January 7, 1937

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Mr. Anthony A. O'Hallaron,
Attorney at Law,
Suite 950 Telephone Building,
1010 Pine Street,
St. Louis, Missouri.

Dear Mr. O'Hallaron:

This department is in receipt of your request for an opinion as to the following:

"On November 19, 1901, Benjamin C. Sanford, then a single man, conveyed all of his property in trust to August Berthold, who has been succeeded by the Mississippi Valley Trust Company. Copy of the trust instrument is attached hereto.

Under the terms of this trust agreement, Virginia B. S. Lawnin was the last beneficiary apecifically named, the instrument giving to her, as such last specifically named beneficiary, the power to nominate the person to thom the property was finally to be conveyed. Mrs. Lawnin died on June 28th, 1936 and left a will nominating her husband, Albert W. Lawnin to receive the property held by the Mississippi Valley Trust Company under the trust conveyance of Mr. Benjamin Sanford, a copy of which said will is attached hereto. The estate consists of property on which the trust company placed a marketable value as of the date of the death of Mrs. Lawnin in the amount of $73,283.64, subject to a commission that they claim will be due upon disbursement in the amount of $3,644.18. Most of the trust property consists of ready marketable bonds.

We are of the opinion that this property will pass to Mr. Lawnin from the Mississippi Valley Trust Company, free from any inheritance or gift taxes under our law. We are attaching herewith a brief memorandum and the law as we interpret it.

Our purpose in addressing you at this time is to give your office full facts to enable you to pass

upon the correctness of our opinion. If you are satisfied, we ask you to give us tax waivers to enable the trustees to make conveyance when the proper time is reached.

Will you please advise of your opinion in the matter and tell us what forms or further information you desire? "

Our conclusion is that this transfer of property to Mr. Lawnin is, without question, subject to the inheritance tax laws of Missouri and for the following reasons:

Section 571, Revised Statutes of Missouri 1929, provides, in part, as follows:

"Whenever any person or corporation shall exercise the power of appointment derived from any disposition of property made either before or after the passage of this law, such appointment when made shall be deemed a transfer taxable under the provisions of this law in the same manner as though the property to which said appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by the donor by will; ********** "

In a power of appointment, the transfer takes its potency from the exercise of the power, and no rights have vested prior to the exercise which can clash with any attempt of a statute to include the property within its domain.

Your position in this matter, briefly speaking, is that Mr. Lawnin's interest vested prior to the enactment of our inheritance tax law, and that the transfer in 1936 whereby Mr. Lawnin came into possession of the property is not now subject to tax. We disagree with this position absolutely. How can it be said Mr. Lawnin's interest became vested in 1901 (the date of the creation of the trust with the power of appointment) when, at that time, he was not even married to Mrs. Lawnin, the donee of the power of appointment, and further, when it would have been entirely possible for Mrs. Lawnin to have exercised her power of appointment in favor of anyone else until the moment of her death?

In any event, the Supreme Court of the United States in the case of Orr v. Gilman, 183 U. S. 278 concluded that a state might legally exact a succession tax in a case precisely on all fours with the case here under discussion. Mr. Justice Shiras said:

"It is claimed that, under the law of the State of New York as it stood at the time of his death, in 1890, David Dows, Senior, had a legal right to transfer, by will, his property or any interest therein, to his grandchildren, without any diminution, or impairment, then imposed by the law of the State upon the exercise of that right; that his said grandchildren acquired vested rights in the property so transferred, and that the subsequent law, whose terms have been above transcribed, operates to diminish and impair those vested rights. In other words, it is claimed that it is not competent for the State, by a subsequent enactment, to exact a price or charge for a privilege lawfully exercised in 1890, and to thus take from the grandchildren a portion of the very property the full right to which had vested in them many years before.

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The answer to be given to this question must, of course, be that furnished us by the Court of Appeals in this case. Matter of Dows, 167 N. Y. 227:

'Whatever be the technical source of title of a grantee under a power of appointment, it cannot be denied that, in reality and substance, it is the execution of the power that gives the grantee the property passing under it. The will of Dows, Senior, gave his son a power of appointment, to be exercised only in a particular manner, to wit, by last will and testament. If, as said by the Supreme Court of the United States, the right to take property by devise is not an inherent or natural right, but a privilege accorded by the State, which it may tax or charge for, it follows that the request of a testator to make a will or testamentary instrument is equally a privilege and equally subject to the taxing power of the State. When David Dows, Senior, devised this property to the appointees under the will of his son he necessarily subjected it to the charge that the State might impose on the privilege accorded to the son of making a will. That charge is the same in character as if it had been laid on the inheritance of the estate of the son himself, that is, for the privilege of succeeding to property under a will.' "

This decision was followed in the case of Chanler v. Kelsey, 51 L. Ed. 882 and a similar transfer held subject to the inheritance tax laws of New York (the law of which state being the basis of our own law). In the course of the opinion, Mr. Justice Day said:

> "However technically correct it may be to say that the estate came from the donor, and not from the donee, of the power, it is self-evident that it was only upon the exercise of the power that the estate in the plaintiffs in error became complete. Without the exercise of the power of appointment the estates in remainder would have gone to all in the class named in the deeds of William B. Astor. By the exercise of this power some were devested of their estates and the same were vested in others. It may be that the donee had no interest in the estate as owner, but it took her act of appointment to finally transfer the estate to some of the class and take it from others."

CONCLUSION

In view of the foregoing, it is the opinion of this department that the transfer of property to Mr. Lawnin accomplished by the will of Mrs. Lawnin is a taxable transfer under the inheritance tax laws of Missouri.

Respectfully submitted,

JOHN W. HOFFMAN, JR.
ASSISTANT ATTORNEY GENERAL.

APPROVED:

(Acting) ATTORNEY GENERAL
J. E. Taylor.

JWH:EG