipper-owner shall receive in any year from its pipe line subsidiaries or departments more than a 7 per cent return on its ownership share of the ICC valuation of the pipe line properties,[6] and that earnings over this amount must be retained by the subsidiary or department in a special surplus fund to be used only for its operations as a common carrier. *United States v. Atlantic Refining Co.*[7]

The control by a few corporations of interstate pipe lines, by far the cheapest form

[26] Leach, Powers of Appointment, 24 A.B.A.J. 807 (1938); Powell, Powers of Appointment, 10 Brooklyn L. Rev. 232 (1941).

[1] 32 Stat. 847–48 (1903), amended by 34 Stat. 587–89 (1907), 49 U.S.C.A. §§ 41–43 (1929).

[2] United States v. Phillips Petroleum Co. and Phillips Pipe Line Co., Civil Action No. 182, U.S.D.C. Del. (1940); United States v. Great Lakes Pipe Line Co., Civil Action No. 183, U.S.D.C. Del. (1940); United States v. Standard Oil Co. (Indiana), Civil Action No. 201, U.S.D.C. N.D. Ind. (1940).

[3] 24 Stat. 379, 381 (1887) as amended, 49 U.S.C.A. §§ 2, 6(7) (1929).

[4] The complaint in the Standard Oil suit alleged that the dividends paid by the Stanolind Pipe Line Company (crude oil) to the Standard Oil Company (Indiana) between 1931 and 1939 amounted to 48 per cent of Stanolind's transportation revenues for the same period; the corresponding figures for the Great Lakes Pipe Line Company (gasoline) and the Phillips Pipe Line Company (gasoline) were alleged to be 49.5 per cent and 38.1 per cent, respectively. The complaints were based on data taken from the annual reports of the pipe lines to the ICC.

[5] 34 Stat. 588 (1907), 49 U.S.C.A. § 41(3) (1929).

[6] A pipe line corporation which fails to earn 7 per cent in any year may, however, pay in dividends the difference between its earnings and the permitted 7 per cent for that year within the next three years, in addition to the 7 per cent payments allowed for those years.

[7] Civil Action No. 14060, D.C. D.C. (1941) (unreported).