

INTER VIVOS TRANSFERS AND THE FEDERAL ESTATE TAX

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No one has the natural right to transfer property to others at his death either by will or by intestacy. The right to take property by will or descent is derived from and regulated by municipal law. It is a privilege, and the authority conferring the privilege may impose conditions upon its exercise.¹ In assessing a tax or excise upon such privilege, the amount thereof may be measured by the value of the property passing.² But such a tax is not upon the property. The thing taxed is the transmission of property from the dead to the living.³ Confusion of thought may arise unless it be always remembered that, fundamentally considered, there are two underlying theories: *viz.*, although it is and must be the property of the decedent which bears the incidence⁴ of the tax, the tax is not upon the property but is laid upon the privilege of transmitting property or on the privilege of receiving property so transmitted.⁵

The right to transmit and the right to receive are distinct, and each is alike under legislative control. So distinct are these privileges that either or both may be taxed as respects the same property.⁶ The one is collected on the transfer of his estate by a decedent, and is known as an estate or transfer

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¹ United States v. Perkins, 163 U. S. 625, 628, 16 Sup. Ct. 1073, 1075 (1896); Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, 288, 18 Sup. Ct. 594, 596 (1898); Knowlton v. Moore, 178 U. S. 41, 56, 20 Sup. Ct. 747, 753 (1900); Plummer v. Coler, 178 U. S. 115, 134, 20 Sup. Ct. 829, 836 (1900); *In re Craig's Estate*, 97 App. Div. 289, 296, 89 N. Y. Supp. 971, 975 (1904), *aff'd* 181 N. Y. 551, 74 N. E. 1116 (1905); People v. McCormick, 327 Ill. 547, 554, 158 N. E. 861, 864 (1927), (1928) 37 YALE L. J. 833; Prentiss v. Eisner, 267 Fed. 16, 18 (C. C. A. 2d, 1920); First National Bank v. Maine, 284 U. S. 312, 329, 52 Sup. Ct. 174, 178 (1932); Coolidge v. Long, 282 U. S. 582, 603, 51 Sup. Ct. 306, 311 (1931); Moody v. Hagen, 36 N. D. 471, 484, 162 N. W. 704, 706 (1917); Note (1918) 1918A ANN. CAS. 939. See also Scott, *Control of Property by the Dead* (1917) 65 U. OF PA. L. REV. 527. For an interesting decision denying this general theory, see Nunnemacher v. State, 129 Wis. 190, 199, 224, 108 N. W. 627, 629, 638 (1906); and Beals v. State, 139 Wis. 544, 556, 121 N. W. 347, 350 (1909). See also Jeffries v. Alexander, 8 H. L. Cas. 594, 648 (1860).

² Plummer v. Coler, *supra* note 1; Reinecke v. Northern Trust Co., 278 U. S. 339, 347, 348, 49 Sup. Ct. 123, 125, 126 (1929), (1929) 29 COL. L. REV. 533; May v. Heiner, 281 U. S. 238, 244, 50 Sup. Ct. 286, 287 (1930); Chase National Bank v. United States, 278 U. S. 327, 334, 49 Sup. Ct. 126, 127 (1929), (1929) 29 COL. L. REV. 532; see Oppenheimer, *Insurance Under the Federal Estate Tax* (1930) 43 HARV. L. REV. 724; McCaughn v. Fidelity Trust Co., 34 F. (2d) 443, 444 (C. C. A. 3d, 1929).

³ Heiner v. Donnan, 285 U. S. 312, 322, 52 Sup. Ct. 358, 359 (1932); Cahen v. Brewster, 203 U. S. 543, 550, 27 Sup. Ct. 174, 176 (1906); Frew v. Bowers, 12 F. (2d) 625, 626 (C. C. A. 2d, 1926) *certiorari* denied 275 U. S. 578, 48 Sup. Ct. 22 (1927).

⁴ For a discussion of the inheritance tax from the points of view of economics and history, see SELIGMAN, *ESSAYS IN TAXATION* (10th ed. 1925) c. v. See Frew v. Bowers, *supra* note 3, at 627.

⁵ Coolidge v. Long, *supra* note 1; Prentiss v. Eisner, *supra* note 1.

⁶ Stebbins v. Riley, 268 U. S. 137, 141, 144, 45 Sup. Ct. 424, 425, 426 (1925).

tax.⁷ It taxes not that to which some person succeeds upon a death, but that which ceased by reason of death.⁸ In order that such a tax may be imposed, there must be a transfer of property, or an interest in property capable of monetary valuation, from the dead to the living at or by reason of death.⁹ An inheritance or succession tax, on the contrary, is based upon the right of the beneficiary to take or receive property on the death of its former owner under the laws governing the devolution of property at death. Under such a law it is material to determine what interest each beneficiary takes and the manner and time of taking, and the amount of the tax depends upon the size of the bequest or devise, the exemption allowed, the relation of the beneficiary to the decedent, *etc.*¹⁰

Most state inheritance tax laws are based upon the right of the beneficiary to receive.¹¹ The federal estate tax,¹² however, is not a tax upon the right to receive, but is an excise or death duty upon the passing of the property from the decedent at death.¹³ "The tax is on the act of the testator, not

⁷ The terms "transfer", "estate" and "succession" taxes, and "death duties" are frequently indiscriminately used to designate the two wholly different forms of tax. It will tend to clarity, to employ the more usual phraseology and refer hereafter to the tax on the privilege of transmission as a transfer tax, and that on the privilege of reception as a succession tax. Cf. *Coolidge v. Long*, *supra* note 1, at 608, 51 Sup. Ct. at 313.

⁸ *Nichols v. Coolidge*, 274 U. S. 531, 537, 47 Sup. Ct. 710, 711 (1927); *Edwards v. Slocum*, 264 U. S. 61, 62, 44 Sup. Ct. 293 (1924); *May v. Heiner*, *supra* note 1.

⁹ *Y. M. C. A. v. Davis*, 264 U. S. 47, 50, 44 Sup. Ct. 291, 292 (1924); *Lederer v. Northern Trust Co.*, 262 Fed. 52 (C. C. A. 3d, 1920).

¹⁰ *Saltonstall v. Saltonstall*, 276 U. S. 260, 269, 48 Sup. Ct. 225, 226 (1928); *Nichols v. Coolidge*, *supra* note 8, at 541, 47 Sup. Ct. at 713; *Leach v. Nichols*, 285 U. S. 165, 169, 52 Sup. Ct. 338, 340 (1932); *Keeney v. New York*, 222 U. S. 525, 533, 32 Sup. Ct. 105, 106 (1911); *Magoun v. Illinois Trust & Savings Bank*, *supra* note 1; *Knowlton v. Moore*, *supra* note 1; *Cahen v. Brewster*, *supra* note 3, at 551, 27 Sup. Ct. at 176.

¹¹ *Leach v. Nichols*, *supra* note 10 (Mass.); *Maxwell v. Bugbee*, 250 U. S. 525, 541, 40 Sup. Ct. 2, 6 (1910) (New Jersey); *In re Roebing's Estate*, 80 N. J. Eq. 163, 168, 104 Atl. 295, 297 (1918); *Baker v. East Orange*, 95 N. J. L. 365, 368, 111 Atl. 681, 682 (1919); *People v. McCormick*, *supra* note 1 (Illinois); *In re Dolan's Estate*, 279 Pa. 582, 124 Atl. 176 (1924). See MAGILL AND MAGUIRE, CASES ON TAXATION (1931) 466. The New York transfer tax, however, was on the right to transmit. *Matter of Schmidlapp*, 236 N. Y. 278, 283, 140 N. E. 697, 698 (1923); *Home Trust Co. v. Law*, 204 App. Div. 590, 593, 198 N. Y. Supp. 710, 713 (1923), *aff'd* 236 N. Y. 607, 142 N. E. 303 (1923); *Keith v. Johnson*, 271 U. S. 1, 8, 46 Sup. Ct. 415, 417 (1926). The Texas statute seems similar to the New York statute. *United States v. Mitchell*, 271 U. S. 9, 46 Sup. Ct. 418 (1926). See, however, *State v. Jones*, 290 S. W. 244, 248 (1927), *rev'd* 118 Tex. 693, 5 S. W. (2d) 973 (1928).

¹² 44 STAT. 9, 27, 69-87 (1926), 26 U. S. C. A. (1928) §§ 1091-11-21, as amended by Act of June 6, 1932, 47 STAT. 278, 26 U. S. C. A. (Supp. 1932) § 1091 *et seq.*

¹³ *Heiner v. Donnan*, *supra* note 1; *Y. M. C. A. v. Davis*, *supra* note 9; see extracts quoted *supra* note 127; *Edwards v. Slocum*, *supra* note 8. See also, *United States v. Woodward*, 256 U. S. 632, 635, 41 Sup. Ct. 615 (1921); *Frick v. Pennsylvania*, 268 U. S. 473, 498, 45 Sup. Ct. 603, 608 (1925). The nature of the Federal Estate Tax was also considered in the following decisions: *Matter of Hamlin*, 226 N. Y. 407, 416, 418, 124 N. E. 4, 6, 7 (1919); *Farmers' Loan & Trust Co. v. Winthrop*, 238 N. Y. 488, 495, 144 N. E. 769, 771 (1924); *Plunkett v. Old Colony Trust Co.*, 233 Mass. 471, 475, 124 N. E. 265, 267 (1919); *Old Colony Trust Co. v. Treasurer and Receiver General*, 238 Mass. 544, 131 N. E. 321 (1921); *People v. Northern Trust Co.*, 289 Ill. 475, 477, 124 N. E. 662, 663 (1919); *Corbin v. Townshend*, 92 Conn. 501, 505, 103 Atl. 647, 648 (1918); *In re Roebing's Estate*, *supra* note 11; *Knight's Estate*, 261 Pa. 537, 104 Atl. 765 (1918); *Tax Commission v. Lamprecht*, 107 Ohio St. 535, 541, 549, 140 N. E. 333, 335, 337 (1923); *Bingham's Adm'r v. Commonwealth*, 196 Ky. 318, 331, 244 S. W. 781, 787 (1922); *State v. First Calumet Trust, etc., Co.*, 71 Ind. App. 467, 470, 125 N. E. 200 (1919); *State ex rel. Smith v. Probate Court*, 139 Minn. 210, 166 N. W. 125 (1918); *Estate of Miller*, 184 Cal. 674, 195 Pac. 413 (1921); *In re Inman's Estate*, 101 Ore. 182, 199 Pac. 615 (1921).

on the receipt of property by the legatees.”¹⁴ “The transfer upon death is taxable, whatsoever the character of the property transferred and to whomsoever the transfer is made.”¹⁵ The distinction between the right to transmit and the right to receive is fundamental and important.

Inheritance tax statutes generally provide that property transferred by a grantor in contemplation of death shall be subjected, along with property passing under his will or by intestacy, to the tax.¹⁶ The value of property transferred in contemplation of death may be included in the value of the gross estate of the decedent for the purposes of an inheritance tax, because the transfer is considered to be testamentary in effect and such a provision is necessary to prevent circumvention of the law.¹⁷ Transfers in actual contemplation of death have characteristics in common with transfers at death so as to justify the inclusion of the former with the latter in the scheme of taxation. Whether transfers are in contemplation of death is largely a question of the particular facts involved.¹⁸ Confronted with the difficulty of proof of such contemplation, statutory presumptions have been enacted.¹⁹

Closely allied with transfers in contemplation of death are those taking effect in possession or enjoyment at or after death. While they are within the same category, for the purpose of taxation,²⁰ there is a clear line of demarcation between them. Gifts to take effect at or after death are distinguished from testamentary transfers in that they are made during life, usually by trust deed or declaration of trust. They are distinguished from gifts in contemplation of death in that the motive is not considered in the former. In principle there is no difference between property passing by deed intended to take effect in possession or enjoyment at or after the death of the grantor and property passing by will or intestacy. In either case it is the privilege of disposing of property after the death of the grantor or testator

¹⁴ Mr. Justice Holmes, in *Ithaca Trust Co. v. United States*, 279 U. S. 151, 155, 49 Sup. Ct. 291 (1929). Cf. *Matter of Schmidlapp*, *supra* note 11, at 283, 140 N. E. at 698, where Judge Cardozo said: “The tax is a charge upon the creation of the right. It is not a charge upon fruition in enjoyment or possession.”

¹⁵ Mr. Justice Brandeis, in *Greiner v. Lewellyn*, 258 U. S. 384, 42 Sup. Ct. 324 (1922). However, bequests to religious and charitable corporations may be deducted in determining the value of the net estate upon which the tax is imposed. *Y. M. C. A. v. Davis*, *supra* note 9. Cf. however, *Rottschaefer, Taxation of Transfers Intended to Take Effect in Possession or Enjoyment at Grantor's Death* (1930) 14 MINN. L. REV. 453, 613, 626, where it is stated that it is difficult to say how much this distinction has influenced the courts.

¹⁶ Transfers in contemplation of death were first specifically taxed in the United States by the 1891 amendment to the New York transfer tax law, N. Y. Laws 1891, c. 215, p. 409. See Bradford, *Evolution of the Meaning of the Words "Gifts Made in Contemplation of Death" in Inheritance Tax Legislation* (1923) 9 VA. L. REV. 267, 269.

¹⁷ *Keeney v. New York*, *supra* note 10; *Milliken v. United States*, 283 U. S. 15, 23, 51 Sup. Ct. 324, 327 (1931); *United States v. Wells*, 283 U. S. 102, 51 Sup. Ct. 446 (1931). Cf. *Heiner v. Donnan*, *supra* note 3, at 323, 52 Sup. Ct. at 360.

¹⁸ *Heiner v. Donnan*, *supra* note 3, at 324, 343, 52 Sup. Ct. at 360, 367. For an exhaustive analysis of the cases, see Note (1920) 7 A. L. R. 1028; Note (1922) 21 A. L. R. 1335; Note (1926) 41 A. L. R. 989; Note (1926) 43 A. L. R. 1229.

¹⁹ *Schlesinger v. Wisconsin*, 270 U. S. 230, 46 Sup. Ct. 260 (1920); *Heiner v. Donnan*, *supra* note 3. See (1931) 31 COL. L. REV. 1052.

²⁰ *United States v. Wells*, *supra* note 17, at 116, 51 Sup. Ct. at 451; cf. *Heiner v. Donnan*, *supra* note 3, at 323, 52 Sup. Ct. at 360.

or of succeeding to it which is taxed.²¹ The dominant purpose is to reach substitutes for testamentary dispositions and thus to prevent evasion of the tax.²² Gifts intended to take effect at or after death, whether in contemplation of death or not, are taxable under the laws of most of the states and of the federal government.²³

What is the meaning of the statutory phrase "intended to take effect in possession or enjoyment at or after death"? The following extract from an opinion by Circuit Judge Hough merits careful consideration:

" . . . The natural inclination of every lawyer is to recognize that 'take effect' is not a phrase of art, to search for some artistic equivalent, and find it in the word 'vest'. But if, as the result of a passage of title, the passing estate is vested, whether in fee, for life, in remainder, or in reversion, even though subject to divestment by subsequent event, then the transfer is complete, and so is the 'possession or enjoyment', for one 'possesses and enjoys' a reversion as thoroughly as he does a fee, even though most men prefer a fee to a reversion.

"But if the transfer of an estate results in the immediate vesting thereof, and of each and every part of the same, the transaction is complete, and the grantor or transferor has no 'interest' left therein; wherefore on his death there can be found no such 'interest' to include in his gross estate."²⁴

Problems as to the interpretation and application of the statutory phrase imposing a tax upon transfers taking effect in possession or enjoyment at or after death arise where grantors have created *inter vivos* trusts, reserving to themselves certain powers. Such trusts may be classified,²⁵ for the present discussion, as follows:

²¹ Crocker v. Shaw, 174 Mass. 266, 54 N. E. 549 (1899); cf. Armstrong v. State, 72 Ind. App. 303, 312, *sub nom.* Conway's Est., 120 N. E. 717, 719 (1918), rehearing denied 141 N. E. xv (1920).

²² United States v. Wells, *supra* note 17.

²³ PINKERTON AND MILLSAPS, INHERITANCE AND ESTATE TAXES (1926) 112. The earliest inheritance tax statute in the United States—the Pennsylvania Act of April 7, 1826—provided for the taxation of transfers intended to take effect at death. See Reish v. Commonwealth, 106 Pa. 521 (1884). The New York statute, N. Y. Laws 1885, c. 483, p. 820, corresponded in its language to the Pennsylvania act in this respect. *In re Johnson's Estate*, 19 N. Y. Supp. 963, 965 (1892). The Illinois statute was taken from N. Y. Laws 1892, c. 399, § 1 (3). *People v. Carpenter*, 264 Ill. 400, 404, 106 N. E. 302, 304 (1914). The phrase was first used by Congress in the legacy and probate tax statute of 1862, c. 119, § 111, 12 STAT. 433, 485 (1862). It was again used in the Inheritance Tax Act of 1898, c. 448, § 29, 30 STAT. 448, 464 (1898). See *Vanderbilt v. Eidman*, 196 U. S. 480, 491, 25 Sup. Ct. 331, 334 (1905). See also Hope, *The Function of the Inheritance Tax: The Taxation of Inter Vivos Transfers* (1933) 11 TAX MAG. 5; Surrey and Aronson, *Inter Vivos Transfers and the Federal Estate Tax* (1932) 32 COL. L. REV. 1332.

²⁴ *Frew v. Bowers*, *supra* note 3, at 627. After considerable diversity of opinion, these words may now be regarded as having an interpretation susceptible of some meaning. For an extensive note on the state cases see Note (1927) 49 A. L. R. 864-903. See also Rottschaefter, *supra* note 15, treating both state and federal decisions, but principally the former.

²⁵ Cf. Runk, *Differing Federal and State Interpretations of the Transfer Inheritance Tax Applied to Trusts Inter Vivos* (1930) 79 U. OF PA. L. REV. 185.

A. The grantor creates a trust for the benefit of others during their lives, with remainder over, reserving to himself a power of revocation during his life.

B. The grantor creates a trust, in terms irrevocable, reserving the income to himself during his life, with remainder over.

C. The grantor reserves both the income for his life and the power to revoke, with remainder over.

D. The grantor creates an irrevocable trust with the income payable to others for their lives, with remainders over.

E. The grantor reserves a right to alter, amend, or revoke the trust in conjunction with either the trustee or the beneficiary.

F. The grantor reserves the life income and a power of appointment, with remainder over in default of appointment, but not the power to revoke.

G. The grantor has or reserves an expectancy or a possibility of reverter.

The application of the federal estate tax to these types of trusts will be considered. In the course of the discussion references will be made to corresponding decisions under state succession taxes. The general question is whether, upon the grantor's death, there is a transfer taking effect in possession or enjoyment within the meaning of the taxing statute.

A. In the first class, the specific question is whether the reservation of the power of revocation, even though unexercised, postpones the possession and enjoyment of the beneficiaries until the grantor's death. The federal courts, and some state courts, hold that there is a taxable transfer upon the grantor's death.²⁶ The termination of the power of control inures to the benefit of the beneficiary and thus brings about, at death, the completion of that shifting of the economic benefits which is the real object of the tax. A power of revocation is analogous to a power of appointment. Where there is a power of revocation, the death of the grantor terminates his right to substitute a testamentary disposition for the *inter vivos* disposition, and the

²⁶ *Reinecke v. Northern Trust Co.*; *Chase National Bank v. United States*; *McCaughn v. Fidelity Trust Co.*, all *supra* note 2; *United States v. Stark*, 32 F. (2d) 453 (C. C. A. 6th, 1929); *Farmers' Loan & Trust Co. v. Bowers*, 29 F. (2d) 14 (C. C. A. 2d, 1928); *Bullen v. Wisconsin*, 240 U. S. 625, 36 Sup. Ct. 473 (1915); *Saltonstall v. Saltonstall*, *supra* note 10; *Hill v. Nichols*, 18 F. (2d) 139 (D. Mass. 1927). In *Chase National Bank v. United States*, *supra* note 2, proceeds of life insurance policies were involved. However, where the insured had no right of revocation respecting the beneficiary, the proceeds on the death of the insured are not a part of the decedent's estate for taxation. *Anthracite Trust Co. v. Phillips*, 49 F. (2d) 910 (M. D. Pa. 1931); *Reed v. Commissioner*, 24 B. T. A. 166 (1931). See also *Sampson v. United States*, 1 F. Supp. 95 (D. Mass. 1932). *State and City Bank & Trust Co. v. Daughton*, 188 N. C. 762, 125 S. E. 621 (1924); *Plainfield Trust Co. v. McCutcheon*, 8 N. J. Misc. 593, 151 Atl. 279 (1930), *aff'd* 108 N. J. L. 201, 154 Atl. 629 (1931); (1929) 29 Col. L. Rev. 1025. *Contra*: *People v. Northern Trust Co.*, *supra* note 13; *Re Miller*, 236 N. Y. 290, 140 N. E. 701 (1923); *Dolan's Estate*, *supra* note 11; *cf. In re Miller's Estate*, 43 Nev. 12, 185 Pac. 565 (1919), *aff'd sub nom. Nickel v. State*, 256 U. S. 222, 41 Sup. Ct. 467 (1921).

failure to make such substitution is tantamount to an expressed declaration of the grantor that his previous settlement should stand. The power of revocation, unexercised by the grantor, leaves the transfer as to him incomplete, and gives him a legal interest which is subject to the tax, whether it be one of transfer or succession.

The Revenue Act of 1924 added a new subsection²⁷ which specifically included in the gross estate the value of property with respect to which the decedent had created a trust and had reserved power in himself to alter, amend, or revoke the same. The general purpose and intent of the Act in this respect were to reach dispositions which are really testamentary in so far as taxation is concerned.²⁸

B. In the second class, the specific question is whether the reservation by the grantor of the income for his life postpones the vesting of the ultimate beneficiary's estate in possession and enjoyment. The great majority of the state courts consider that the retention of the income by the grantor for his life delays the vesting of the remaindermen's estate in possession or enjoyment until the grantor's death and hold that a taxable interest passes at the death of the grantor.²⁹ On the other hand, the Supreme Court of the United States recently held that no taxable interest passed at the death of the grantor, title having vested at the time of the execution of the trust deed.³⁰

In *May v. Heimer*³¹ the grantor made an irrevocable deed of trust by the terms of which she gave the income of the property to her husband during

²⁷ § 302(d) 43 STAT. 304 (1924), 26 U. S. C. A. (1928) § 1094 n. Cf. *United States v. Field*, 255 U. S. 257, 41 Sup. Ct. 256 (1921).

²⁸ *United States v. Stark*, *supra* note 26, at 454. Cf. *Corliss v. Bowers*, 281 U. S. 376, 50 Sup. Ct. 336 (1930); *Reinecke v. Smith*, 61 F. (2d) 325 (C. C. A. 7th, 1932); and *Stetson v. Commissioner*, 26 B. T. A. 390 (1932), in connection with § 166 of the Revenue Act of 1932, 47 STAT. 221 (1932), 26 U. S. C. A. (Supp. 1932) § 3166.

²⁹ *Reish v. Commonwealth*, *supra* note 23; *In re Dolan's Estate*, *supra* note 11; *In re Barber's Estate*, 304 Pa. 235, 241, 155 Atl. 565, 567 (1931); *American Board of Commissioners v. Bugbee*, 98 N. J. L. 84, 118 Atl. 700 (1922), *aff'd sub nom.* *Congregational Home Missionary Society v. Bugbee*, 101 N. J. L. 214, 127 Atl. 192 (1925); *In re Honeyman*, 98 N. J. Eq. 638, 129 Atl. 393 (1925); *In re Russell*, 104 N. J. Eq. 578, 146 Atl. 361 (1929), (1929) 29 Col. L. Rev. 1025; *Farmers' Loan & Trust Co. v. Bugbee*, 6 N. J. Misc. 415, 141 Atl. 579 (1928); *Worcester Bank v. Commissioner*, 275 Mass. 216, 175 N. E. 726 (1931); *State Street Trust Co. v. Treasurer*, 209 Mass. 373, 95 N. E. 852 (1911); *Saltonstall v. Saltonstall*, *supra* note 10 (interpreting a Mass. statute); *People v. Northern Trust Co.*, 330 Ill. 238, 161 N. E. 525 (1928); *People v. McCormick*, *supra* note 1; *People v. Kelly*, 281 Ill. 509, 75 N. E. 1038 (1905); *People v. Welch's Estate*, 235 Mich. 555, 209 N. W. 930 (1926); *Matter of Schmidlapp*, *supra* note 11; *Matter of Patterson*, 146 App. Div. 286, 130 N. Y. Supp. 970 (1911), *aff'd* 204 N. Y. 677, 98 N. E. 1109 (1912); *Matter of Cochrane*, 117 Misc. 18, 190 N. Y. Supp. 895 (1921); *aff'd* 202 App. Div. 751 (1922); *Matter of Bostwick*, 160 N. Y. 489, 55 N. E. 208 (1899). *Contra*: *State & City Bank & Trust Co. v. Daughton*, *supra* note 26; *Downes v. Safe Deposit & Trust Co.*, 157 Md. 87, 145 Atl. 350 (1929).

³⁰ *May v. Heimer*, *supra* note 2, (1930) 44 HARV. L. REV. 131, (1930) 29 MICH. L. REV. 123; *Burnet v. Northern Trust Co.*, 283 U. S. 782, 51 Sup. Ct. 342 (1931), *aff'g* 41 F. (2d) 732 (C. C. A. 7th, 1930); *Morsman v. Burnet*, 283 U. S. 783, 51 Sup. Ct. 343 (1931), *rev'g* 44 F. (2d) 902 (C. C. A. 8th, 1930); *McCormick v. Burnet*, 283 U. S. 784, 51 Sup. Ct. 343 (1931), *rev'g* 43 F. (2d) 277 (C. C. A. 7th, 1930); *Hodgkins v. Commissioner*, 44 F. (2d) 43 (C. C. A. 7th, 1930), *certiorari* denied 283 U. S. 825, 51 Sup. Ct. 350 (1931). See also *Coolidge v. Long*, *supra* note 1; *McCaughn v. Carnill*, 43 F. (2d) 69 (C. C. A. 3d, 1930), *certiorari* denied 283 U. S. 825, 51 Sup. Ct. 350 (1931). See also *Boyd v. United States*, 34 F. (2d) 488 (D. Conn. 1929).

³¹ *Supra* note 2.

his lifetime and after his death to herself during her lifetime, with remainders over to her children. It was held that the transfer was not intended to take effect in possession or enjoyment at or after her death, within the legal significance of those words; that the transfer became effective immediately upon the delivery of the deed of trust, she having definitely disposed of not only the possession of the property but also the right of enjoyment; and that, therefore, the *corpus* of the trust should not be included in the value of the gross estate of the grantor for purposes of the federal estate tax. The contingency whether she predeceased her husband or not was immaterial. Mr. Justice McReynolds, writing for an unanimous court, said:

“ . . . At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event.”³²

In *Burnet v. Northern Trust Co.*³³ the decedent before her death had conveyed by an irrevocable deed property to a trustee, which was to pay the income to her during her life and after her death to distribute the *corpus* equally among her children. The Circuit Court of Appeals for the Seventh Circuit, following *May v. Heiner*, held the transfer was non-taxable. Circuit Judge Evans said:

“ . . . It is true that the settlor in the May case provided in her trust deed for the life use by her husband and, upon his death, she surviving, for the life use of herself. This difference in the facts, however, seems to us immaterial. The conclusion, under this decision, seems inescapable that property conveyed by an irrevocable deed of trust, to third parties, with no reversionary interest, contingent or otherwise, in the settlor, though the income during the settlor's life be payable to settlor, does not pass at the settlor's death, but at the date of the execution and delivery of the deed of trust.”³⁴

The Supreme Court affirmed this decision in a *per curiam* opinion upon the authority of *May v. Heiner*.

In the *Morsman* case,³⁵ property was transferred to a trustee to pay the income to the grantor during life and for a period of two years after the

³² 281 U. S. at 243, 50 Sup. Ct. at 287.

³³ *Supra* note 30. The Illinois Supreme Court upheld the state succession tax on the trust property. *People v. Northern Trust Co.*, *supra* note 29, at 246, 161 N. E. at 528. In the government's petition for a writ of *certiorari* in the case it is stated (p. 23) that the Solicitor General (Thacker) and counsel, who have considered the decision below, 41 F. (2d) 732 (C. C. A. 7th, 1930), in the Department of Justice, do not share "the gravest doubt as to the correctness" of that decision entertained by officials of the Treasury Department, because of the decision in *May v. Heiner*, *supra* note 2. The government's supporting brief concludes with the statement that it was prepared by the Bureau of Internal Revenue and presents the views of the Treasury Department upon the question involved. Evidently the Solicitor General considered that *May v. Heiner* was controlling.

³⁴ 41 F. (2d) at 732.

³⁵ *Supra* note 30.

grantor's death equally to the grantor's sons. At the expiration of the two-year period the trust was to terminate and the *corpus* divided among the sons. The power to change the trustee was reserved to the grantor and all the beneficiaries. The trustee was given full power of management of the property, provided that in selling and making investments the trustee was to follow the written advice of the grantor and one of the beneficiaries. The reservation of income, which was to cease or pass to others on the grantor's death, did not subject the *corpus* to the federal estate tax. In this instance the Supreme Court, upon *certiorari*, reversed the Circuit Court of Appeals for the Eighth Circuit in a *per curiam* opinion, based upon *May v. Heiner*. At the same time a third *per curiam* opinion was rendered, likewise upon the authority of *May v. Heiner*, reversing the Circuit Court of Appeals for the Seventh Circuit.

In the *McCormick* case³⁶ the grantor established a trust whereby the income was to be accumulated and added to the principal, except so much as she might request to be paid to her to supplement her income from other property should the latter not amount to a certain sum and for such charitable purposes as she might designate. Upon the grantor's death, the income was to be divided equally among her children for their lives. The trust was to terminate on the death of the last of the beneficiaries. The grantor might terminate the trust with the consent of any one of the beneficiaries and the trust properties reverted to her if she survived the beneficiaries. The trustee was restricted from making any change in the trust property without the written approval of the grantor, and she retained the power to direct the voting of stock in the trust estate. The transfer was held non-taxable.

The three cases were all decided upon the same date. The following day the Secretary of the Treasury requested that the statute be amended in order that tax avoidance might be prevented.³⁷ A joint resolution was passed the same day.³⁸

³⁶ *Supra* note 30. The Illinois Supreme Court upheld the state succession tax on the trust property. *People v. McCormick*, *supra* note 1.

³⁷ 74 CONG. REC. 7198 (1931). Senator Smoot stated on the floor that the decisions of the Supreme Court came almost like a bombshell, because nobody ever anticipated such decisions, since everybody thought the law was perfectly plain. 74 CONG. REC. 7078-9 (1931). See, however, the evident opinion of the Solicitor General to the contrary, *supra* note 33.

³⁸ The amendment passed both Houses without objection, 74 CONG. REC. 7078-9 (1931), and was approved and signed by the President the same day. 74 CONG. REC. 7392 (1931). Senator Walsh of Montana entertained "very grave doubt" as to the constitutionality of the amendment. 74 CONG. REC. 7079 (1931). The Revenue Act of 1926, § 302 (c), 44 STAT. 70 (1926), 26 U. S. C. A. § 1094 (c) (1928), as amended by the joint resolution, as respects this subsection, read as follows: "To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth."

Three more recent decisions may be properly included in this second class, where the grantor reserves the income of the trust during his lifetime. In the *Hodgkins* case³⁹ the irrevocable trust deed directed the payment of the income to the grantor for life, and thereafter to his wife during her life. The trust was to continue thereafter during the lifetime of the grantor's son, with remainders over. The son might elect to terminate the trust for his own benefit ten years after the death of the grantor and his wife. The transfer was held non-taxable as one effective in possession or enjoyment at or after death. Circuit Judge Evans, again writing for the court, said:

“. . . The legal effect of this provision was to limit and restrict and perhaps postpone the beneficiary's full enjoyment of the fund trans-

In this connection see, T. D. 4314 (Int. Rev. 1931); and T. D. 4340 (Int. Rev. 1932), amending U. S. Treas. Reg. 70, Art. 20. The subsection was further amended by the Revenue Act of 1932, 47 STAT. 279 (1932), 26 U. S. C. A. § 1094 (c) (Supp. 1932), so as to read as follows: "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth." The SEN. REP. No. 665, 72d Cong. 1st Sess., Ser. No. 9488, on the Revenue Act of 1932 has the following comment at 49: "The purpose of this amendment to section 302 (c) of the Revenue Act of 1926 is to clarify in certain respects the amendments made to that section by the joint resolution of March 3, 1931, which was adopted to render taxable a transfer under which the decedent reserved the income for his life. The joint resolution was designed to avoid the effects of decisions of the Supreme Court holding such a transfer not taxable if irrevocable and not made in contemplation of death. Certain new matter has also been added, which is without retroactive effect.

The changes are: (1) "The insertion of the words 'or for any period not ascertainable without reference to his death', is to reach, for example, a transfer where decedent reserved to himself semi-annual payments of the income of a trust which he had established, but with the provision that no part of the trust income between the last semi-annual payment to him and his death should be paid to him or his estate, or where he reserves the income, not necessarily for remainder of his life, but for a period in the ascertainment of which the date of his death was a necessary element.

(2) "The insertion of the words 'or for any period which does not in fact end before his death', which is to reach, for example, a transfer where decedent, 70 years old, reserves the income for an extended term of years and dies during the term, or where he is to have the income from and after the death of another person until his own death, and such other person predeceases him. This is a clarifying change and does not represent new matter.

(3) "The insertion of the words 'the right to the income' in place of the words 'the income' is designed to reach a case where decedent had the right to the income, though he did not actually receive it. This is also a clarifying change.

(4) "The insertion of the words 'either alone or in conjunction with any person' is to reach a case where decedent had a right, with the concurrence of another person or persons, to designate those who should possess or enjoy the property or the income therefrom.

"The amendments to section 302 (f) and section 315 (b) of the Revenue Act of 1926 are to bring these sections into agreement with section 302 (c) of the 1926 Act, as amended, in the respects above indicated."

Almost contemporaneously therewith the New York Legislature amended its estate tax law, which is patterned after and closely follows the federal law, to make § 249-r (3) conform to the 1931 amendment of § 302 (c) of the Revenue Act of 1926. However, the New York law has not as yet been amended to conform to the provisions of § 302 (c) as amended by the Revenue Act of 1932. On April 27, 1933, Governor Lehman vetoed Assembly Bill No. 1886 which, among other things, was intended to conform § 294-r (3) of the New York Tax Law to § 302 (c) of the Revenue Act of 1932. See also, N. Y. Laws 1932, c. 320, p. 193, adding a new subdivision (7-a) to § 249-r of article 10-c, New York Estate Tax, added by N. Y. Laws 1930, c. 710, superseding arts. 10 and 10-A.

³⁹ *Hodgkins v. Commissioner*, *supra* note 30.

ferred. It was not indicative of any control by the settlor during the life of the trust agreement. It in no way impeached the irrevocable character of the agreement. It did not evidence an intention on the settlor's part to make the transfer effective in possession or in enjoyment at or after his death." ⁴⁰

And in *McCaughn v. Carnill* ⁴¹ the decedent in his lifetime transferred property to trustees. The income was payable to the grantor during his life, and upon his death to his widow for her life. After the death of both, the income was payable to their children with remainders over. The grantor retained no power to revoke or amend the trust and the transfer was held not to have been intended to take effect in possession or enjoyment at or after the death of the grantor under the Act of 1924. Circuit Judge Davis said:

" . . . The transfer of the corpus of this fund was not testamentary in character and was, as above stated, beyond recall by the donor. At his death no interest in this trust fund held under the trust instrument passed from him to the living. The transfer had already been made and title thereto had been definitely fixed by the trust deed." ⁴²

Finally, in *Boyd v. United States*, ⁴³ the grantor made a trust, without reserving power to amend or revoke, with directions to pay a portion of the income to himself for life, the balance to be added to principal. On his death, the *corpus* was to be distributed to his heirs, subject to the rights of his mother. It was held that the transfer was not subject to the federal estate tax, notwithstanding the fact that beneficiaries' enjoyment was postponed until the death of the grantor. The court said:

" . . . So long as the settlor retained no title, and no right to acquire any, nor any power of disposition of the trust, the fact that the beneficiaries were postponed until the settlor's death to an actual enjoyment of the corpus of the trust is immaterial." ⁴⁴

C. In the third situation, where the grantor retains the power of revocation and the income for life, both federal and state courts impose the tax. The state courts regard the retention of the income by the grantor for his life as the test of taxability, ⁴⁵ whereas the federal courts consider the reservation

⁴⁰ 44 F. (2d) at 44.

⁴¹ *Supra* note 30. *Contra*: *McCaughn v. Girard Trust Co.*, 11 F. (2d) 520 (C. C. A. 3d, 1926); *Reed v. Howbert*, 8 F. (2d) 641 (D. Colo. 1925).

⁴² 43 F. (2d) at 70.

⁴³ *Supra* note 30. *Cf.* *Shukert v. Allen*, 273 U. S. 545, 47 Sup. Ct. 461 (1927). *Contra*: *Tips v. Bass*, 21 F. (2d) 460 (D. Tex. 1927).

⁴⁴ 34 F. (2d) at 490.

⁴⁵ *Dolan's Estate*, 279 Pa. 582, 124 Atl. 176 (1924); *Re Miller*, *supra* note 26; *Matter of Carnegie*, 203 App. Div. 91, 195 N. Y. Supp. 502 (1922), *aff'd* 236 N. Y. 517, 142 N. E. 266 (1923); *People v. Northern Trust Co.*, *supra* note 13; *Dexter v. Treasurer and Receiver General*, 243 Mass. 523, 137 N. E. 877 (1923).

of the power of revocation the criterion of taxation.⁴⁶ Judge Cardozo has said:

“. . . A gift by deed of trust to take effect in enjoyment upon the death of the donor, with the reservation of intermediate use, and with complete power of revocation, approaches so nearly to a gift by will that the legislature may declare their substantial identity for the purpose of taxation.”⁴⁷

D. In the fourth type of case, in which the grantor reserves neither the income nor the power to revoke, it has been held⁴⁸ generally that when the grantor dies there is no taxable transfer, the beneficial enjoyment and possession having passed immediately to the beneficiaries upon the execution of the trust deed. In *Shukert v. Allen*⁴⁹ the testator had conveyed certain securities in trust to accumulate the income (subject to certain deductions in case of the extreme destitution of the testator's wife or of any of the beneficiaries named) until thirty years had elapsed, unless the last of the beneficiaries should have died more than twenty-one years before that date, and then to divide the principal and undistributed income among those of his three children then living and the descendants living of such as might theretofore have died. Mr. Justice Holmes, in delivering the opinion of the Court said:

“. . . The transfer was immediate and out and out, leaving no interest remaining in the testator. The trust in its terms has no reference to his death but is the same and unaffected whether he lives or dies. Although the circuit court of appeals seems to have thought otherwise, the interest of the children respectively was vested as soon as the instrument was executed, even though it might have been divested as to any one of them in favor of his issue if any, or of the surviving beneficiaries, if he died before the termination of the trust.

“. . . But it seems to us tolerably plain, that when the grantor parts with all his interest in the property to other persons in trust, with no thought of avoiding taxes, the fact that the income vested in the beneficiaries was to be accumulated for them instead of being handed to them to spend, does not make the trust one intended to take effect in possession or enjoyment at or after the grantor's death.”⁵⁰

⁴⁶ *Home Trust Co. v. Edwards*, 30 F. (2d) 976 (S. D. N. Y. 1929); *Hanna v. United States*, 68 Court Cl. 45 (1929), *certiorari* denied 280 U. S. 612, 50 Sup. Ct. 161 (1930); *Reinecke v. Northern Trust Co.*, *supra* note 2; *Dean v. Willcuts*, 32 F. (2d) 374 (D. Minn. 1929); *United States v. Stark*; *Bullen v. Wisconsin*, both *supra* note 26; *Saltonstall v. Saltonstall*, *supra* note 10.

⁴⁷ *Matter of Schmidlapp*, *supra* note 11, at 284, 140 N. E. at 699.

⁴⁸ *Shukert v. Allen*, *supra* note 43; *Reinecke v. Northern Trust Co.*, *supra* note 2; *Brady v. Ham*, 45 F. (2d) 454 (C. C. A. 1st, 1930), (1931) 44 HARV. L. REV. 653; *Farmers' Loan & Trust Co. v. Bowers*, *supra* note 26; *In re Prange's Will*, 201 Wis. 636, 231 N. W. 271 (1930); *Highfield v. Equitable Trust Co.*, 155 Atl. 724 (Del. Super. 1931); *Dexter v. Treasurer and Receiver General*, *supra* note 45.

⁴⁹ *Supra* note 43.

⁵⁰ 273 U. S. at 547, 548, 47 Sup. Ct. at 461.

Therefore, if the beneficial use or enjoyment of the property is vested in the beneficiaries, or is accumulated by a trustee for their benefit and not the grantor's, then from the aspect of enjoyment the transaction lacks the attributes that constitute it one intended to take effect in possession or enjoyment at or after death.⁵¹

In this connection, *Coolidge v. Long*⁵² should be considered. There the grantors conveyed certain properties to a trustee to pay the income to themselves in stated proportions during their joint lives, thereafter wholly to the survivor and upon the death of the survivor to divide the principal equally among their five sons; provided that if any of the sons should predecease the survivor his share should go to those entitled to take his property under intestate succession and provided further that in no event should a widow of any such deceased son take more than one-half of such share. The grantors released their rights to the income prior to death. Massachusetts sought to tax the succession under an act in force when the survivor died on the ground that not until the death of the survivor did the property vest in the sons or their successors. No act so taxing the succession was in force when the trust was executed. The state court⁵³ upheld the tax upon the assumption that there could not be a manucaption of the property by the ultimate remaindermen until the termination of the trust, but the Supreme Court reversed this decision, and in so doing Mr. Justice Butler said:

“ . . . By the deed of each Grantor one-fifth of the remainder was immediately vested in each of the sons subject to be divested only by his death before the death of the survivor of the settlors. It was a grant in praesenti to be possessed and enjoyed by the sons upon the death of such survivor. *Blanchard v. Blanchard*, 1 Allen 223; *Clarke v. Fay*, 205 Mass. 228; *McArthur v. Scott*, 113 U. S. 340, 379, and cases cited. And see *United States v. Fidelity Trust Co.*, 222 U. S. 158; *Henry v. United States*, 251 U. S. 393. The provisions for the payment of income to the settlors during their lives did not operate to postpone the vesting in the sons of the right of possession or enjoyment. The settlors divested themselves of all control over the principal; they had no power to revoke or modify the trust. *Coolidge v. Loring* (235 Mass. 223, 126 N. E. 276). Upon the happening of the event specified without more, the trustees were bound to hand over the property to the beneficiaries. Neither the death of Mrs. Coolidge nor of her husband was a generating source of any right in the remaindermen. *Knowlton v. Moore*, 178 U. S. 41, 56. Nothing moved from her or him or from the estates of either when she or he died. There was no transmission then. The rights of the remaindermen, including possession and enjoyment upon the termination of the trusts, were derived solely from the deeds. The situation would have been precisely the same if the possibility of

⁵¹ Compare the quotation from Judge Hough's opinion in *Frew v. Bowers*, *supra* note 24.

⁵² *Supra* note 1. The same deed of trust was before the Court in *Nichols v. Coolidge*, *supra* note 8. See also *Coolidge v. Loring*, 235 Mass. 220, 126 N. E. 276 (1920).

⁵³ *Coolidge v. Commissioner*, 268 Mass. 443, 167 N. E. 757 (1929).

divestment had been made to cease upon the death of a third person instead of upon the death of the survivor of the settlor or the settlors. The succession, when the time came, did not depend upon any permission or grant of the Commonwealth. While the sons, if occasion should arise, might by appropriate suit require the trustees to account, it is to be borne in mind that the property was never in the custody of the law or of any court. Resort might be had to the law to enforce the rights that had vested. But the Commonwealth was powerless to condition possession or enjoyment of what had been conveyed to them by the deeds. *Barnitz v. Beverly*, 163 U. S. 118, and cases cited.

"The fact that each son was liable to be divested of the remainder by his own death before that of the survivor of the grantors does not render the succession incomplete. The vesting of actual possession and enjoyment depended upon an event which must inevitably happen by the efflux of time, and nothing but his failure to survive the settlors could prevent it. *Blanchard v. Blanchard*, supra; *Moore v. Lyons*, 25 Wend. 119, 144. Succession is effected as completely by a transfer of a life estate to one and remainder over to another as by a transfer in fee. *Reinecke v. Trust Co.*, 278 U. S. 339, 347-348."⁵⁴

In *Nichols v. Bradley*⁵⁵ the grantor created a trust providing that one-half of the income of the trust estate should be paid to her during her lifetime, and that the other half should be divided equally among her three daughters and their issue, but that in case of the death of all of the daughters without issue during the life of the grantor, the entire income should be paid to her for life and then to others. The case was decided before *May v. Heiner*,⁵⁶ and apparently it was assumed that one-half of the fund was subject to the tax. The government contended that the entire value of the trust fund should be included, because of her contingent right to get the entire income in the event her three daughters predeceased her. But the court said:

" . . . upon making the trust deed, Mrs. Bradley parted with the possession and enjoyment of this half of the property contributed by her to the trust, and that she was to have no reversionary interest in this half unless the daughters and their issue failed to survive her, or (what is the same thing) unless she survived the daughters and their issue, which she did not do. Having died first, no reversionary interest ever arose in her favor. Her death did not pass the right to the possession and enjoyment of the half of the property and income here in question from her to the daughters and their issue. That right passed to them at once by the declaration of trust, subject to defeasance in case they failed to survive Mrs. Bradley. Her death, however, before that of her daughters, foreclosed the possibility of a reversionary interest arising in her favor. In other words, her death did not effect the transfer of the possession and enjoyment of the property and income to the daughters from and after that time, but, having occurred during the lifetime of the

⁵⁴ 282 U. S. at 597, 598, 51 Sup. Ct. at 309.

⁵⁵ 27 F. (2d) 47 (C. C. A. 1st, 1928).

⁵⁶ See text supra 942 et seq.

daughters, it foreclosed the possibility of her acquiring a reversionary interest in this half of the property."⁵⁷

In *Burnet v. Pacific Southwest Trust & Savings Bank*⁵⁸ an irrevocable trust was created under which the estate conveyed was to go to the sons of the grantor or the survivor, if either survived for twelve years. In the event of the death of both of the sons prior to the expiration of twelve years from the date of the trust, the grantor having previously died, the trust estate was to go to the devisees or heirs of the grantor. No income was to be paid to the grantor. The sons survived the grantor and the twelve year period. The government contended that the trust property should be included in the grantor's estate, because the rights of the sons were dependent upon their surviving the grantor and the twelve year period. The court held, however, that their interest vested under the trust instrument, and that since the sons survived the trust term and were entitled to the whole estate, the contingency that the grantor might have taken was valueless. Circuit Judge Wilbur said:

" . . . The Commissioner contends that the rights of the sons of the trustor were so far dependent upon the death of the trustor that their possession and enjoyment thereof took effect at or after his death, and hence the estate was subject to the estate tax. It is clear, however, that the death of the trustor in no way affected the disposition of the property to them. Their interest was fixed by the trust conveyance; it is true that the interest of either was to be divested by his death if it occurred before December 1, 1929, and that in the event both died before that date the estate would vest in either the devisees or the heirs of the trustor, as the case might be.

"As to this contingent remainder, it is clear that the right thereto was fixed when, and only when, the settlor died. This contingent interest would be one that would take effect in possession or enjoyment at or after the death of the trustor. It has been demonstrated by the passage of time that this contingency is valueless, as both sons survived the termination of the trust, and are now entitled to the whole estate. The Commissioner did not undertake to levy a tax upon this contingent interest, and makes no claim of his right to do so now. If the value of this contingent interest is properly to be considered as a part of the gross estate of the trustor, no claim of the Commissioner is based thereon. His claim is that the whole trust estate conveyed in the deed is to be added to the gross estate for the purpose of fixing the tax thereon. This contention is largely based upon the untenable point made by him that the entire interest of the sons comes within the purview of the law taxing estates that vest in possession or enjoyment after death. To the other cases herein cited on this point we add *May v. Heiner*, 281 U. S. 238."⁵⁹

⁵⁷ 27 F. (2d) at 48.

⁵⁸ 45 F. (2d) 773 (C. C. A. 9th, 1931), *certiorari* denied 283 U. S. 825, 51 Sup. Ct. 350 (1931).

⁵⁹ *Id.* at 776-777.

Finally, in *Curley v. Tait*, Judge Rose said:

“. . . If all beneficial ownership and possession irrevocably passes from the transferor at the time of the transfer, it would seem to be immaterial whether it goes to one person or to several, and if to several, whether their enjoyment is to be simultaneous or successive, and, if the latter, at what time or upon the happening of what event the rights of one give place to those of another.”⁶⁰

E. Where the grantor reserves to himself alone the power to revoke the trust, such reservation, we have seen, renders the transfer incomplete under the federal estate tax law until his death. But where the grantor provides that he may revoke the trust in conjunction with either the trustee or the beneficiaries, the situation is somewhat different.

In *Farmers' Loan & Trust Co. v. Bowers*⁶¹ the deed of trust reserved no income to the grantor, but provided that the income should be distributed to the issue of the grantor in certain proportions. At the death of the grantor the principal should be distributed to and among the issue of the grantor in such shares as he might by will appoint, and, in default of such appointment, to his then surviving issue. The deed provided that the grantor, but only with the written consent of the trustee, might modify or revoke the trust, in whole or in part. The grantor died without having exercised the limited power of appointment reserved to him. The question was whether the *corpus* of the trust was a part of the decedent's net estate subject to the estate tax. The government sought to distinguish *Nichols v. Coolidge*⁶² on the theory that here there was a reserved power to modify. It was held that Section 402 (e) of the Act of 1919 did not justify a tax on the limited power of appointment⁶³ reserved by the grantor. Circuit Judge Manton said:⁶⁴

“. . . By the indenture of May, 1916, the settlor parted with all control over the corpus of the trust, except a conditional power to revoke, and then only with the consent of the trustee. The trustee had obligations with respect to the trust property and the rights of the beneficiaries. Its consent could be granted only with due regard for such duties. Thus the settlor was beyond the power legally to control.”

⁶⁰ 276 Fed. 840, 842 (D. Md. 1921).

⁶¹ *Supra* note 26. See also *Stone v. Commissioner*, 26 B. T. A. 1, 5 (1932).

⁶² *Supra* note 8. It will be noted that in the case being discussed the court reached its conclusion by its interpretation of the language of the taxing act and found it unnecessary to consider any question of the constitutionality of the act.

⁶³ See TRUSTS RESTATEMENT, TENTATIVE DRAFT NO. 1 (Am. L. Inst. 1930) § 27b; Gray, *Release and Discharge of Powers* (1911) 24 HARV. L. REV. 511, 512; *Matter of Harbeck*, 161 N. Y. 211, 220, 55 N. E. 850, 852 (1900); N. Y. REAL PROP. LAW (1909) §§ 134, 135; *Fletcher v. Fletcher*, 4 Hare 67, 79 (Eng. 1844); *Brandies v. Cochrane*, 112 U. S. 344, 351, 5 Sup. Ct. 194, 197 (1844); *Jones v. Clifton*, 101 U. S. 225 (1879). Under § 70a of the Bankruptcy Act, 30 STAT. 565 (1898), 11 U. S. C. A. § 110 (1927), the trustee shall be vested with the title of the bankrupt, “to all powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person.” *Montague v. Silsbee*, 218 Mass. 107, 105 N. E. 611 (1914); *Forbes v. Snow*, 245 Mass. 85, 140 N. E. 418 (1923); see also *Eaton v. Boston Trust Co.*, 240 U. S. 427, 36 Sup. Ct. 391 (1916).

⁶⁴ 29 F. (2d) at 16-18.

Continuing he said :

“ . . . When, in May, 1916, the settlor made his indenture, he transferred his title and also all possession and enjoyment. His reserved powers were not conditions of the vesting of the estate, but merely conditional limitations.”

Concluding he said :

“ . . . But here there is no such absolute and unconditional power (to revoke the trust). The trustee's consent was necessary for the settlor's exercise of the power. It therefore required the action of both. The power could not be exercised by the settlor alone, and therefore it was not a general power exercised by the decedent, within the meaning of the statute (402 (e) of the Act of 1919). Congress intended only to tax the general power, which the settlor might have exercised himself or treated the property as part of his estate. It is apparent Congress made such a distinction between a general power exercised by a decedent and a limited power requiring more than the act or will of the settlor.”

A power of revocation somewhat similar to the one in the preceding case, that is, dependent upon the consent of the trustee, was before the court in *Hill v. Nichols*,⁶⁵ which involved the same deed of trust in the *Saltonstall*⁶⁶ case. The transfer was held non-taxable under the federal estate tax, but the state succession tax was sustained by the Supreme Court of the United States. The difference in the two statutes, the former upon the right to transmit and the latter upon the right to receive the property, is clearly the basis of the different results.⁶⁷

In the *Reinecke* case with respect to each of the “five trusts” the grantor reserved the power to alter, change or modify the trust, which was to be exercised in the case of four of them by the grantor and the single beneficiary of each trust, acting jointly, and in the case of one of these trusts, by the grantor and a majority of the named beneficiaries, acting jointly. Mr. Justice Stone, in holding that the trusts were not taxable on the ground that they were intended to take effect in possession or enjoyment at or after the death of the grantor, said :

“ . . . If it be assumed that the power to modify the trust was broad enough to authorize disposition of the trust property among new beneficiaries or to revoke the trusts, still it was not one vested in the settlor alone, as were the reserved powers in the case of the two trusts (terms of which reserved to grantor alone power of revocation). He could not effect any change in the beneficial interest in the trusts without the consent in the case of four of the trusts, of the person entitled to that interest, and in the case of one trust without the consent of a major-

⁶⁵ *Supra* note 26, at 141.

⁶⁶ *Supra* note 10.

⁶⁷ *Cf. Coolidge v. Long, supra* note 1, at 596, 51 Sup. Ct. at 308.

ity of those so entitled. Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute.”⁶⁸

In *Brady v. Ham*⁶⁹ the declaration of trust provided that the income should be paid to the grantor's daughters, with remainders over. The grantor reserved power to do practically anything with the trust fund except apply its economic benefits to herself. The commissioner included the trust fund as a part of the estate of the grantor upon her death under Section 302 (d) and (h) of the Revenue Act of 1926. The court decided that the transfer was not taxable. Circuit Judge Wilson, in delivering the opinion of the court, said:

“. . . The decedent, Elizabeth S. Haynes, by her declaration of trust expressly deprived herself of the enjoyment of all economic benefits in the trust estate. While she might control the final disposition of it so far as the beneficiaries were concerned, she could not restore to herself any beneficial enjoyment of it. She reserved no power of revocation as in the first 'two trusts' in the Reinecke case. So far as any economic benefits of the trust estate were concerned, they passed to the trustees at the time of the execution of the declaration of trust. The enjoyment of them may not have been definitely settled on the beneficiaries until her death, and the beneficiaries may have been subject to a succession tax, but the right of enjoyment of any economic benefits thereof irrevocably passed from the decedent in 1911.”⁷⁰

The government in *White v. Erskine*⁷¹ contended that by subdivision (d) of Section 302 of the Revenue Act of 1926 Congress undertook to impose a new form of excise tax, namely, a tax on the power to alter or revoke before death a trust created by the grantor, whether the power be of a general or limited nature. But the court held that if there be no property or beneficial interest in property passing from the decedent at death, there can be no estate tax within the meaning of Section 301, which imposed the tax. Circuit Judge Wilson again delivered the opinion of the court, saying:

“. . . In other words, where a grantor, either alone or in conjunction with anyone not a beneficiary under the trust, has retained 'the power to revest in himself title to any part of the trust,' to quote from section 219 (g), then the body of the trust at the death of the decedent may be included in the value of the gross estate; but where the decedent has no such power except by the consent of an adverse party as one of the beneficiaries, or as in this instance of the trustee for the beneficiaries,

⁶⁸ *Supra* note 2, at 346, 49 Sup. Ct. at 125.

⁶⁹ *Supra* note 48. See, however, *Porter v. Commissioner*, *infra* note 75.

⁷⁰ 45 F. (2d) at 456.

⁷¹ 47 F. (2d) 1014 (C. C. A. 1st, 1931). See, however, *Porter v. Commissioner*, *infra* note 75, and the extract quoted therefrom, *infra* note 128.

the right of revocation is gone from the donor and also all beneficial interest for taxing purposes under section 301 of the act."⁷²

And in *Cover v. Burnet*⁷³ the grantor reserved the right, at any time during his life, to alter, change, or modify the trust, "without the right to withdraw any part of the principal." The transfer was held not subject to the estate tax as one intended to take effect in possession or enjoyment at or after his death. Chief Justice Martin, speaking for the Court of Appeals for the District of Columbia, said:

" . . . The grantor reserved no power to repossess himself at any time of any part of the principal of the fund, nor to withdraw the same from the beneficiaries who were to receive it under the terms of the trust instrument. Accordingly, the right reserved by the grantor to alter, change, or modify the trust did not extend to a redistribution of the corpus of the fund, and even if by force of the reservation the grantor could have demanded and obtained the entire income from the trust fund during his lifetime, the irrevocable grant of the remainder would not have been affected thereby."⁷⁴

However, in the recent case of *Porter v. Commissioner*⁷⁵ the Supreme Court upheld the tax under Section 302 (d) of the Act of 1926 when the grantor reserved unto himself alone the power to change the beneficiaries but without the right to designate himself or his estate for the reason that the reserved power was "the substantial equivalent of a general power of appointment by will". While the power reserved was not absolute, it was deemed "a substitute for testamentary disposition". Mr. Justice Butler said:

" . . . Here the donor retained until his death power enough to enable him to make a complete revision of all that he had done in respect to the creation of the trusts even to the extent of taking the property from the trustees and beneficiaries named and transferring it absolutely

⁷² 47 F. (2d) at 1016.

⁷³ 53 F. (2d) 915 (App. D. C. 1931). See, however, *Porter v. Commissioner*, *infra* note 75.

⁷⁴ 53 F. (2d) at 916.

⁷⁵ 53 Sup. Ct. 451 (1933), *aff'g* 60 F. (2d) 673 (C. C. A. 2d, 1932), *aff'g* 23 B. T. A. 1016 (1931). Circuit Judge Learned Hand said, 60 F. (2d) at 674, "Though he has finally denuded himself, he controls the disposition while he lives; the existing limitations are conditional upon his pleasure. A gift is a bilateral transaction and demands a donee as well as a donor; it is incomplete though the donor has parted with his interest, if the donee remains indeterminate, and the beneficiaries are determined only when the power to change them ends."

The Circuit Court of Appeals suggested that while Congress may measure an excise as it will, still it may be held that the excise must be computed with some relation to the property disposed of. That is, it may not be reckoned by a graduated scale upon an amount which included the grantor's estate as well. It would seem, therefore, that the Circuit Court of Appeals in effect adopted the argument of the government in *White v. Erskine*, *supra* note 71, that § 302 (d) of the Act of 1926, 44 STAT. 70 (1926), 26 U. S. C. A. § 1094 (d) (1928), imposed a new form of excise tax. However, neither that case nor *Brady v. Ham*, *supra* note 69, was mentioned by the Circuit Court of Appeals. See also *Meyer v. Bank of Manhattan Trust Co.*, 232 App. Div. 228, 249 N. Y. Supp. 640 (1931); *Faulkner v. Irving Trust Co.*, 231 App. Div. 87, 246 N. Y. Supp. 313 (1930).

or in trust for the benefit of others. So far as concerns the tax here involved, there is no difference in principle between a transfer subject to such changes and one that is revocable.”⁷⁶

The Supreme Court stated that the decision of the Circuit Court of Appeals, which it affirmed, was in conflict with that in *Brady v. Ham*,⁷⁷ and *Cover v. Burnet*.⁷⁸ It would seem, therefore, that these decisions were thereby overruled. And it is believed that *White v. Erskine*, *supra*, was also overruled, since the Court stated that the construction that subdivision (a) of Section 302 is a limitation upon subdivision (d), as there held, cannot be sustained. The Court further stated that “subdivision (d) requires to be included in the calculation all property *previously* transferred by decedent, the enjoyment of which remains at the time of his death subject to any change by the exercise of a power by himself alone or in conjunction with another.”

The Circuit Court of Appeals admitted that if the deed had antedated the statute and there had been a complementary gift tax in the Act of 1926 (as there is in the Act of 1932), appropriately worded, so as to make the revocation of such a power taxable as a gift, difficulties would have arisen, since the donee could not escape, either by revoking the power or leaving it unexercised until his death. On this aspect of the case, Circuit Judge Learned Hand said :

“ . . . the testator by relinquishing the power could have freed his estate altogether; he had ample season for this, for he did not die until some eight months after the statute was passed. This seems to us to avoid any possible constitutional difficulties. If the power be regarded as the testator’s property in a beneficial sense,—a hypothesis we reject,—*Reinecke v. Northern Trust Co.* rules; if it be regarded as limited to a change of beneficiaries from which he could not indirectly profit, he might abandon it and avoid the tax. Surely there is no such hardship in the alternative as would justify holding that the inclusion of the estate in the base for computations denied him ‘due process of law’.”⁷⁹

Thus, the net estate, upon the transfer of which the federal estate tax is imposed, is not limited to property which passes from the decedent at his death. The decedent may have deprived himself of all estate or interest in the property, but if his death terminates the “possibility of any change by him”, either alone or in conjunction with any person, and is, “in respect of title to the property in question, the source of valuable assurance passing from the dead to the living” the transfer is taxable. The fact that the

⁷⁶ 53 Sup. Ct. at 453.

⁷⁷ *Supra* note 48. See text *supra* 953.

⁷⁸ *Supra* note 73.

⁷⁹ 60 F. (2d) at 674.

decendent held no estate or interest in the property or the beneficial enjoyment thereof is not necessarily conclusive.

It should be noted that the phrase, "either by the decedent alone or in conjunction with any person" in Section 302 of the Revenue Act of 1932, respecting the power of a grantor to alter, amend or revoke a trust, is different from the language employed in Section 166 of the Act where the additional words "not having a substantial adverse interest" are included.⁸⁰ The difference may be of importance.

Finally in *Dexter v. Treasurer and Receiver General*⁸¹ by the deed of trust the grantor divested himself of all his title to the trust estate. He reserved the power to appoint other persons than those named as beneficiaries, but it was expressly stipulated that the grantor could not re-vest the trust property in himself or any beneficial interest therein. The death of the grantor did not measure the duration of the trust. The transfer was held not to come within the meaning of the state statute, as property passing by deed made or intended to take effect in possession or enjoyment after the death of the grantor.

F. In the sixth class, the grantor reserves less by a general power of appointment than by a power of revocation. However, having reserved the income for his life and the right to dispose of the remainder by will, the non-exercise of the power is analogous to a testamentary disposition in accordance with the original provisions of the trust deed.⁸² That is to say, a power of appointment is considered the equivalent of a power of revocation for purposes of the tax. Reservation of the beneficial interest during life and a power of appointment by will is little less than ownership.⁸³

⁸⁰ In this connection, compare the following extract from SEN. REP. No. 665, *supra* note 38, at 34:

"*Revocable Trusts.* Under the present law the income of a trust is taxable to the grantor where, at any time during the taxable year, the grantor has power to re-vest in himself title to any part of the corpus of the trust, either alone or in conjunction with any person not a beneficiary of the trust. In an attempt to avoid this section, the practice has been adopted by some grantors of reserving power to re-vest title to the trust corpus in conjunction with a beneficiary having a very minor interest or of conferring the power to re-vest upon a person other than a beneficiary; in such cases the grantor has substantially the same control as if he alone had power to revoke the trust. While it is, of course, yet to be established that such device accomplishes its purpose, it is considered expedient to make it clear that in any of these cases the income shall be taxed to the grantor. The House bill made the grantor of a trust taxable upon the income of any part of the corpus of the trust, where the power to re-vest in the grantor title to such part of the corpus was in the grantor alone or was in the grantor in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus. Your committee has extended the scope of this provision so as to include, as well, the cases where the power to re-vest title to any part of the corpus is held, either alone or in conjunction with the grantor, by a person not having a substantial adverse interest in such part of the corpus or in the income therefrom."

See *Corliss v. Bowers*, and *Stetson v. Commissioner*, both *supra* note 28. See also the portion of the report quoted *supra* note 38, and the New York cases cited *supra* note 75.

⁸¹ *Supra* note 45.

⁸² *Darnall v. Connor*, 161 Md. 210, 155 Atl. 894 (1931), (1932) 17 CORN. L. Q. 301; *Bullen v. Wisconsin*, *supra* note 26; *Smith v. Commissioner*, 59 F. (2d) 56 (C. C. A. 1st, 1932), *rev'd* 23 B. T. A. 631 (1931); *Bromley v. Commissioner*, 26 B. T. A. 878 (1932); *Scott, Trusts and the Statute of Wills* (1930) 43 HARV. L. REV. 521, 535.

⁸³ *New York Life Ins. & Trust Co. v. Livingston*, 133 N. Y. 125, 128, 30 N. E. 724 (1892).

But in *United States v. Field*⁸⁴ the decedent died leaving a trust, the income of which was to be paid to his wife during her life, and after her death to such persons as she should by will appoint. She died leaving a will appointing the income to her children. The commissioner included in the gross estate of the wife the property covered by the power of appointment. The Supreme Court held that Section 202 (b) of the Revenue Act of 1916 had no provisions which applied to the exercise of a power of appointment by a decedent respecting property not her own.

The federal statute⁸⁵ and some state statutes⁸⁶ expressly tax the exercise of a general power of appointment. Under the federal estate tax statute, a power may be general, although it may be exercised only by will.⁸⁷

In *Fidelity-Philadelphia Trust Co. v. McCaughn*⁸⁸ it was held that where the persons or classes who may be appointed are otherwise unlimited, the fact that the donee cannot exercise it for his own benefit, does not prevent it from being a general power; and a general power of appointment was not to be deemed special, because property passing under it could not under the law of the state be subjected in equity to the claims of the donee's creditors. On the other hand, a power which the donee cannot exercise in favor of his creditors is not deemed to be a general one.⁸⁹ The distinction has been pointed out by Circuit Judge Parker in the following language:

“ . . . Nothing passes or is transferred from the estate of the donee in the case of a naked or special power of appointment, and Congress has recognized this fact by not requiring that property passing under a special power be included in the estate. It is only property subject to a general power—property of which the donee might have obtained the benefit by subjecting it to the payment of his debts—which is required to be included.”⁹⁰

⁸⁴ *Supra* note 27.

⁸⁵ Sec. 302 (f) of the Revenue Act of 1932, 47 STAT. 279 (1932), 26 U. S. C. A. § 1094 (f) (Supp. 1932).

⁸⁶ *Saltonstall v. Saltonstall*, *supra* note 10; *Bullen v. Wisconsin*, *supra* note 26; *Matter of Wendell*, 223 N. Y. 433, 119 N. E. 879 (1918); *Orr v. Gillman*, 183 U. S. 278, 22 Sup. Ct. 213 (1901), *aff'g* *Matter of Dows*, 167 N. Y. 227, 60 N. E. 439 (1901); *Chanler v. Kelsey*, 205 U. S. 466, 27 Sup. Ct. 550 (1907), *aff'g* *Matter of Delano*, 176 N. Y. 486, 68 N. E. 781 (1903); *Wachovia Bank & Trust Co. v. Doughton*, 272 U. S. 567, 47 Sup. Ct. 202 (1926), (1927) 36 YALE L. J. 716, (1927) 25 MICH. L. REV. 786; *Brandies v. Cochrane*, *supra* note 63, at 351. See also *Simes, The Devolution of Title to Appointed Property* (1928) 22 ILL. L. REV. 480, 508.

⁸⁷ *Minis v. United States*, 66 Court Cl. 58, *certiorari* denied 278 U. S. 657, 49 Sup. Ct. 185 (1929); *Whitlock-Rose v. McCaughn*, 21 F. (2d) 164 (C. C. A. 3d, 1927); *Blackburne v. Brown*, 43 F. (2d) 320 (C. C. A. 3d, 1930); (1930) 30 COL. L. REV. 418; *cf.* *Fidelity Trust Co. v. McCaughn*, 1 F. (2d) 987, 988 (E. D. Pa. 1924); *Bishop v. Commissioner*, 23 B. T. A. 920, 928 (1931). Reference has been made to the distinction between general and limited powers of appointment. *Supra* note 63. See also *Farmers' Loan & Trust Co. v. Bowers*, *supra* note 26. See text *supra* 951.

⁸⁸ 34 F. (2d) 600 (C. C. A. 3d, 1929).

⁸⁹ *Leser v. Burnet*, 46 F. (2d) 756 (C. C. A. 4th, 1931).

⁹⁰ *Id.* at 760.

Finally, in *Stratton v. United States*⁹¹ the life tenant had power of appointment by will. There was a gift over in default of such appointment. Under the local law her exercise of the power subjected the property to her debts. Consequently, the property embraced within the power was included in the gross estate of the donee. It would seem, therefore, that the law of the state respecting powers is a controlling element.⁹²

G. A trust deed may provide that if the beneficiary of the income for life, with remainder to his issue, should die without leaving any issue, the trust shall terminate and the *corpus* revert to the grantor. It is not an impossible contingency that during the lifetime of the grantor he might receive back the property. Here the question is whether there was an absolute transfer, or whether it is contingent until the death of the grantor. A brief consideration of several cases will illustrate the importance of ascertaining the exact nature of the interest of the grantor in this particular.

In the case of a grant upon condition subsequent, the grantee takes—not title in fee simple absolute—but only a base or determinable fee. However, nothing remains in the grantor or his heirs except the right to take advantage of a breach of the condition—a mere possibility of reverter, which is neither an estate nor an interest in property, nor an assignable nor a devisable chose in action, nor a possibility coupled with an interest, but a bare possibility alone.⁹³ A possibility of reverter in the grantor is similar to, though not quite identical with, the possibility of reverter which remains in the grantor upon a condition subsequent.⁹⁴ A mere expectancy is not property.⁹⁵

⁹¹ 50 F. (2d) 48 (C. C. A. 1st, 1931), *certiorari* denied 284 U. S. 651, 52 Sup. Ct. 31 (1932).

⁹² Cf. *Leser v. Burnet*, *supra* note 89; *Tyler v. United States*, 281 U. S. 497, 501, 50 Sup. Ct. 356, 358 (1930); *Warburton v. White*, 176 U. S. 484, 489, 496, 20 Sup. Ct. 404, 406, 409 (1900); *Moffitt v. Kelly*, 218 U. S. 400, 404, 31 Sup. Ct. 79, 80 (1910). However, in *Porter v. Commissioner*, *supra* note 75, at 452, it is stated: "The Act, § 301 (a), imposes a tax 'upon the transfer of the net estate of every decedent.' The net estate as there used does not mean an amount to be ascertained as such under any general rule of law or under statutes governing the administration of estates, but is the gross estate as specifically defined in § 302 less deductions permitted by § 303."

⁹³ *Marvin v. Smith*, 46 N. Y. 571, 576 (1871); *Trustees of Calvary Presbyterian Church v. Putnam*, 221 App. Div. 502, 504, 224 N. Y. Supp. 651, 654 (1927); *Nicholl v. New York & Erie R. R. Co.*, 12 N. Y. 121, 132 (1854); *Fowler v. Coates*, 201 N. Y. 257, 263, 94 N. E. 997, 998 (1911); *Matter of Terry*, 218 N. Y. 218, 112 N. E. 931 (1916); *Southwick v. New York Christian Missionary Soc.*, 151 App. Div. 116, 135 N. Y. Supp. 392 (1912); *North v. Graham*, 235 Ill. 178, 181, 85 N. E. 267, 269 (1908); *Presbyterian Church v. Venable*, 159 Ill. 215, 218, 42 N. E. 836, 837 (1896); *Institution for Savings v. Home for Aged Women*, 244 Mass. 583, 587, 139 N. E. 301, 303 (1923); *Puffer v. Clark*, 202 Mich. 169, 199, 168 N. W. 471, 480 (1918); *Pond v. Douglas*, 106 Me. 85, 89, 75 Atl. 320, 322 (1909); *Lyford v. Laconia*, 75 N. H. 220, 225, 72 Atl. 1085, 1089 (1909); *Powell*, *Determinable Fees* (1923) 23 COL. L. REV. 207, 222-231; *Note* (1924) 30 A. L. R. 478.

⁹⁴ *First Universalist Society v. Boland*, 155 Mass. 170, 175, 29 N. E. 524, 525 (1892).

⁹⁵ *In re Ellenborough*, [1903] 1 Ch. 697, 701. In New York where the grantor reserves the reversion in the event of the beneficiary leaving no issue, the grantor has an estate in expectancy, which is descendible, devisable and alienable in the same manner as an estate in possession. *New York Life Ins. & Trust Co. v. Cary*, 191 N. Y. 33, 39, 83 N. E. 598, 600 (1908).

In *Klein v. United States*⁹⁶ the grantor conveyed a life estate, which was to become a fee "in the event that said grantee shall survive the said grantor". Since the vesting of the fee in the grantee was dependent upon the happening of the condition precedent, the transfer was postponed to take effect in possession and enjoyment at or after the death of the grantor. And in *Sargent v. White*⁹⁷ the grantor transferred property to trustees with directions to pay the income to himself, or to accumulate the whole or any part and add it to the *corpus*. If the grantor survived his wife, the trust estate was to be paid over to him. If the wife survived, then the trustees on the donor's death were to pay over the *corpus* to the wife. The grantor predeceased the wife and the transfer was held taxable as one taking effect in possession or enjoyment upon the grantor's death, since the grantor had, in effect, conveyed the trust funds to the trustees to hold during his life, with contingent remainders in himself and his wife. Circuit Judge Wilson, in delivering the opinion of the court, said:

" . . . It was clearly the intent of the decedent that the trust funds should not become absolutely vested during his life, or, in the words of the statute, that the remainder after the life estate in the trustees should not 'take effect in possession or enjoyment' in his wife until his death. Upon his death and as a result, the entire trust funds then passed to his wife. See *Klein v. United States*, 283 U. S. 231, 75 L. Ed. 996, which differs from this case to this extent—that the grantor by deed transferred a life estate in some real estate directly to his wife, expressly reserving in himself the fee, which, or, as in this case the absolute title to the trust funds, passed to the wife in case she survived him."⁹⁸

And in *Chemical Bank & Trust Co. v. Commissioner*⁹⁹ property was transferred by a deed to a trustee to pay the income therefrom to the grantor's estranged wife until her death, or prior termination of the trust, and then to convey the principal to the grantor, if then living, or, if not, then to his children. Upon certain contingencies, the grantor might revoke the trust with the consent of his wife. The grantor died before the wife, with the trust still in force. The transfer of the remainder interest to the children was held to be one intended to take effect in possession or enjoyment at or after his death. Mr. Murdock, a member of the Board of Tax Appeals, said:

" . . . The transfer of the remainder to the children was one intended to take effect in possession or enjoyment at or after the grantor's death. It was contingent upon his dying before the trust terminated. It vested in the children at his death. His death was the indispensable and intended event which effected the transmission of the

⁹⁶ 283 U. S. 231, 51 Sup. Ct. 398 (1931).

⁹⁷ 50 F. (2d) 410 (C. C. A. 1st, 1931). See also *Union Trust Co. v. United States*, 73 Court. Cl. 315, 54 F. (2d) 153 (1931).

⁹⁸ 50 F. (2d) at 411.

⁹⁹ 25 B. T. A. 1153 (1932).

remainder from the dead (the husband) to the living (the children). The transfer of the remainder was not a sale for a full and adequate consideration in money or money's worth. The grantor could not sell to himself, and there was no consideration in money or money's worth for the transfer to the children."¹⁰⁰

The reverse situation was presented in *Peabody v. Commissioner*,¹⁰¹ where the grantor conveyed full title with provision for reversion to herself in case she survived two grandchildren. The transfer of the property subject to defeasance upon the happening of the condition subsequent was held non-taxable. The distinction between a disposition to take effect upon the death of the grantor and one to take effect immediately but subject to be revoked by the grantor is important.

In *Commissioner of Internal Revenue v. Duke*¹⁰² the grantor executed two trust instruments by which he conveyed to himself, as trustee, for the benefit of his daughter and her descendants, certain personal property. The grantor also appointed successor trustees, who accepted the trusts. The grantor did not reserve the power to revoke. The trust properties were to revert to the grantor in the event the daughter died during his lifetime. The daughter survived the grantor, and upon his death the successor trustees took possession of the *corpus* and administered the trusts in accordance with their terms, without any other change by reason of the death of the grantor. The Board held that the decedent had divested himself fully and irrevocably of all interest in the trust property, that no interest therein remained to be transferred as an incident of his death, and that there was no basis for the federal estate tax. Mr. Trammell delivered the opinion, saying:

" . . . The fact that there was a bare possibility that the property which had already passed to the trust for the beneficiary might revert to the grantor during his lifetime, not by any act on his part, does not have the effect of reserving to the grantor any rights or benefits which passed at or after his death. He might have, by a bare possibility, reacquired the property during his life, but he did not."¹⁰³

The fact that the grantor constituted himself trustee is immaterial,¹⁰⁴ since he did not retain control over the economic benefits or enjoyment of the trust estate during the continuance of the trust in his lifetime. In the *McCormick* case¹⁰⁵ the trust properties reverted to the grantor if she survived the beneficiaries, and the transfer was held non-taxable.

¹⁰⁰ *Id.* at 1156.

¹⁰¹ 24 B. T. A. 787 (1931). To the same effect, see *Dunham v. Commissioner*, 26 B. T. A. 286, 291 (1932). See Scott, *supra* note 82, at 528.

¹⁰² 23 B. T. A. 1104 (1931), *aff'd* 62 F. (2d) 1057 (C. C. A. 3d, 1933) *certiorari* granted, U. S. Daily L. J., May 9, 1933, at 217. Cf. *Klein v. United States*, *supra* note 96.

¹⁰³ *Id.* at 1112.

¹⁰⁴ *Reinecke v. Northern Trust Co.*, *supra* note 2; *Erickson v. Commissioner*, 26 B. T. A. 831 (1932). See also *Wheeler v. Commissioner*, 20 B. T. A. 695 (1930).

¹⁰⁵ *Supra* note 36. Cf. *Guggenheim v. Commissioner*, 58 F. (2d) 188 C. C. A. 2d, 1932), *rev'd* 53 Sup. Ct. 369 (1933), (1933) 81 U. OF PA. L. REV. 776.

Under the New York transfer tax statute it was held¹⁰⁶ that the mere existence of a possibility of reversion, whether expressly reserved or implied from the incompleteness of the limitations, did not render a transfer taxable. It will be recalled that the New York transfer tax, like the federal estate tax, is on the right to transmit.¹⁰⁷ In *Matter of Barstow*¹⁰⁸ the grantor conveyed property in trust to be held by the trustee during the lives of her two daughters. The grantor reserved the income for her life and upon her death one-half of the income was to be paid to one daughter and the other half to the other daughter. The trust instrument further provided that the trust property should revert to the grantor should both daughters die before she did. No power of revocation was reserved. It was held that the reservation by the grantor of the possibility of reversion did not prevent the transfer from taking effect when the deed of trust was executed. The court said:

“ . . . Mrs. Barstow could do nothing to change the effect of the deed. The corpus was beyond her control, except for the happening of the contingency that she might survive the two life tenants, and then she would have been revested with the corpus. The rights of the beneficiaries did not depend upon the death of the donor. The term of the trust was not measured by the life of the donor, but by the lives of her two daughters. They had an interest in principal and income, provided one or both survived the donor. They took a vested estate subject to being divested if the donor survived both daughters. If we ‘are to view the sequence of events in the order of the actual rather than the possible’ (*Matter of Schmidlapp*, 236 N. Y. 278, 286), then we have not only a right but are bound to conclude that because Mrs. Barslow died before the termination of the trust which she created, the transfer took place when the deed was executed, and not when she died. There was the contingency that she might survive her daughters, but that did not depend upon any affirmative or volitional act of the donor.”¹⁰⁹

It would seem, therefore, that the mere right of a grantor to have the trust property transferred to him upon the happening of a remote contingency over which he has no control—such as the death of a *cestui que trust* prior to the death of the grantor—is not an interest in property and such a possibility of reversion does not render the transfer taxable, especially when the contingency never happened.¹¹⁰ Obviously, if the *corpus* of the trust fund re-

¹⁰⁶ *Matter of Kirby*, 133 Misc. 152, 231 N. Y. Supp. 408 (1928), *aff'd* 228 App. Div. 640, 239 N. Y. Supp. 390 (1930), *aff'd* without opinion 254 N. Y. 624, 173 N. E. 894 (1930); *Matter of Barstow*, 230 App. Div. 371, 244 N. Y. Supp. 588 (1930), *aff'd* without opinion 256 N. Y. 647, 177 N. E. 177 (1931); *Matter of Schweinert*, 133 Misc. 762, 234 N. Y. Supp. 307 (1929), (1929) 43 HARV. L. REV. 143; *In re Bowers' Estate*, 195 App. Div. 548, 553, 186 N. Y. Supp. 912, 915, *aff'd* 231 N. Y. 613, 132 N. E. 910 (1921). See, however, *In re Dunlap's Estate*, 205 App. Div. 128, 199 N. Y. Supp. 147 (1923).

¹⁰⁷ *Supra* note 11.

¹⁰⁸ *Supra* note 106.

¹⁰⁹ 230 App. Div. at 372, 244 N. Y. Supp. at 589.

¹¹⁰ *Cf. Guggenheim v. Commissioner*, *supra* note 105.

verts to the grantor during his lifetime, it will be taxable at his death, if still in his possession.

Ever since the enactment of the estate tax law in 1916, Congress has sought to prevent the avoidance of the tax by including in the gross taxable estate of the decedent all transfers or trusts made in contemplation of, or intended to take effect in possession or enjoyment at or after death. Apparently the statute was considered all inclusive.¹¹¹ But the recurrent contest between the government and the taxpayer over the collection of this "onerous incidence" of ownership¹¹² showed the necessity of further legislation if all gaps were to be closed. The first step was the inclusion of the exercise of a general power of appointment¹¹³ and certain insurance policies by the Revenue Act of 1918.¹¹⁴ The trust device presented possibilities of avoiding the estate tax; the aim of the trust device being to transfer property, in some instances, without surrendering control and enjoyment or its use during the life of the grantor.¹¹⁵ But there have been gradual restrictions on the trust device. Mention has been made of the amendment¹¹⁶ of March 3, 1931, designed to include in the gross estate all transfers reserving an interest for the life of the grantor, which was inspired by the three *per curiam* opinions¹¹⁷ following *May v. Heiner*. Such restrictions culminated in the Revenue Act of 1932, imposing a gift tax.¹¹⁸ While the federal estate tax is not a gift tax,¹¹⁹ nevertheless a transfer by gift may be subject to both the gift tax and the estate tax. Accordingly, Congress has provided for a credit of the former against the latter.¹²⁰ The conclusive or irrebuttable presumption in the Act of 1926 that transfers made within two years of death were deemed to be in contemplation thereof having been held unconstitutional,¹²¹ was omitted from the Act of 1932.

¹¹¹ *United States v. Field*, *supra* note 27, at 261, 41 Sup. Ct. at 257.

¹¹² Clark, J., in *Clapp v. Heiner*, 51 F. (2d) 224, 225 (C. C. A. 3d, 1931).

¹¹³ Simes, *supra* note 86, at 508-514. See the cases cited *supra* notes 88-91. Cf. *Wachovia Bank & Trust Co. v. Doughton*, *supra* note 86.

¹¹⁴ 40 STAT. 1097. See *Chase National Bank v. United States*, *supra* note 2, and cases cited. See also Oppenheimer, *supra* note 2. As to the taxation of insurance trusts see Hanna, *Some Legal Aspects of Life Insurance Trusts* (1930) 78 U. OF PA. L. REV. 346, 373; and as to the application of state inheritance taxes to the proceeds of war-risk insurance, see (1928) 14 CORN. L. Q. 242.

¹¹⁵ See Leaphart, *The Use of the Trust to Escape the Imposition of Federal Income and Estate Taxes* (1930) 15 CORN. L. Q. 587, 595.

¹¹⁶ See *supra* note 38.

¹¹⁷ *Supra* notes 33-36.

¹¹⁸ Act of 1932, §§ 501-532, 47 STAT. 245 (1932), 26 U. S. C. A. § 1136a-1136gg (Supp. 1932).

¹¹⁹ The gift tax is constitutional and valid as to gifts made after its effective date. *Bromley v. McCaughn*, 280 U. S. 124, 50 Sup. Ct. 46 (1929), (1926) 40 HARV. L. REV. 118, 120, (1926) 26 COL. L. REV. 852. But it is invalid as to gifts made prior to its enactment. *Untermeyer v. Anderson*, 276 U. S. 440, 48 Sup. Ct. 353 (1928).

¹²⁰ § 301 (b) of the Revenue Act of 1932. See also, § 322 of the Act of 1924, 43 STAT. 315 (1924), 26 U. S. C. A. (1928) § 1134; and § 404 of the Act of 1928, 45 STAT. 791, 863 (1928), 26 U. S. C. A. (1928) § 1134.

¹²¹ *Heiner v. Donnan*, *supra* note 3; *Handy v. Delaware Trust Co.*, 285 U. S. 352, 52 Sup. Ct. 371 (1932); *Guinzburg v. Anderson*, 54 F. (2d) 629 (C. C. A. 2d, 1931), *certiorari* denied 285 U. S. 553, 52 Sup. Ct. 410 (1932); *White v. Hall*, 53 F. (2d) 210 (C. C. A. 1st, 1931), *certiorari* denied, 285 U. S. 553, 52 Sup. Ct. 410 (1932); *American Security & Trust Co. v. Commissioner*, 24 B. T. A. 334 (1931). See also (1931) 31 COL. L. REV. 1052.

The question remains as to what powers a grantor may retain in a trust without rendering it subject to inheritance taxation. If the provision of the Revenue Act of 1932 including in the gross estate all transfers where the grantor reserves the income of the trust for his life,¹²² be upheld, the federal estate and gift taxes may be considered a well rounded system of inheritance taxation.¹²³

An appreciation of the problem may be had by a brief discussion of the nature of the interest of the *cestui que trust*. A supposititious case will be helpful. *A*, the owner of securities, conveys them to a trustee upon trust to pay the income thereof to himself during his life and thereafter to *W*, his wife. Upon the death of the survivor of *A* and *W*, the trustee shall distribute the trust estate equally among the children of *A* and *W*; there being two children living at the date of execution of the trust instrument. It is obvious that upon the delivery of the trust instrument an interest in remainder vests in the children, subject to opening up to admit subsequently born children. The children have an expectancy. What is the nature of the interest of *A* under the trust? Is it property,¹²⁴ or merely the right to enforce¹²⁵ the performance of the trust in equity?

Under the law of New York, a beneficiary during life of the income of a trust fund has no property interest in the income arising from the securities

¹²² See *supra* note 38.

¹²³ See Comment (1929) 38 YALE L. J. 657; Note (1932) 45 HARV. L. REV. 156; Amberg, *Retroactive Excise Taxation* (1924) 37 HARV. L. REV. 691; Coolidge v. Long, *supra* note 1. Nichols v. Coolidge, *supra* note 8; Untermyer v. Anderson, *supra* note 119; Blodgett v. Holden, 275 U. S. 142, 48 Sup. Ct. 105 (1927); Reinecke v. Smith, *supra* note 28.

¹²⁴ See Scott, *The Nature of the Rights of the Cestui Que Trust* (1917) 17 COL. L. REV. 269; Brown v. Fletcher, 235 U. S. 589, 598, 35 Sup. Ct. 154, 157 (1915); Maguire v. Trefry, 253 U. S. 12, 16, 40 Sup. Ct. 417, 418 (1920), *aff'g* 230 Mass. 503, 120 N. E. 162 (1918); the dissenting opinion of Mr. Justice Holmes, in Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83, 96, 50 Sup. Ct. 59, 62 (1929); Hunt v. Perry, 165 Mass. 287, 291, 43 N. E. 103, 104 (1896); McCeney v. Prince George's County, 153 Md. 25, 137 Atl. 291 (1927); Brandies v. Cochrane, *supra* note 63, at 351, 5 Sup. Ct. at 197; 3 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1919) § 975; 39 Cyc. 228.

¹²⁵ See Stone, *The Nature of the Rights of the Cestui Que Trust* (1917) 17 COL. L. REV. 467. See also the concurring opinion of Mr. Justice Stone in Safe Deposit & Trust Co. v. Virginia, *supra* note 124 at 95, 96, 50 Sup. Ct. at 61, 62; (1930) 30 COL. L. REV. 539, 544; (1930) 43 HARV. L. REV. 668; (1930) 28 MICH. L. REV. 776; Melenky v. Melen, 233 N. Y. 19, 22, 134 N. E. 822 (1922); Schenck v. Barnes, 156 N. Y. 316, 321, 50 N. E. 967, 968 (1898); Marx v. McGlynn, 88 N. Y. 357, 376 (1882); Bennett v. Garlock, 79 N. Y. 302, 320 (1880); Gilman v. Reddington, 24 N. Y. 9, 15-16 (1861); Coster v. Lorillard, 14 Wend. 265, 304 (N. Y. 1835); Culter v. Hardy, 48 Cal. 568 (1874); *In re Dolan's Estate*, 79 Cal. 65, 21 Pac. 545 (1889); Culbertson v. Whitbeck Co., 127 U. S. 326, 334, 8 Sup. Ct. 1136, 1140 (1888) (upon a Michigan statute).

"A cestui que trust is frequently spoken of as an equitable owner of the land. This, though a convenient form of expression, is clearly inaccurate. The trustee is the owner of the land, and, of course, two persons with adverse interests cannot be owners of the same thing. What the cestui que trust really owns is the obligation of the trustee; * * *." Ames, *Purchaser for Value Without Notice* (1887) 1 HARV. L. REV. 1, 9; see also HOFFFELD, FUNDAMENTAL LEGAL CONCEPTIONS (1923) 24, 106; Book Review (1913) 26 HARV. L. REV. 462, 464.

In the case of an oral contract for the sale of land, the purchaser, in certain instances in spite of the bar of the Statute of Frauds, has a right to a conveyance but is held to have no equitable estate in the land. Buckmaster v. Harrop, 7 Ves. Jr. 341 (Eng. 1802); Blew v. McClelland, 29 Mo. 304 (1860); (1924) 22 MICH. L. REV. 834.

constituting the trust fund, but has only a chose in action available against the trustee to enforce the performance of the trust in equity. The persons for whose benefit the trust is created take no estate or interest in the *corpus*; the whole estate in law and in equity being in the trustee.¹²⁶

The nature of the federal estate tax must be clearly understood. Chief Justice Taft described its precise nature by saying:

“. . . What was being imposed here was an excise upon the transfer of an estate upon death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of death.”¹²⁷

The only section¹²⁸ imposing the tax, Section 301, is on the transfer of “the net estate of every decedent.” As a general proposition if there is no property or beneficial interest in property passing from the decedent at death, there can be no federal estate tax.¹²⁹ The real question in our supposititious case is, whether the remainders which the children take under the trust instru-

¹²⁶ *Archer-Shee v. Garland*, [1931] A. C. 212; *People ex rel. Brooklyn Trust Co. v. Loughman*, 226 App. Div. 41, 234 N. Y. Supp. 336 (1929), *aff'd* without opinion *sub nom. People ex rel. Brooklyn Trust Co. v. Lynch*, 251 N. Y. 569, 168 N. E. 430 (1929). See also the New York cases cited *supra* note 125.

¹²⁷ *Y. M. C. A. v. Davis*, *supra* note 9, at 50, 44 Sup. Ct. at 292. See also cases cited *supra* notes 13-15.

In *Crooks v. Loose*, 36 F. (2d) 571, 573 (C. C. A. 8th, 1929) Circuit Judge Booth said, “The federal estate tax law is not concerned primarily with the character of the interest or estate acquired by the beneficiary, or its subsequent status; but the law is primarily concerned with the ceasing of the interest of the decedent in the property, with the ‘shifting of economic benefits’ of property from the decedent. If there is such a ceasing of the interest of the decedent, such a ‘shifting of economic benefits’, the federal estate tax comes into play.”

¹²⁸ *Reinecke v. Northern Trust Co.*, *supra* note 2, at 348, 49 Sup. Ct. at 126. See also *White v. Erskine*, *supra* note 71, at 1016, where Circuit Judge Wilson said, “In sec. 302 (a) it is expressly limited to the extent of the interest therein of the decedent at the time of his death. This limitation in view of the nature of the tax, viz. a tax on the right to transfer property at death, must, in view of the opening words of each subdivision, be applied throughout the section. In other words, if there be no property or beneficial interest in property passing from the decedent at death, there can be no tax under this act.”

However, in *Porter v. Commissioner*, *supra* note 75, at 453, it is stated, “And petitioners assume, as held in *White v. Erskine*, 47 F. (2d) 1014, that (a) is a limitation upon (d) and argue that the gross estate includes property only to the extent of the ‘interest therein of the decedent at the time of his death’ and that, as before his death he had divested himself of all title, the property so transferred is not to be included in the gross estate. But the construction thus taken for granted cannot be sustained. Subdivision (a) does not in any way refer to or purport to modify (d) and, in view of the familiar rule that tax laws are to be construed liberally in favor of taxpayers, it cannot be said that, if it stood alone, (a) would extend to the transfers brought into the gross estate by (d). *United States v. Field*, *supra*, 264. Moreover, Congress has progressively expanded the bases for such taxation. Comparison of § 302 with corresponding provisions of earlier Acts warrants the conclusion that (d) is not a mere specification of something covered by (a) but that it covers something not included therein. Cf. *Chase National Bank v. United States*, 278 U. S. 327; *Tyler v. United States*, 281 U. S. 497; *Gwinn v. Commissioner*, 287 U. S. 224; *Burnet v. Guggenheim*, 287 U. S. 21.”

¹²⁹ *New York Trust Co. v. Eisner*, 256 U. S. 345, 41 Sup. Ct. 506 (1921); *Edwards v. Slocum*; *Nichols v. Coolidge*, both *supra* note 8; *Y. M. C. A. v. Davis*, *supra* note 9; *May v. Heimer*; *Chase National Bank v. United States*; *Reinecke v. Northern Trust Co.*, all *supra* note 2; *Frew v. Bowers*, *supra* note 3; *McCaughn v. Carnill*, *supra* note 30; *Brady v. Ham*, *supra* note 69; *White v. Erskine*, *supra* note 71; *Leser v. Burnet*, *supra* note 89.

ment were "intended to take effect in possession or enjoyment at or after" the death of *A*. Until his death, it may be argued, they have no actual possession, or right to the possession of the property. Since the children cannot receive any part of the principal or the income until after *A*'s death, it may be contended, their right of enjoyment is postponed until the happening of that event, and that whatever interest they may have had before, the right to the possession and enjoyment depends upon the death of *A*, the grantor. In other words, the argument is that the death of the grantor is the event which makes the transfer complete and effective and secures to the children and *W*, the wife, the possession and enjoyment of the property.

In order to answer these questions, reference should be made to the extract from *Coolidge v. Long*.¹³⁰ In addition, it should be observed that the statute draws a distinction between the passing of the right of succession and the subsequent enjoyment,¹³¹ or termination of a defeasible quality. The federal estate tax is imposed upon "the transfer of an estate upon the death of the owner",¹³² but it may not be imposed when in advance thereof the vested expectant estate has passed from the grantor. Finally, if there be no property or beneficial interest in property passing from *A* upon his death, there can be no federal estate tax.

Section 302 (c) of the Revenue Act of 1932 is explicit, and the intent of Congress thereby to impose the tax is undoubted.¹³³ If the interest of *A* is regarded as merely a personal claim against the trustee—a chose in action, the interest he possessed immediately prior to his death was "obliterated" by that event¹³⁴ and nothing passes from the dead to the living. Consequently there can be no federal estate tax upon the transfer by *A* in the assumed case, since the transfer was made and title to the *corpus* of the fund was definitely fixed by the trust deed. If, on the other hand, the interest of the *cestui que trust* is regarded as an interest in the trust property,¹³⁵ and not merely as a personal claim against the trustee, the tax may be upheld.

As yet there is no explicit holding by the Supreme Court that beneficial interest is, in general, the test of taxability.¹³⁶ It is doubtful what the Supreme Court will ultimately hold on the question whether a person may

¹³⁰ *Supra* note 54. See text *supra* 949.

¹³¹ *Cf.* *Shukert v. Allen*, *supra* note 49; *McCaughn v. Carnill*; *Hodgkins v. Commissioner*, both *supra* note 30; *Curley v. Tait*, *supra* note 60.

¹³² *May v. Heiner*, *supra* note 2, at 244, 50 Sup. Ct. at 287; *Y. M. C. A. v. Davis*, *supra* note 9; *Nichols v. Coolidge*, *supra* note 8, at 537, 47 Sup. Ct. at 771.

¹³³ See SEN. REP. NO. 665, *supra* note 38.

¹³⁴ *May v. Heiner*, *supra* note 2, at 243, 50 Sup. Ct. at 286.

¹³⁵ The question as to the interest of the *cestui que trust* may be determined by the law of the particular state where the transfer occurs. *Cf.* *Tyler v. United States*, *supra* note 92, at 501, 50 Sup. Ct. at 538; *Warburton v. White*, *supra* note 92, at 496, 20 Sup. Ct. at 409; *De Vaughn v. Hutchinson*, 165 U. S. 566, 570, 17 Sup. Ct. 461, 462 (1897); *Leser v. Burnet*, *supra* note 89, at 760; *Whitelock-Rose v. McCaughn*, *supra* note 87, at 165. *Cf.*, however, *Blackburne v. Brown*, *supra* note 87, at 322. Compare, however, *Saltonstall v. Saltonstall*, *supra* note 10 at 271, 48 Sup. Ct. at 227 (where a succession tax was being considered).

¹³⁶ *Cf.*, however, *Porter v. Commissioner*, *supra* note 75.

make an absolute transfer of his property and require the net income, or a portion thereof, to be paid to himself during his life without subjecting it to the tax, notwithstanding the language of the present statute. The question is whether the death of *A* "has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result".¹³⁷ In this connection the following language of Mr. Justice Sutherland seems pertinent:

" . . . If the event is death and the result which is made the occasion of the tax is the bringing into being or the enlargement of property rights, and Congress chooses to treat the tax imposed upon that result as a death duty, even though, strictly, in the absence of an expression of the legislative will, it might not thus be denominated, there is nothing in the Constitution which stands in the way."¹³⁸

It will be noted that it is "the bringing into being or the enlargement of property rights" which may be made the occasion of the estate tax. But if the rights of the remaindermen are brought into being or fixed by the deed of trust and no property or beneficial interest in property passes from *A* at his death, there is no taxable transfer within the legal meaning of the statutory phrase, "intended to take effect in possession or enjoyment at or after his death". However, the provision may be upheld as an adjunct to the general scheme of taxation as a means to prevent an avoidance of the estate tax by this method of disposition during the lifetime of the grantor.¹³⁹

As to what powers a grantor may reserve respecting the management of the trust without subjecting the transfer to the tax has been the subject of judicial consideration. We have seen¹⁴⁰ that the grantor may constitute himself trustee without retaining the economic benefits or enjoyment of the trust estate. In such an event, the grantor presumably will have full control of the administration of the trust. On the other hand, the grantor may, among other powers, reserve the power to supervise the changing or reinvestment of the trust funds, to require the trustee to execute proxies to his nominee or otherwise direct the voting of stock in the trust estate, and to appoint successor trustees without subjecting the transfer to the tax.¹⁴¹ The *ratio pertinens* has been expressed by Mr. Justice Stone:

" . . . Nor did the reserved powers of management of the trusts save to decedent any control over the economic benefits or the enjoyment of the property. He would equally have reserved all these powers and others had he made himself the trustee, but the transfer would not for

¹³⁷ Cf. *Tyler v. United States*, *supra* note 92, at 503, 50 Sup. Ct. at 539.

¹³⁸ *Id.* at 502, 50 Sup. Ct. at 538.

¹³⁹ Compare *Taft v. Bowers*, 278 U. S. 470, 482, 49 Sup. Ct. 199, 201 (1929).

¹⁴⁰ *Reinecke v. Northern Trust Co.*, *supra* note 2, at 346, 49 Sup. Ct. at 125; *Commissioner v. Duke*, *supra* note 102; *Wheeler v. Commissioner*, *supra* note 104.

¹⁴¹ *Reinecke v. Northern Trust Co.*, *supra* note 2, see text *supra* 953; *McCormick v. Burnet*, *supra* note 30, see text *supra* 944; *Commissioner v. Duke*, *supra* note 102. Cf. *Brady v. Ham*, *supra* note 48, see text *supra* 953.

that reason have been incomplete. The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made. His power to recall the property and of control over it for his own benefit then ceased and as the trusts were not made in contemplation of death, the reserved powers do not serve to distinguish them from any other gift inter vivos not subject to the tax."¹⁴²

If the reservation by the grantor does not affect in any substantial degree "the economic benefits or the enjoyment of the property" or his death end the possibility of any change by his exercise or non-exercise of a power with respect to the disposition of the principal and income, it may be disregarded for purposes of the federal estate tax.

Conclusions

There is a decided difference between transfer and succession taxes. Cases arising under the former may not be, and in many instances are not, dispositive of a similar issue upon the latter. Indeed the transfer under the same deed of trust may be non-taxable in so far as the federal estate tax is concerned and yet taxable in so far as a state succession tax is concerned.¹⁴³ Conversely, a transfer may be held subject to the federal estate tax as a transfer intended to take effect at or after death and not be subject to the state tax.¹⁴⁴

Congress did not intend to limit the estate tax to transfers of title at death. The object of Congress, in the federal estate tax statute is to impose an excise tax not only measured by the value of the property actually owned by the decedent at his death, *i. e.*, his net estate at death;¹⁴⁵ but also based upon the value of property the subject of transactions which accomplish the same results, *i. e.*, transactions which are in effect testamentary in character although the title has passed from the decedent prior to his death. In other words, to prevent tax avoidance, Congress seeks to impose the tax whenever there is a transfer, regardless of its form, which in substance is testamentary in character; *i. e.*, whenever there is a gift or transfer consummated by the death of the donor or transferor.

In the second category, Congress has included (a) property passing under a general power of appointment exercised by the decedent; (b) pro-

¹⁴² *Reinecke v. Northern Trust Co.*, *supra* note 2, at 346, 49 Sup. Ct. at 125.

¹⁴³ *Hill v. Nichols*, *supra* note 26; *Saltonstall v. Saltonstall*, *supra* note 10; *Burnet v. Northern Trust Co.*, *supra* note 30; *People v. Northern Trust Co.*, *supra* note 29; *McCormick v. Burnet*, *supra* note 30; *People v. McCormick*, *supra* note 11.

¹⁴⁴ *Home Trust Co. v. Edwards*, *supra* note 46; *Matter of Carnegie*, *supra* note 45; *McCaughn v. Fidelity Trust Co.*, 34 F. (2d) 443 (C. C. A. 3d, 1929); *In re Dolan's Estate*, *supra* note 11. On the other hand, the transfer may be subject to both federal and state taxes. *Matter of Schmidlapp*, *supra* note 11; *United States v. Stark*, *supra* note 26. And the transfer may not be subject to either. *Nichols v. Coolidge*, *supra* note 8; *Coolidge v. Long*, *supra* note 2 (because retroactively applied and hence unconstitutional).

¹⁴⁵ *Greiner v. Lewellyn*, *supra* note 15.

ceeds of insurance policies¹⁴⁶ taken out by the decedent upon his own life; (c) property held as tenants by the entirety¹⁴⁷ and as joint tenants;¹⁴⁸ (d) transfers in contemplation of death or powers of revocation released in contemplation of death; (e) transfers intended to take effect in possession or enjoyment at or after the decedent's death; and (f) transfers rendered absolute and complete by the death of the decedent, which before were not complete on account of a power of revocation being reserved by the decedent. In none of the foregoing six situations does the item or asset constitute a part of the decedent's estate. Nor is there a transfer of title from the decedent at his death. However, in each case the transaction is testamentary in character or accomplishes the same result that a testamentary disposition would accomplish.

Excluded as a basis for the estate tax are (a) transfers made for a consideration,¹⁴⁹ (b) transfers made by an outright gift not in contemplation of death; and (c) transfers by way of gift not in contemplation of death which are absolute and the decedent up to the time of his death has no interest in the property or power of control over or to direct the course of distribution of the property by his action or non-action.

Extensions of inheritance tax laws to include transfers not taking effect at the death of the grantor have been designed to prevent circumvention. To include property passing by virtue of *inter vivos* transfers, or in the exercise of a power of appointment or the non-exercise of a power of revocation, in the estate of the decedent for tax purposes cannot be justified unless the testamentary character of such a transfer brings it within the reason supporting the tax. Death must be the generating source of the transfer of the use and enjoyment of the property. If a disposition accomplish substantially the same result as would be accomplished by testacy or intestacy, the tax seems permissible; but not otherwise.

¹⁴⁶ See *supra* note 114.

¹⁴⁷ *Tyler v. United States*, *supra* note 92. See also, *Commissioner of Internal Revenue v. Fletcher Savings & Trust Co.*, 59 F. (2d) 508 (C. C. A. 7th, 1932); *Third National Bank v. White*, 287 U. S. 577, 53 Sup. Ct. 290 (1932), *aff'g* 58 F. (2d) 1085 (C. C. A. 1st, 1932), *aff'g* 45 F. (2d) 911 (D. Mass. 1930); *Robinson v. Commissioner of Internal Revenue*, 63 F. (2d) 652 (C. C. A. 6th, 1933). *Contra*: *Matter of Lyon*, 233 N. Y. 208, 135 N. E. 247 (1922).

¹⁴⁸ *O'Shaughnessy v. Commissioner of Internal Revenue*, 60 F. (2d) 235 (C. C. A. 6th, 1932); *Gwinn v. Commissioner of Internal Revenue*, 287 U. S. 224, 53 Sup. Ct. 157 (1932).

¹⁴⁹ *Hirsh v. United States*, 68 Court Cl. 508, 35 F. (2d) 982 (1929).