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DEATH TAXES ON COMPLETED TRANSFERS
INTER VIVOS

Lorentz B. Knouff*

THE taxation of certain types of transfers inter vivos under statutes levying an excise upon transfers of property at death has long been an accepted method of supplementing the death tax. These acts include transfers which, while not actually partaking of the characteristics of a transfer at death in the same sense as transfers by will or by the law relating to intestacy, bear a sufficient relationship to such transfers to justify their inclusion within the scope of a system of death taxes. This has been true both of death taxes levied by the states, in most instances known as "succession" taxes, i.e., taxes upon the right of a transferee to *succeed* to property upon the death of the transferor, and of the federal estate tax,—a tax upon a decedent's right to *transfer* his property to others upon his death. The problems involved in the determination of just what types of transfers inter vivos may be included within the scope of the death taxes levied either by the states or by the federal government have been problems of the construction of particular statutory provisions and problems of constitutionality. The power of both the state legislatures and of Congress to levy excise taxes upon such transfers was early established; hence the constitutional questions have arisen almost exclusively with respect to the validity of state and federal statutes under the due process provisions of the Fourteenth and Fifth Amendments, respectively. Here again, the power to tax the particular type of transfer by one form of excise or another being established, the question has been one of the valid exercise of that power by means of *classification*; i.e., whether the legislative body may treat a particular type of transfer inter vivos in the same manner as a transfer at death in order to subject it to the death tax.

The paths of development of the law with respect to the questions of statutory construction and constitutionality, under the succession taxes levied by the states¹ and under the federal estate tax since its inception in 1916, have been in some respects nearly parallel and in

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¹ Transfers inter vivos "made or intended to take effect in possession or enjoyment after the death of the grantor" were subject to a collateral inheritance tax in Pennsylvania as early as 1826. Pa. Acts (1825-26), c. 72, p. 227.

others widely divergent. This parallel or divergent historical development has resulted from legislative attempts to fit transfers inter vivos of particular types into the two systems of death taxes in order to prevent avoidance of the tax by the use of such transfers. These two systems of death taxes are in some respects so similar that the rules with respect to the inclusion of a particular type of transfer inter vivos in each are practically identical; in other respects they are so dissimilar, with respect to rules both of construction and of constitutionality, that a separate and independent set of rules has been found necessary for each. Under either system of taxation, however, transfers inter vivos have been included within the scope of the death tax upon one or the other of two principal theories.

(1) The transfer may be subjected to the tax because, although made and completed during the transferor's lifetime, it partakes sufficiently of the nature of a testamentary disposition of property to justify its treatment as though it were in fact a transfer at death. The most common type of transfer inter vivos subject to the death tax under this category is the transfer made in contemplation of death. The subjection of such transfers to the death tax, which began early in the history of state succession taxes and which was carried over into the federal estate tax law, has been uniformly upheld. Such transfers usually have been included within the scope of the death tax by express language, and such inclusion has been upheld under both the Fourteenth and the Fifth Amendments.

(2) The transfer may be subjected to the tax because, although when made it purported to be a transfer inter vivos, it was not complete and absolute, but until the time of his death the transferor reserved to himself, by some manner or other, some interest in or control over the property—some “string”² to the property transferred. The freeing of the property from this restraint at the transferor's death is deemed a sufficient incident for the imposition of the death tax upon the property. Here the battleground has been more furiously contested, and the basic differences in the succession and estate tax systems have here revealed themselves both with respect to the construction placed upon particular statutory provisions and with respect to questions of constitutionality. Many types of transfers inter vivos have been subjected to the tax as coming within this “reservation of interest or control” category. Except where problems of statutory construction have made

² See language of Justice Stone in his dissenting opinion in *Helvering v. St. Louis Union Trust Co.*, 296 U. S. 39, 56 S. Ct. 74 (1935).

it necessary to designate types of transfers within the category by more explicit language,³ such types have generally been taxed under both state and federal statutes as transfers "intended to take effect in possession or enjoyment at or after the transferor's death." Perhaps the most common type, with respect to both succession taxes and the federal estate tax, has been the transfer where the transferor reserves until death the power to recall to himself the property transferred.

The subjection of transfers *inter vivos* to the death tax under each of the above categories has been based upon the proposition that, for a transfer *inter vivos* properly to be subject to the death tax, it must bear some reasonable relationship to transfers at death either by will or under the law relating to intestacy. This rule has been applied both in problems of statutory construction⁴ and in problems of constitutionality.⁵ The recent decision of the United States Supreme Court in *Helvering v. Bullard*⁶ seems to have abandoned this test for the inclusion of transfers *inter vivos* within the scope of the death tax, so far as the federal death tax is concerned. It is the purpose here to study the present status of the law relating to death taxes upon transfers *inter vivos*, with particular reference to the taxation of such transfers complete when made, as upheld by this Supreme Court decision.

SUBSTITUTES FOR TESTAMENTARY DISPOSITION

Transfers made in contemplation of death are held subject to the death tax, although complete and irrevocable when made, upon the theory that they are, in effect, substitutes for testamentary disposition, and hence properly to be reached in order to prevent evasion of the death tax.⁷

³ See text and notes 50 to 55, *infra*.

⁴ *Helvering v. St. Louis Union Trust Co.*, 296 U. S. 39, 56 S. Ct. 74 (1935); *May v. Heiner*, 281 U. S. 238, 50 S. Ct. 286 (1930); *Edwards v. Slocum*, 264 U. S. 61, 44 S. Ct. 293 (1924); *Young Men's Christian Assn. v. Davis*, 264 U. S. 47, 44 S. Ct. 291 (1924).

⁵ *Heiner v. Donnan*, 285 U. S. 312, 52 S. Ct. 358 (1932); *Nichols v. Coolidge*, 274 U. S. 531, 47 S. Ct. 710 (1927). See *Knowlton v. Moore*, 178 U. S. 41, 20 S. Ct. 747 (1900).

⁶ (U. S. 1938) 58 S. Ct. 565 reversing (C. C. A. 7th, 1937) 90 F. (2d) 144, which reversed 34 B. T. A. 243 (1936).

⁷ *Milliken v. United States*, 283 U. S. 15, 51 S. Ct. 324 (1931); *United States v. Wells*, 283 U. S. 102, 51 S. Ct. 446 (1931). This has become known as the "adjunct" theory of taxation. See *Tyler v. United States*, 281 U. S. 497, 50 S. Ct. 356 (1930). Under this theory the taxing body has power to levy such taxes, not ordinarily classified within the scope of the particular taxing system, as are reasonably necessary to make the system of taxation complete and consistent and to prevent facile

The decision in every contemplation of death case must turn upon a question of fact. The criteria presently determinative of whether or not a transfer inter vivos was made in contemplation of death rest upon the principle that "the motive which induces the transfer must be of the sort which leads to testamentary disposition."⁸ Originally intended to reach only gifts causa mortis, the definition of the words "in contemplation of death" has been extended to include all those transfers inter vivos, the dominant motive for the creation of which bears some resemblance to those motives which lead to testamentary disposition of property. Under both state and federal statutes, rebuttable presumptions have been upheld which require the taxation of *all* transfers made within a reasonable period before death, in the absence of the introduction of sufficient evidence to establish that the dominant motive for the transfer was one associated with life.⁹

Since the tax is imposed here by reason of the transferor's motive and not because of the nature of the transfer itself, the rules with respect to transfers made in contemplation of death have remained closely parallel under the federal estate tax and state succession tax systems.

Doubts as to the constitutionality of a death tax upon transfers inter vivos made in contemplation of death seldom have been entertained seriously. Certain limitations have been placed, however, upon the exercise of the taxing power to reach such completed transfers inter vivos. Thus, under the federal estate tax, in *Heiner v. Donnan*¹⁰ the Supreme Court held unconstitutional, as a denial of due process of law as guaranteed by the Fifth Amendment, the provision of the Revenue Act of 1926 creating a conclusive presumption that all inter vivos transfers made within two years before death were made in contemplation of death and hence subject to the tax.¹¹ Similarly, in *Schlesinger v. Wisconsin*,¹² the Supreme Court held in violation of the Fourteenth Amendment a conclusive presumption raised by a Wisconsin succession tax statute that all transfers made within six years before death were made in contemplation of death.

evasion of the law. *Reinecke v. Smith*, 289 U. S. 172, 53 S. Ct. 570 (1933); *Milliken v. United States*, *supra*; *Tyler v. United States*, *supra*.

⁸ *United States v. Wells*, 283 U. S. 102 at 117, 51 S. Ct. 446 (1931); *Becker v. St. Louis Union Trust Co.*, 296 U. S. 48, 56 S. Ct. 78 (1935).

⁹ See, for example, *Farmers' Loan & Trust Co. v. Bowers*, (C. C. A. 2d, 1934) 68 F. (2d) 916.

¹⁰ 285 U. S. 312, 52 S. Ct. 358 (1932).

¹¹ 44 Stat. L. 70, § 302 (c) (1926).

¹² 270 U. S. 230, 46 S. Ct. 260 (1926).

TRANSFERS WITH RESERVATION OF SOME INTEREST OR
CONTROL IN THE TRANSFEROR

The test to determine whether a particular transfer *inter vivos*, not made in contemplation of death and not otherwise serving as a substitute for a testamentary disposition, is subject to the death tax under this category has been whether the transfer was *complete when made*. Various types of transfers *inter vivos* have been held incomplete where some interest in the property or some control over it has been reserved to the transferor until his death. An example of a type of transfer clearly incomplete until death is the deed remaining undelivered until the transferor's death.¹³

In determining the completeness of the transfer, in many instances, the rules developed under the federal estate tax have differed from the rules developed under the state succession tax statutes because of the basic differences between the two systems of taxation. Since under the succession tax the thing taxed is the *receipt* of property by the transferee, whereas under the federal estate tax the tax is based upon the *transfer* of property by the transferor, the transfer in either case being effected by the transferor's death, a transfer may be complete so far as the transferor is concerned, yet remain incomplete as to the transferee.¹⁴ Perhaps the best judicial exposition of this difference between the two types of taxes is contained in the dissenting opinion of Justice Roberts, in *Coolidge v. Long*.¹⁵ There the test of completeness of the transfer under the federal estate tax, where the excise is upon the privilege of transmission, is stated to be whether the *transferor has parted with every vestige of control* over the beneficial enjoyment and possession of the property, whereas under a succession tax the transfer is not complete until the *transferee actually has received full possession and enjoyment of the property*.¹⁶ The distinction is between the transfer of the estate of a decedent, which is the subject of the estate tax, and the completion of the shifting of the economic benefits and burdens of the property, which is the subject of the succession tax.¹⁷ One of the commonest types of transfer *inter vivos* within the "reservation of interest or control" category is the transfer with a power of altera-

¹³ See, for example, *Hunt v. Wicht*, 174 Cal. 205, 162 P. 639 (1917); *People v. Shutts*, 305 Ill. 539, 137 N. E. 418 (1922); *Matter of Jones' Estate*, 65 Misc. 121, 120 N. Y. S. 862 (1909); *Matter of Sharer's Estate*, 36 Misc. 502, 73 N. Y. S. 1057 (1901); *Appeal of Davenport*, 10 Sadler (Pa.) 603, 14 A. 346 (1888).

¹⁴ See *In re Estate of Rising*, 186 Minn. 56, 242 N. W. 459 (1932).

¹⁵ 282 U. S. 582, 51 S. Ct. 306 (1931).

¹⁶ *Ibid.*, 282 U. S. 582 at 623-632.

¹⁷ *In re Estate of Rising*, 186 Minn. 56, 242 N. W. 459 (1932).

tion, amendment, or revocation reserved to the transferor, as typified by the revocable trust. Under some state succession taxes and the early federal estate tax statutes, such transfers were considered as within the larger group of transfers "intended to take effect in possession or enjoyment at or after the transferor's death." Thus, under such a provision of the federal estate tax law, it was early established that where the power to revoke the transfer is reserved to the transferor, the property transferred is subject to the tax, even though the power of revocation is never exercised.¹⁸

Under the state succession tax laws, most jurisdictions have held transfers with reservation of a power of revocation to come within provisions taxing transfers intended to take effect in possession or enjoyment at or after the transferor's death,¹⁹ adopting a rule similar to that under the federal statute. However, in some states it has been held that, where the power was never exercised, a transfer is not subject to the tax merely because the transferor reserved to himself power to alter, amend, or revoke.²⁰ This rule is based upon the theory that

¹⁸ *Reinecke v. Northern Trust Co.*, 278 U. S. 339, 49 S. Ct. 123 (1929).

¹⁹ *Bryant v. Hackett*, 118 Conn. 233, 171 A. 664 (1934); *Lilly v. State*, 156 Md. 94, 143 A. 661 (1928); *Boston Safe Deposit & Trust Co. v. Commissioner*, 267 Mass. 240, 166 N. E. 729 (1929); *Saltonstall v. Treasurer and Receiver General*, 256 Mass. 519, 153 N. E. 4 (1926), *affd.* *Saltonstall v. Saltonstall*, 276 U. S. 260, 48 S. Ct. 225 (1928); *New England Trust Co. v. Abbot*, 205 Mass. 279, 91 N. E. 379 (1910); *Plainfield Trust Co. v. McCutcheon*, 8 N. J. Misc. Rep. 593, 151 A. 279 (1930), *affd.* 108 N. J. L. 201, 154 A. 629 (1931); *In re Fosdick's Estate*, 102 N. J. Eq. 45, 139 A. 318 (1927); *Matter of Hall's Estate*, 149 Misc. 217, 267 N. Y. S. 59 (1933); *Matter of Feustman's Estate*, 136 Misc. 579, 240 N. Y. S. 403 (1929); *Matter of Hoyt*, 86 Misc. 696, 149 N. Y. S. 91 (1914); *In re Schermhorn's Estate*, 149 N. Y. S. 95 (Surr. Ct. 1913); *State & City Bank & Trust Co. v. Doughton*, 188 N. C. 762, 125 S. E. 621 (1924); *Du Bois' Appeal*, 121 Pa. 368, 15 A. 641 (1888); *In re Fulham's Estate*, 96 Vt. 308, 119 A. 433 (1923); *Trust Co. of Norfolk v. Commonwealth*, 151 Va. 883, 141 S. E. 825, 145 S. E. 326 (1928). Compare *Hasbrouck v. Martin*, 120 N. J. Eq. 96, 183 A. 735 (1936).

But see *Dexter v. Treasurer and Receiver General*, 243 Mass. 523, 137 N. E. 877 (1923), where a trust was held not subject to the tax where the settlor reserved the right to divest the beneficiaries of their interest, but reserved no right to regain any of the property herself. This is *contra* to the federal rule in *Porter v. Commissioner*, 288 U. S. 436, 53 S. Ct. 451 (1933). See text and note 32, *infra*.

²⁰ *People v. Northern Trust Co.*, 289 Ill. 475, 124 N. E. 662 (1919) (such transfers were made subject to the tax in Illinois by amendment to the taxing statute in 1933); *Downes v. Safe Deposit & Trust Co.*, 163 Md. 30, 161 A. 400 (1932) [but see *Smith v. State*, 134 Md. 473, 107 A. 255 (1919)] (such transfers were made subject to the tax in Maryland by amendment to the taxing statute in 1937); *Matter of Miller's Estate*, 204 App. Div. 418, 198 N. Y. S. 202, modified 236 N. Y. 290, 140 N. E. 701 (1923); *Matter of Carnegie's Estate*, 203 App. Div. 91, 196 N. Y. S. 502 (1922), *affd.* 236 N. Y. 517, 142 N. E. 266 (1923); *Matter of Bowers'*

the transfer is complete when made, despite the reserved power, and that the vested interest of the transferee is merely subject to being divested by the settlor's exercise of the power during his lifetime. In some of the jurisdictions in which a statute taxing transfers intended to take effect in possession or enjoyment at or after death has been so construed, transfers with a power of revocation reserved have been made subject to the tax by specific amendment to the statute.²¹

Where the transferor reserves to himself a power of appointment over the property transferred, exercisable by will or otherwise at any time during his lifetime, the exercise of which might divest the present transferees of their interests, the transfer is taxable under both the federal estate tax²² and succession tax²³ statutes. Such a reserved power is tantamount to a power to alter, amend, or revoke.

Estate, 195 App. Div. 548, 186 N.Y.S. 912, *affd.* 231 N.Y. 613, 132 N.E. 910 (1921) (power of revocation exercisable only with consent of trustee); *Matter of Masury's Estate*, 28 App. Div. 580, 51 N. Y. S. 331 (1898), *affd.* 159 N. Y. 532, 53 N. E. 1127 (1899); *Matter of Schell's Estate*, 134 Misc. 242, 234 N. Y. S. 305 (1926); *Matter of Votichenko's Estate*, 134 Misc. 241, 234 N. Y. S. 304 (1928); *Matter of Schweinert's Estate*, 133 Misc. 762, 234 N. Y. S. 307 (1929); *Matter of Cochrane's Estate*, 117 Misc. 18, 190 N. Y. S. 895 (1921), *affd.* 202 App. Div. 751, 194 N. Y. S. 924 (1922); *In re Wing's Estate*, 190 N. Y. S. 908 (Surr. Ct. 1921) (such transfers were made subject to the tax in New York by amendment to the taxing statute in 1922); *In re Dolan's Estate*, 279 Pa. 582, 124 A. 176 (1924); *Hildebrand Estate*, 24 Luz. Leg. Reg. (Pa.) 525 (1928); *Dick's Estate*, 30 Dist. (Pa.) 839 (1921), reversed on other grounds, 273 Pa. 69, 116 A. 549 (1922) (power of revocation exercisable only with consent of trustee). See also, *Matter of Flynn's Estate*, 117 Misc. 90, 190 N. Y. S. 905 (1921); *In re Leach's Estate*, 282 Pa. 545, 128 A. 497 (1925); *In re Killien's Estate*, 178 Wash. 335, 35 P. (2d) 11 (1934). *Contra: Wright's Appeal*, 38 Pa. St. 507 (1861).

²¹ See cases cited *supra*, note 20.

²² Treasury Regulations 80, Art. 19 (a) provides in part: "The statutory phrase, 'a transfer . . . intended to take effect in possession or enjoyment at or after his death,' includes a transfer, by trust or otherwise, in connection with which the decedent reserved or retained, either to himself alone or in conjunction with any other person or persons, the right during his life, or for a period not ascertainable without reference to his death, or for such a period as to evidence an intention that the right should continue for at least the duration of his life, to designate the person or persons who should possess or enjoy the transferred property (in whole or in part), or any of the income thereof."

Following this construction of the statute, see *Agnes Davis Exton*, 33 B. T. A. 215 (1935); *Frederick Foster*, 31 B. T. A. 769 (1934); *Day Kimball, Admrs.*, 29 B. T. A. 60 (1933). See also *Equitable Trust Co. of New York, Admr.*, 31 B. T. A. 329 (1934), where the reserved power was to designate by will only the proportions in which the members of the class fixed by the trust instrument should take, and the transfer was held not subject to the tax.

²³ See for example, *Darnall v. Connor*, 161 Md. 210, 155 A. 894 (1931);

In the creation of many inter vivos trusts, the power to alter, amend, or revoke has been reserved not to the settlor alone, but to be exercised by him in conjunction with, or with the consent of, some other person. In 1924 Congress enacted a specific provision taxing transfers inter vivos by trust or otherwise, "where the enjoyment thereof was subject at the date of his [the transferor's] death to any change through the exercise of a power, either by the decedent [transferor] alone or in conjunction with any person, to alter, amend, or revoke."²⁴ Where such a power was reserved in conjunction with the trustee of a trust, it was held under this statute and its subsequent amendment in 1926,²⁵ that this was tantamount to a power reserved to the transferor alone, since the trustee's interest in the property was not adverse to that of the settlor.²⁶ But, in part because of an analogy drawn from a similar provision contained in an income tax statute,²⁷ it was long believed that the words "any person" as contained in this statute, should be construed as though worded "any person not having a substantial adverse interest to that of the transferor." This construction had been adopted by the United States Board of Tax Appeals²⁸ and by decisions of two United States Circuit Courts of Appeal.²⁹ These cases held that, where the power to alter, amend, or revoke was exercisable by the settlor only in conjunction with a beneficiary of the trust, the transfer was not subject to the tax to the extent of such adverse interest. However, the opposite result was reached by the

Smith v. State, 134 Md. 473, 107 A. 255 (1919); Matter of Ogsbury, 7 App. Div. 71, 39 N. Y. S. 978 (1896); Matter of Hall's Estate, 149 Misc. 217, 267 N. Y. S. 59 (1933); Denniston's Estate, 325 Pa. 453, 191 A. 39 (1937); Commonwealth v. Kuhn, 2 Pa. Co. Ct. Rep. 248, 18 Phila. 403 (1886).

²⁴ 43 Stat. L. 304, § 302 (d), Revenue Act of 1924.

²⁵ 44 Stat. L. 71, § 302 (d).

²⁶ Witherbee v. Commissioner, (C. C. A. 2d, 1934) 70 F. (2d) 696, certiorari denied, 293 U. S. 582, 55 S. Ct. 96 (1934); Boston Safe Deposit & Trust Co., 34 B. T. A. 911 (1936), and see Reinecke v. Smith, 289 U. S. 172, 53 S. Ct. 570 (1933), adopting similar construction of income tax statute. Contra: White v. Erskine, (C. C. A. 1st, 1931) 47 F. (2d) 1014.

In Matter of Stewart's Estate, 138 Misc. 866, 248 N. Y. S. 171 (1931), aff'd. 235 App. Div. 772, 255 N. Y. S. 970 (1932), the interest of a trustee was held sufficiently adverse, so that a trust revocable by the settlor with the trustee's consent was held not subject to the succession tax.

²⁷ 43 Stat. L. 277, § 219(g), Revenue Act of 1924.

²⁸ Old National Bank in Evansville, Exr., 31 B. T. A. 379 (1934); David J. Lit, 28 B. T. A. 853 (1933); Estate of Stone, 26 B. T. A. 1 (1932); Colonial Trust Co., 22 B. T. A. 1377 (1931).

²⁹ Commissioner v. City Bank Farmers' Trust Co., (C. C. A. 2d, 1934) 74 F. (2d) 242; Lit v. Commissioner, (C. C. A. 3rd, 1934) 72 F. (2d) 551.

Circuit Court of Appeals for the Seventh Circuit,³⁰ where it was held that the language of the statute was too clear to be susceptible of construction, the words "any person" meaning just what they said. This view was adopted by the Supreme Court in a five to four decision in *Helvering v. City Bank Farmers' Trust Co.*,³¹ where the Court also declared the power of Congress to levy the death tax upon such a transfer not to infringe the due process clause of the Fifth Amendment.

Prior to the decision in the *City Bank* case, it had been held by the Supreme Court that a transfer was taxable although the transferor had completely divested himself of title without power to regain it, where he reserved the power to alter or modify the trusts created, including the implied power to change the beneficiaries in any manner except in favor of himself.³²

It will be noted that the words "alter, amend, or revoke" were used in the 1924 and 1926 Acts. In November, 1935, two cases—*Helvering v. Helmholz*³³ and *White v. Poor*³⁴—came before the Supreme Court involving the application of this provision to inter vivos trusts. In the *Helmholz* case a trust had been created in 1918, under which no power of revocation was reserved to the settlor, but which provided for its termination by any one of several methods, among which was delivery to the trustee of a written instrument signed by all the beneficiaries declaring the trust term at an end. The settlor reserved the income from the trust property during her lifetime. In *White v. Poor* the trust, created in 1919, provided that it might be terminated at any time by the person or persons who should then be trustees thereunder. The original trustees were the settlor, her son (a beneficiary), and a third person (not a beneficiary and not a relative). In 1920 the settlor resigned as trustee, and a daughter was appointed to fill the vacancy. After serving one year the daughter resigned and the settlor was appointed trustee to fill the vacancy in the manner provided by the trust instrument, viz., by written instrument

³⁰ *Commissioner v. Straus*, (C. C. A. 7th, 1935) 77 F. (2d) 401, reversed on rehearing on other grounds, 81 F. (2d) 1016.

³¹ 296 U. S. 85, 56 S. Ct. 70 (1935). See also, *Boston Safe Deposit & Trust Co. v. Commissioner*, (Mass. 1936) 3 N. E. (2d) 33, appeal dismissed 299 U. S. 518, 57 S. Ct. 312 (1936), where the Massachusetts succession tax was held applicable to a transfer in trust where the settlor reserved the power to revoke in conjunction with his wife. Each was a beneficiary of one-half the income for life. The interest of the wife was held not to be "adverse" to that of the settlor.

³² *Porter v. Commissioner*, 288 U. S. 436, 53 S. Ct. 451 (1933).

³³ 296 U. S. 93, 56 S. Ct. 68 (1935).

³⁴ 296 U. S. 98, 56 S. Ct. 66 (1935).

signed by the surviving trustees and approved by the then living children of the settlor, beneficiaries of the trust. The settlor continued to act as a trustee until her death. In each case the government contended that the transfers were subject to the tax under section 302 (d) upon the theory that, at the time of death, the settlor in each case was in possession of a power to alter, amend, or revoke exercisable in conjunction with other persons,—in the *Helmholz* case in conjunction with the other beneficiaries of the trust, and in *White v. Poor* in conjunction with the other trustees. The Supreme Court, in holding the transfers not subject to federal estate tax, rejected these contentions in each case, holding that in neither case was there any power reserved to anyone to alter, amend, or revoke the trust, but only a power to *terminate*. In the *Helmholz* case, this power was said to add nothing to the rights conferred upon the parties at common law, it being the general rule that all the parties in interest, being *sui juris*, may terminate a trust. The decision in *White v. Poor* was rested more specifically upon the point that whatever power the settlor had at death to participate in a termination of the trust was *acquired* by her by virtue of the action of the other trustees, and was not *reserved* to her in the original declaration of trust.

The Treasury Department, sensing a loophole in the law as it existed under section 302 (d) of the Revenue Act of 1926 by virtue of the decisions in *Helvering v. Helmholz* and *White v. Poor*, secured an amendment of that section under the Revenue Act of 1936,³⁵ to tax transfers inter vivos “by trust or otherwise, where the enjoyment thereof was subject at the date of his [the transferor’s] death to any change through the exercise of a power (*in whatever capacity exercisable*) by the decedent alone or *by the decedent* in conjunction with any other person (*without regard to when or from what source the decedent acquired such power*), to alter, amend, revoke, or *terminate*.” The italicized words were added by the 1936 amendment. No case has yet either construed or tested the constitutionality of the added provisions.

Thus under the federal death tax, so far as the “reservation of interest or control” cases are concerned, Congress has exercised the taxing power to encroach, step by step, upon the field of completed transfers inter vivos to the extent that, under the 1936 act, such transfers are taxed where the only control reserved to the transferor is that allowed him at common law without any specific reservation in the

³⁵ 49 Stat. L. 1744, § 805 (a), 26 U. S. C. (Supp. III, 1937), § 411 (d):

instrument, such as the power to terminate a trust with the consent of all the beneficiaries.³⁶ But it must be remembered that Congress has levied the tax and the courts have upheld it in these cases upon the theory that, because of the reservation, the transfer remained in some particular *incomplete* until the transferor's death.

Certain types of transfers within the "reservation of interest or control" category have been held to be excluded from or included within the scope of transfers "intended to take effect in possession or enjoyment at or after death" under the federal estate tax, depending upon whether the interest in the property transferred was vested in the transferee at the time of the transfer, subject to a divesting contingency, or remained contingent until the death of the transferor. Thus, in *Klein v. United States*,³⁷ a transfer was held subject to the death tax under such provision, where the interest of the transferee in the remainder after a life estate immediately vested in her was made contingent on her surviving the transferor, otherwise the reversion to remain vested in the transferor. On the other hand, in *Helvering v. St. Louis Union Trust Co.*,³⁸ and in *Becker v. St. Louis Union Trust Co.*,³⁹ where the property transferred was vested immediately in the transferees, subject to being divested by the failure of the transferees to survive the transferors, the transfers were held by five to four decisions in each case not subject to the tax. In *Helvering v. St. Louis Union Trust Co.*, Justice Sutherland distinguished the *Klein* case upon the theory that there the estate granted in remainder was to vest in the grantee only upon the happening of the condition precedent that the grantor die during the life of the grantee, hence death became the generating source of the grantee's title; whereas in the *St. Louis Union Trust Co.* case the estate was vested in the grantee immediately upon the transfer and the grantor's death simply put an end to the possibility of reverter by extinguishing it.⁴⁰ Justice Stone, in a dissenting opinion in this case, in which Justices Hughes, Brandeis, and Cardozo joined, stated that the practical effect of the transfer in each of the two cases was the same, and by use of a different form of language (use of words creating a condition subsequent rather than a

³⁶ In general, as to nature of powers which a transferor may reserve without subjecting the transfer to federal estate tax, see HUGHES, THE FEDERAL DEATH TAX, § 101 (1938).

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

³⁸ 296 U. S. 39, 56 S. Ct. 74 (1935).

³⁹ 296 U. S. 48, 56 S. Ct. 78 (1935).

⁴⁰ *Helvering v. St. Louis Trust Co.*, 296 U. S. 39 at 43, 45, 56 S. Ct. 74 (1935).

condition precedent) the transferor in the *St. Louis Union Trust Co.* case attained the same end as the transferor in the *Klein* case, but escaped the tax. It was the opinion of the dissenting justices that it should be of no consequence what particular conveyancer's device the decedent selected to hold in suspense the ultimate disposition of his property until his death. It is of interest to note that while refinements of property law have been applied by the Supreme Court, as in these cases, where the question is merely one of the construction of the language of a particular statute, the Court has held that refinements of title are without controlling force where the question is one of the power of Congress to tax a particular type of transfer.⁴¹

Transfers to two or more persons as joint tenants, or to a husband and wife as tenants by the entirety, present a peculiar problem within the "reservation of interest or control" group of transfers. It is well settled at common law that upon the death of one joint tenant or tenant by the entirety the survivor receives no interest in the property which he or she did not have before.⁴² Therefore none of the property is subject, for example, to probate proceedings on the estate of the decedent. In the absence of a statute specifically subjecting jointly owned estates to the tax, the state courts in some jurisdictions have held that the interest of a decedent in such type of estate is not subject to the tax.⁴³ Various rules have been adopted by statute or otherwise

⁴¹ See, for example, *Burnet v. Wells*, 289 U. S. 670, 53 S. Ct. 761 (1933), holding valid an income tax statute taxing as income of the settlor the income of an irrevocable funded insurance trust used to pay the premiums upon the policies; also *Tyler v. United States*, 281 U. S. 497, 50 S. Ct. 356 (1930).

⁴² But property held in joint tenancy may be partitioned among the joint tenants in most jurisdictions. Death of any one joint tenant would thus put an end to his right to secure exclusive ownership of a part of the jointly owned property. Cf. *Gwinn v. Commissioner*, 287 U. S. 224, 53 S. Ct. 157 (1932).

⁴³ *Estate of Gurnsey*, 177 Cal. 211, 170 P. 402 (1918); *McDougald v. Boyd*, 172 Cal. 753, 159 P. 168 (1916) (joint bank deposits, before joint tenancies were subjected to the tax by 1915 statute); *Commonwealth v. Merritt's Exr.*, 210 Ky. 779, 276 S. W. 802 (1925) (joint tenancy in real estate before enactment of statute expressly making joint tenancies taxable); *Palmer v. Treasurer*, 222 Mass. 263, 110 N. E. 283 (1915) (tenancy by the entirety in real estate—apparently the present rule); *In re Peterson's Estate*, 182 Wash. 29, 45 P. (2d) 45 (1935) (joint tenancy, before enactment of 1935 statute expressly making joint tenancies taxable).

The Pennsylvania legislature has experienced difficulty in attempting to subject jointly owned property to the tax. It was held by the courts under a 1919 statute that upon the death of one joint tenant there was no transfer "made or intended to take effect in possession or enjoyment at or after such death." *McIntosh's Estate*, 289 Pa. 509, 137 A. 661 (1927) (joint tenancy); *Leach's Estate*, 282 Pa. 545, 128 A. 497 (1925) (joint tenancy); *Fink's Estate*, 6 D. & C. (Pa.) 799 (1925) (tenancy

in other jurisdictions with respect to the application of succession taxes to jointly owned property.⁴⁴ Under the federal estate tax, however,

by the entirety). *Contra*: Carr's Estate, 30 Dist. (Pa.) 481 (1921) (joint tenancy, on ground of right of severance). The courts also rendered ineffective a statute enacted in 1929 providing that whenever any property is held in the joint names of two or more persons, except as tenants by the entirety "and payable to either or the survivor upon the death of one of such persons, the right of the surviving person or persons entitled to the immediate ownership or possession and enjoyment of such property shall be deemed, prima facie, a transfer of one-half, or other proper fraction thereof, taxable under the provisions of this act. . . ." Pa. Pub. Laws (1929), p. 1795 at 1797. This statute was construed not to subject to the succession tax joint bank accounts created in the name of two persons by agreement with express provision for survivorship, it being held that the statute by creating but a prima facie presumption of a "transfer," left open the question whether there *is* a transfer on the death of one joint owner, and that here there was no such transfer, since the interest of each joint tenant is at common law in the undivided whole from the time of creation of the tenancy. Haggerty's Estate, 311 Pa. 503, 166 A. 580 (1933); Lowry's Estate, 314 Pa. 518, 171 A. 878 (1934); Hamer's Estate, 18 D. & C. (Pa.) 401 (1932). The statute was amended in 1936 to abrogate this construction. Pa. Laws (Spec. Sess. 1936), No. 21, effective July 14, 1936.

In Michigan and Vermont there are no statutory provisions subjecting joint tenancies to the tax. The same is true with respect to tenancies by the entirety in Michigan, Vermont, and Virginia. In Oregon and Pennsylvania tenancies by the entirety are expressly excepted from the statute taxing joint estates. In Indiana, by statute, tenancies by the entirety in real estate have been expressly excepted from the operation of the statute taxing jointly owned property. In New Jersey it has been ruled that tenancies by the entirety are not within the scope of such a statute.

⁴⁴ In the following states, by statute or otherwise, with respect to property held in joint tenancy, upon the death of one joint tenant, the tax is imposed upon the proportionate share of the joint tenancy property represented by the decedent's interest therein: Colorado (statute); Connecticut (statute); Delaware (statute); Illinois [statute: under the statute before a 1933 amendment, the survivor was taxed only upon the proportionate share of the decedent as determined by his contribution thereto, *People v. Varel*, 351 Ill. 96, 184 N. E. 209 (1932)]; Kentucky (statute); Maryland (statute); Montana (statute: except such part of the property as originally belonged to the survivor); New Mexico (statute: only as to property acquired by the tenants by gift, bequest, devise, or inheritance); New York (statute: only as to property acquired by the tenants by gift, bequest, devise, or inheritance); North Dakota (statute); Ohio [statute: see *Tax Commission v. Hutchison*, 120 Ohio St. 361, 166 N. E. 352 (1929)]; Pennsylvania (statute); Rhode Island (statute: as to property acquired by decedent and survivor by gift, bequest, devise, or inheritance); South Carolina (statute: unless original contribution otherwise); South Dakota (by ruling of tax commissioner; no statutory provision); (by practice; no statutory provision); Wisconsin (statute).

In the following states it is provided by statute or otherwise that upon the death of one tenant by the entirety one-half of the jointly owned property will be subject to the tax: Colorado (statute); Connecticut (statute); Delaware (statute); Illinois (statute); Kentucky (statute); Montana (statute: except such part thereof as originally belonged to survivor); New Mexico (statute: only as to property acquired by tenants by gift, bequest, devise, or inheritance); New York (statute: only as to property

the interest of the survivor is considered complete only upon the death of the other joint owner, and the entire jointly owned property,

acquired by tenants by gift, bequest, devise, or inheritance); North Carolina (statute); North Dakota (no express statutory provision; statute refers to jointly owned property); Rhode Island (statute: as to property acquired by decedent and survivor by gift, bequest, devise, or inheritance); South Carolina (no statutory provision; probably follows joint tenancy provision taxing proportionate share unless original contribution shown to be otherwise); Wisconsin (statute).

In the following states, by statute or otherwise, with respect to property held in joint tenancy, the tax is imposed upon the entire property except to the extent of the contribution of the survivor or survivors to the original acquisition thereof: Arizona (statute); California (statute); Idaho (statute); Indiana (statute); Iowa (statute); Maine (statute); Massachusetts (statute); Minnesota (statute); New Hampshire (statute); New Jersey [statute effective in 1922; but all joint tenancies in New Jersey probably are subject to inheritance tax whether created before or after the passage of the statute where the joint tenants themselves participated in the creation of the joint tenancy; see *In re Huggins' Estate*, 96 N. J. Eq. 275, 125 A. 27 (1924), *affd.* 3 N. J. Misc. Rep. 1072, 130 A. 923 (1925), *affd.* 103 N. J. L. 182, 134 A. 917 (1926)]; New Mexico (statute: as to all property not acquired by the tenants by gift, bequest, devise, or inheritance); New York (statute: as to all property not acquired by the tenants by gift, bequest, devise, or inheritance; also statutory provision taxing property coming to wife by reason of being in joint names of husband and wife under common law right of survivorship); Oklahoma (statute); Oregon (statute); Rhode Island (statute: as to all property not acquired by decedent and survivor by gift, bequest, devise, or inheritance); Tennessee (statute: unless it cannot be clearly shown how much belonged to decedent, in which case the tax is upon decedent's proportionate share); Utah (statute); Virginia (statute); Washington (statute); West Virginia (by construction of ambiguous statute); Wyoming (statute).

In the following states it is provided, by statute or otherwise, that upon the death of one tenant by the entirety, the tax is imposed upon the entire jointly owned property except to the extent of the contribution of the survivor to the original acquisition thereof: Indiana (statute: as to personalty only; real estate held by the entirety not subject to the tax by statute); Iowa (statute); Maine (statute); Massachusetts (statute: as to personalty only; no tax on realty); Minnesota (statute); New Hampshire (by construction of statute); New Mexico (statute: as to all property not acquired by tenants by gift, bequest, devise, or inheritance); New York (statute: as to all property not acquired by tenants by gift, bequest, devise, or inheritance); Oklahoma (statute); Rhode Island (statute: as to all property not acquired by decedent and survivor by gift, bequest, devise, or inheritance); Tennessee (statute, unless it cannot be clearly shown how much belonged to decedent, in which case the tax is upon one-half); Utah (statute); West Virginia (by construction of ambiguous statute); Wyoming (statute).

It is held in New York that a joint tenancy or tenancy by the entirety created before enactment of any statute taxing such a tenancy is nevertheless taxable up to the entire value thereof upon the death of one tenant. *Matter of Weiden's Estate*, 263 N. Y. 107, 188 N. E. 270 (1933); *Matter of Dwyer's Estate*, 149 Misc. 603, 268 N. Y. S. 33 (1933). *Contra*: *Matter of Arink's Estate*, 147 Misc. 225, 264 N. Y. S. 440 (1933). In *Matter of Dwyer's Estate*, *supra*, it was stated that *Matter of Weiden's Estate* overruled *Matter of McKelway's Estate*, 221 N. Y. 15, 116 N. E. 348 (1917), which held that but one-half of property held by two joint tenants under

whether held under joint tenancy or tenancy by the entirety, is subjected to the tax, except to the extent of the contribution of the survivor or survivors to the original acquisition thereof.⁴⁵ The rule was established in *Tyler v. United States* that "the death of one of the parties to the tenancy became the 'generating source' of important and definite accessions to the property rights of the other."⁴⁶

TRANSFERS WITH RESERVATION OF INCOME TO TRANSFEROR

The irrevocable transfer inter vivos not made in contemplation of death, with reservation of the income from the property to the transferor during his life, but with the entire remainder interest vested in the transferee at the time of the transfer, does not readily fall within the "reservation of interest or control" group of transfers inter vivos. Although the owner of the vested remainder interest does not acquire actual physical possession of the property transferred until the death of the transferor, his interest has a definite and readily ascertainable value, of which the transferor cannot deprive him. To the extent of that value, at least, the transfer is complete when made. Under the state succession tax statutes, as a matter of construction, it has been held generally that a transfer inter vivos with the reservation of a life estate to the transferor is taxable as a transfer intended to take effect in possession or enjoyment at or after the transferor's death.⁴⁷

a tenancy created before enactment of the statute could be taxed upon the death of one tenant, and *Matter of Lyon's Estate*, 233 N. Y. 208, 135 N. E. 247 (1922), which held that no part of a tenancy by the entirety created before enactment of the taxing statute might be subjected to the tax.

A rule similar to that in *Matter of Weiden's Estate*, supra, has been adopted in *Ohio. Tax Commission v. Hutchison*, 120 Ohio St. 361, 166 N. E. 352 (1929).

⁴⁵ 44 Stat. L. 71, § 302(e) (1926), 26 U. S. C. (1935), § 411(e).

Jointly owned estates have been held subject to federal estate tax upon the death of one joint owner in the following cases: *Helvering v. Bowers*, (U. S. 1938) 58 S. Ct. 525, reversing (C. C. A. 7th, 1937) 90 F. (2d) 790 (tenancy by the entirety in Indiana real estate); *Foster v. Commissioner*, (U. S. 1938) 58 S. Ct. 525, affg. (C. C. A. 9th) 90 F. (2d) 486 (joint tenancy in California real and personal property); *Third Nat. Bank & Trust Co. of Springfield v. White*, 287 U. S. 577, 53 S. Ct. 290 (1932), affg. (D. C. Mass. 1930) 45 F. (2d) 911 (tenancy by the entirety in Massachusetts personal property); *Gwinn v. Commissioner*, 287 U. S. 224, 53 S. Ct. 157 (1932) (joint tenancy in California personal property); *Tyler v. United States*, 281 U. S. 497, 50 S. Ct. 356 (1930) (tenancy by the entirety in stock of West Virginia corporation, and tenancies by the entirety in Pennsylvania real estate).

See also Treasury Regulations 80, Articles 22, 23.

⁴⁶ 281 U. S. 497 at 504, 50 S. Ct. 356 (1930).

⁴⁷ *In re Hubbs*, 41 Ariz. 466, 19 P. (2d) 672 (1933); *In re Estate of Potter*,

This is based upon the rule that the succession is not complete, so far as the transferee is concerned, until he has gained possession of the

188 Cal. 55, 204 P. 826 (1922); In re Estate of Murphy, 182 Cal. 740, 190 P. 46 (1920); Hackett v. Bankers Trust Co., 122 Conn. 107, 187 A. 653 (1936); Blodgett v. Guaranty Trust Co., 114 Conn. 207, 158 A. 245 (1932), affd. 287 U. S. 509, 53 S. Ct. 244 (1933); Harber v. Whelchel, 156 Ga. 601, 119 S. E. 695 (1923); People v. Moses, 363 Ill. 423, 2 N. E. (2d) 724 (1936); People v. Northern Trust Co., 330 Ill. 238, 161 N. E. 525 (1928); People v. McCormick, 327 Ill. 547, 158 N. E. 861 (1927); People v. Forman, 322 Ill. 223, 153 N. E. 376 (1926); People v. Tavener, 300 Ill. 373, 133 N. E. 211 (1921); People v. Shaffer, 291 Ill. 142, 125 N. E. 887 (1920); People v. Kelley, 218 Ill. 509, 75 N. E. 1038 (1905); People v. Moir, 207 Ill. 180, 69 N. E. 905 (1904); In re Estate of Toy, 220 Iowa 825, 263 N. W. 501 (1935); Lamb's Estate v. Morrow, 140 Iowa 89, 117 N. W. 1118 (1908); Darnall v. Connor, 161 Md. 210, 155 A. 894 (1931) [but see Downes v. Safe Deposit & Trust Co., 157 Md. 87, 145 A. 350 (1929); Smith v. State, 134 Md. 473, 107 A. 255 (1919)]; Worcester County National Bank v. Commr., 275 Mass. 216, 175 N. E. 726 (1931); Crocker v. Shaw, 174 Mass. 266, 54 N. E. 549 (1899); In re Kutsche's Estate, 268 Mich. 659, 256 N. W. 586 (1934); In re Estate of Rising, 186 Minn. 56, 242 N. W. 459 (1932); In re Estate of Marshall, 179 Minn. 233, 228 N. W. 920 (1930); In re Estate of Schuh, 66 Mont. 50, 212 P. 516 (1923); In re Estate of Bronzynski, 116 Neb. 196, 216 N. W. 558 (1927); Douglas County v. Kountze, 84 Neb. 506, 121 N. W. 593 (1909); Kimball v. Potter, (N. H. 1938) 196 A. 272; Fidelity Union Trust Co. v. Thayer-Martin, 118 N. J. L. 277, 192 A. 74 (1937), affd. 119 N. J. L. 425, 426, 197 A. 40, 41 (1938) (agreement by donee to pay annuity); In re Hartford's Estate, 122 N. J. Eq. 489, 194 A. 800 (1937); In re Brockett's Estate, 111 N. J. Eq. 183, 162 A. 150 (1932); In re Perry's Estate, 111 N. J. Eq. 176, 162 A. 146 (1932); In re Russell's Estate, 104 N. J. Eq. 578, 146 A. 361 (1929), affd. 8 N. J. Misc. Rep. 547, 151 A. 78 (1930), affd. 108 N. J. L. 185, 154 A. 626 (1931); In re Harvey's Estate, 2 N. J. Misc. Rep. 247, 129 A. 393 (1924), affd. *sub nom.* Moore v. Bugbee, 3 N. J. Misc. Rep. 435, 128 A. 679 (1925), affd. 102 N. J. L. 720, 135 A. 919 (1926), writ of error dismissed 278 U. S. 565, 49 S. Ct. 36 (1929); In re Honeyman's Estate, 98 N. J. Eq. 638, 129 A. 393 (1925), affd. *sub nom.* Bugbee v. Board of Home Missions, 4 N. J. Misc. Rep. 99, 131 A. 924 (1926), affd. 103 N. J. L. 173, 134 A. 915 (1926); Congregational Home Missionary Soc. v. Bugbee, 101 N. J. L. 214, 127 A. 192 (1925); American Bd. Commrs. v. Bugbee, 98 N. J. L. 84, 118 A. 700 (1922); Carter v. Bugbee, 91 N. J. L. 438, 103 A. 818 (1918), affd. 92 N. J. L. 390, 106 A. 412 (1919); Farmers' Loan & Trust Co. v. Bugbee, 6 N. J. Misc. Rep. 415, 141 A. 579 (1928); Matter of Hayes' Estate, 264 N. Y. 448, 191 N. E. 507 (1934), affg. 240 App. Div. 756, 266 N. Y. S. 16 (1933); Matter of Miller's Estate, 236 N. Y. 290, 140 N. E. 701 (1923); Matter of Schmidlapp's Estate, 236 N. Y. 278, 140 N. E. 697 (1923); Matter of Dana Co., 215 N. Y. 461, 109 N. E. 557 (1915); Matter of Patterson's Estate, 204 N. Y. 677, 98 N. E. 1109 (1912), affg. 146 App. Div. 286, 130 N. Y. S. 970 (1910); Matter of Keeney's Estate, 194 N. Y. 281, 87 N. E. 428 (1909), affd. 222 U. S. 525, 32 S. Ct. 105 (1912); Matter of Cornell's Estate, 170 N. Y. 423, 63 N. E. 445 (1902); Matter of Brandreth's Estate, 169 N. Y. 437, 62 N. E. 563 (1902); Matter of Green's Estate, 153 N. Y. 223, 47 N. E. 292 (1897); Matter of Garcia's Estate, 183 App. Div. 712, 170 N. Y. S. 980 (1918); Matter of Masury's Estate, 28 App. Div. 580, 51 N. Y. S. 331 (1898), affd. 159 N. Y.

property transferred, together with all its economic benefits. In many of these cases the courts have held the transfer subject to the tax for

532, 53 N. E. 1127 (1899); Matter of Best's Estate, 140 Misc. 31, 249 N. Y. S. 784 (1931); Matter of Winters' Estate, 135 Misc. 258, 237 N. Y. S. 101 (1924); Matter of Stephan's Estate, 121 Misc. 596, 201 N. Y. S. 461 (1923); Matter of Hanna's Estate, 119 Misc. 159, 195 N.Y.S. 749 (1922); Matter of Fitzgibbon's Estate, 106 Misc. 130, 173 N. Y. S. 898 (1919); Matter of Egerton's Estate, 103 Misc. 471, 170 N. Y. S. 222 (1918); Matter of Meserole's Estate, 98 Misc. 105, 162 N. Y. S. 414 (1916); Matter of Dobson's Estate, 73 Misc. 170, 132 N. Y. S. 472 (1911); Matter of Skinner's Estate, 45 Misc. 559, 92 N. Y. S. 972 (1904), modified 106 App. Div. 217, 94 N. Y. S. 144 (1905); Sherman v. Tax Commission, 125 Ohio St. 367, 181 N. E. 539 (1932); In re Estate of Weber, 24 Ohio N. P. (N.S.) 33 (1921); In re Estate of Wallace, 131 Ore. 597, 282 P. 760 (1929); Sellers' Estate, 325 Pa. 377, 191 A. 170 (1937); Cooper's Estate, 320 Pa. 418, 183 A. 45 (1936); Husband's Estate, 316 Pa. 361, 175 A. 503 (1934); Leffman's Estate, 312 Pa. 236, 167 A. 343 (1933); Barber's Estate, 304 Pa. 235, 155 A. 565 (1931); Todd's Estate (No. 2), 237 Pa. 466, 85 A. 845 (1912); Du Bois' Appeal, 121 Pa. 368, 15 A. 641 (1888); Reish, Admr. v. Commonwealth, 106 Pa. St. 521 (1884); Maris's Estate, 14 Pa. Co. Ct. 171 (1893); Mishler's Estate, 15 D. & C. (Pa.) 781 (1930); Wieland's Estate, 2 D. & C. (Pa.) 277 (1922); Appeal of Walz, 33 Dauph. (Pa.) 290 (1930); Estate of Riddle, 19 Phila. (Pa.) 105 (1888); Conwell's Estate, 22 W. N. C. (Pa.) 183 (1888) (payment of annuity in return for advancement on account of legacy); In re Romney's Estate, 60 Utah 173, 207 P. 139 (1922); In re Ellis' Estate, 169 Wash. 581, 14 P. (2d) 37 (1932); In re Estate of Ogden, 209 Wis. 162, 244 N. W. 571 (1932); In re Estate of Waite, 208 Wis. 307, 242 N. W. 173 (1932); In re Estate of Schranck, 202 Wis. 107, 230 N. W. 691 (1930). See: Brown v. Gulliford, 181 Iowa 897, 165 N. W. 182 (1917); People ex rel. Attorney General v. Welch's Estate, 235 Mich. 555, 209 N. W. 930 (1926).

See also Koch v. McCutcheon, 111 N. J. L. 154, 167 A. 752 (1933), where an absolute transfer by a husband to his wife for life or until remarriage with income to the children upon the wife's death or remarriage, the corpus vesting in the children at death of survivor of donor and wife, was held within the statute though there was no reservation of income to the donor, the court rationalizing that the husband by reason of his family position might have had income for the asking. Compare In re Hollander's Estate, 123 N. J. Eq. 52, 195 A. 805 (1938).

But see Blodgett v. Union & New Haven Trust Co., 97 Conn. 405 at 410, 116 A. 908 (1922), refusing to tax such a transfer under a statute levying a succession tax upon property "which shall pass by gift to take effect at death," because the transfer was "a gift *in praesenti* of the remainder interest in property of which the decedent reserved no more than a life interest which was extinguished by her death." The court differentiated the language of a later statute taxing transfers "intended to take effect in possession or enjoyment at the death of such grantor or donor."

It was held in New York under a former statute that a transfer with reservation of enjoyment for life was a transfer intended to take effect in possession or enjoyment at or after death where a power of revocation was also reserved, although the reservation of a power of revocation alone, under the statute, would not make the transfer subject to the tax. Matter of Schmidlapp's Estate, 236 N. Y. 278, 140 N. E. 697 (1923); Matter of Dana Co., 215 N. Y. 461, 109 N. E. 557 (1915); Matter of Bostwick, 160 N. Y. 489, 55 N. E. 208 (1899). See cases cited supra, note 20.

The same rule has been followed in Pennsylvania, in which state the reservation

the reason that it is said to be a substitute for a testamentary disposition.⁴⁸ These decisions are in accord with the theory of the succession tax, since the physical possession of the property, free of the transferor's right to income, is acquired by the transferee only upon the transferor's death.⁴⁹

Until the handing down of three per curiam decisions by the Supreme Court on March 2, 1931,⁵⁰ such transfers were also treated under the federal death tax as transfers intended to take effect in possession or enjoyment at or after the transferor's death. In these three decisions, however, the Court, following a previous decision in *May v. Heimer*,⁵¹ held that the language of the taxing statutes in-

of a power of revocation has been held not to be sufficient of itself to subject the transfer to the tax. *Lines' Estate*, 155 Pa. 378, 26 A. 728 (1893); *Hurley's Estate*, 16 D. & C. (Pa.) 521 (1931); *Christopher's Estate*, 10 D. & C. (Pa.) 375 (1926); *Hartley's Estate*, 8 D. & C. (Pa.) 164 (1925). See cases cited supra, note 20.

Likewise, the transfer is held subject to the tax in Pennsylvania where the transferor retained a life estate and the power to appoint by will. *In re Denniston's Estate*, 325 Pa. 453, 191 A. 39 (1937); *Commonwealth v. Kuhn*, 2 Pa. Co. Ct. Rep. 248, 18 Phila. 403 (1886).

See also *In re Estate of Bullen*, 143 Wis. 512, 128 N. W. 109 (1910), *affd.* 240 U. S. 625, 36 S. Ct. 473 (1916), where the transferor retained the income for life, a power of revocation and a power of appointment.

⁴⁸ *In re Hubbs*, 41 Ariz. 466 at 473, 19 P. (2d) 672 (1933); *Hackett v. Bankers Trust Co.*, 122 Conn. 107 at 117, 187 A. 653 (1936); *Blodgett v. Guaranty Trust Co.*, 114 Conn. 207 at 212, 220, 158 A. 245 (1932), *affd.* 287 U. S. 509, 53 S. Ct. 244 (1933); *People v. Forman*, 322 Ill. 223 at 230, 153 N.E. 376 (1926); *Crocker v. Shaw*, 174 Mass. 266 at 267, 54 N. E. 549 (1899); *In re Estate of Rising*, 186 Minn. 56 at 59, 242 N. W. 459 (1932); *Kimball v. Potter*, (N. H. 1938) 196 A. 272 at 274; *In re Brockett's Estate*, 111 N. J. Eq. 183; at 188, 162 A. 150 (1932); *In re Perry's Estate*, 111 N. J. Eq. 176 at 181, 182, 162 A. 146 (1932); *Matter of Keeney's Estate*, 194 N. Y. 281 at 287, 87 N. E. 428 (1906), *affd.* 222 U. S. 525, 32 S. Ct. 105 (1912); *Matter of Garcia's Estate*, 183 App. Div. 712 at 716, 170 N. Y. S. 980 (1918).

⁴⁹ Text and notes 14 to 17, supra. In *In re Estate of Rising*, 186 Minn. 56 at 67, 242 N. W. 459 (1932), in discussing the distinction between the transfer and succession taxes, the court said, "Our legislature, without impugning the common law concept of the *vesting in interest* of the remainder, which is effected by a gift with reservation of life estate or use to the donor, has simply recognized that death, although not the 'generating source' of interest, is yet the operative event which causes 'the vesting in possession,' and the coming into enjoyment, and so perfects title in the remainderman. That operation is plainly and in any view a succession of such real and substantial sort, with such vital and enlarging effect on property rights as to make it the proper subject of an excise." (Italics the court's.) See also *In re Ellis' Estate*, 169 Wash. 581 at 584-586, 14 P. (2d) 37 (1932).

⁵⁰ *Burnet v. Northern Trust Co.*, 283 U. S. 782, 51 S. Ct. 342 (1931); *Morsman v. Burnet*, 283 U. S. 783, 51 S. Ct. 343 (1931); *McCormick v. Burnet*, 283 U. S. 784, 51 S. Ct. 343 (1931).

⁵¹ 281 U. S. 238, 50 S. Ct. 286 (1930).

volved⁵² could not be construed to include such transfers. Although *May v. Heiner* decided a similar question, on account of a slight factual variation the Treasury Department refused to recognize it as determinative of the question with respect to an ordinary transfer with reservation of a life estate.⁵³

Upon the handing down of these three per curiam decisions, Congress, acting upon the demand of the Treasury Department, in order to plug the leak in revenue, on March 3, 1931, immediately amended the act to tax transfers "intended to take effect in possession or enjoyment at or after his [the transferor's] death, *including a transfer under which the transferor has retained for his life or any period not ending before his death . . . the possession or enjoyment of, or the income from, the property.*"⁵⁴ The italicized words were added by the amendment. This language was altered somewhat by a clarifying amendment in 1932.⁵⁵

⁵² *Burnet v. Northern Trust Co.*, 283 U. S. 782, 51 S. Ct. 342 (1931). and *McCormick v. Burnet*, 283 U. S. 784, 51 S. Ct. 343 (1931), involved the construction of § 402(c), Revenue Act of 1921; *Morsman v. Burnet*, 283 U. S. 783, 51 S. Ct. 343 (1931), involved the construction of § 302(c), Revenue Act of 1924. The language of the two statutes in this particular was identical.

⁵³ See Brief for the Government in *Helvering v. Bullard*, (U. S. 1938) 58 S. Ct. 565. In *May v. Heiner*, 281 U. S. 238, 50 S. Ct. 286 (1930), a life estate was given to the grantor's husband, and after his death a life estate to the grantor. Whether the grantor's husband was living at the grantor's death did not appear from the record, but the Court held that question to be of no importance. Likewise, under a succession tax statute, the intervening life estate has been held not to vary the rule imposing the tax upon such transfers. *Hackett v. Bankers Trust Co.*, 122 Conn. 107, 187 A. 653 (1936).

⁵⁴ Joint Resolution (Pub. 131), approved March 3, 1931. 46 Stat. L. 1516.

⁵⁵ 47 Stat. L. 279, § 803(a), 26 U. S. C. (1935), § 411(c). The decision of the Supreme Court in *Heiner v. Donnan*, 285 U. S. 312, 52 S. Ct. 358 (1931), declared unconstitutional the provisions of § 302(c), Revenue Act of 1926, that all transfers made within two years before death were conclusively presumed to have been made in contemplation of death. It turned upon the question of the power of Congress, by means of classification, to create a fictitious factual status in order to subject to the death tax types of transfers not normally within its scope. Apparently it created doubt in the minds of the Treasury Department lawyers as to the validity of the provision of the 1931 amendment (enacted before that decision) specifically taxing transfers with the reservation of a life estate. The 1931 amendment by express language taxed such transfers as *included* within the category of transfers "intended to take effect in possession or enjoyment at or after death." The 1932 amendment was worded so as to subject to the tax transfers "intended to take effect in possession or enjoyment at or after his [the transferor's] death, *or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life . . . the possession or enjoyment of, or the right to the income from, the property.*" (Italics supplied.)

In *Hassett v. Welch*, (U. S. 1938) 58 S. Ct. 559 at 562, the Supreme Court

Congress, by these amendments in 1931 and 1932, expressly stated its intention to reach transfers inter vivos where the income from the property was reserved to the transferor for life. But the question of the power of Congress to reach such transfers remained to be determined.

CONSTITUTIONALITY OF A FEDERAL DEATH TAX UPON COMPLETED TRANSFERS INTER VIVOS

The question of the power of Congress, within the limits of the due process clause of the Fifth Amendment, constitutionally to subject to the death tax completed transfers inter vivos had not been passed upon directly by the Supreme Court prior to its decision in *Helvering v. Bullard*.⁵⁶ Although constitutional questions with respect to the retroactive application of death tax statutes to transfers inter vivos had been before the Supreme Court on numerous occasions previous to this decision, there had been few Supreme Court decisions with respect to the constitutionality of such taxes prospectively applied to completed transfers inter vivos. In *Heiner v. Donnan*⁵⁷ the Court, in holding in violation of the Fifth Amendment the provisions of section 302 (c) of the Revenue Act of 1926 that all transfers made within two years before death were made in contemplation of death, followed the already well established rule that the thing taxed under the federal estate tax statute was "the transmission of property from the dead to the living," and said that the statute did not include pure gifts inter vivos.⁵⁸ It was not said, however, that such a statute *could* not include such gifts. On the other hand the Court, in *Heiner v. Donnan*, studied the taxing statute for the purpose of determining whether it might be sustained as a gift tax, and concluded that it could not, for two reasons: (1) because the intent of Congress to enact the provision as an incident of the death tax was unmistakable; and (2) even if the statute

recently said that the 1932 amendment "reenacted the substance of the Joint Resolution with but slight verbal differences."

⁵⁶ (U. S. 1938) 58 S. Ct. 565.

⁵⁷ 285 U. S. 312, 52 S. Ct. 358 (1931).

⁵⁸ *Ibid.*, 285 U. S. 312 at 322. The Court continued: "The tax rests, in essence, 'upon the principle that death is the generating source from which the particular taxing power takes its being and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested. . . . It is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties.'" Quoting from *Knowlton v. Moore*, 178 U. S. 41 at 56, 57, 20 S. Ct. 747 (1900).

See also *Edwards v. Slocum*, 264 U. S. 61, 44 S. Ct. 293 (1924); *Young Men's Christian Assn. v. Davis*, 264 U. S. 47, 44 S. Ct. 291 (1924).

could be construed as imposing a gift tax, it would nevertheless violate the due process clause *because the tax was measured, not upon the value of the gift at the date of the transfer, but upon the value of the transferor's estate at death, including the value of the transferred property.*⁵⁹ It was held that the imposition of such a tax would be so arbitrary as to be in direct conflict with the Fifth Amendment.

There was no question in *Heiner v. Donnan* but that Congress had the power to reach the particular type of transfer by one sort of excise tax or the other. The question was thus narrowed to the validity of the *exercise* of the power by the *classification* of such transfers *inter vivos* with transfers at death or transfers testamentary in nature for the purpose of subjecting them to the death tax. As to the effect of such classification, the Court said:⁶⁰

“under the statute the value of the gift when made is to be ignored, and its value arbitrarily fixed as of the date of the donor's death. The result is that upon those who succeed to the decedent's estate there is imposed the burden of a tax, measured in part by property which comprises no portion of the estate, to which the estate is in no way related, and from which the estate derives no benefit of any description. Plainly, this is to measure the tax on A's property by imputing to it in part the value of the property of B, a result which both the *Schlesinger*^[61] and *Hoeper*^[62] cases condemn as arbitrary and a denial of due process of law. Such an exaction is not taxation but spoilation.”

In *Guaranty Trust Co. v. Blodgett*,⁶³ the Supreme Court held that the construction by a state court⁶⁴ of its succession tax statute taxing transfers “intended to take effect in possession or enjoyment at the death of the grantor or donor” to include the identical type of transfer involved in *Helvering v. Bullard*, *viz.*, a transfer *inter vivos* with remainders vested but with the reservation of income from the transferred property to the transferor for life, did not violate the due

⁵⁹ *Heiner v. Donnan*, 285 U. S. 312 at 330, 332, 52 S. Ct. 358 (1931).

⁶⁰ *Ibid.*, 285 U. S. 312 at 327.

⁶¹ *Schlesinger v. Wisconsin*, 270 U. S. 230, 46 S. Ct. 260 (1926). See text and note 12, *supra*.

⁶² *Hoeper v. Tax Commission*, 284 U. S. 206, 52 S. Ct. 120 (1931). Here the Court held void as a denial of due process of law under the Fourteenth Amendment a Wisconsin statute which provided for the computation of the income tax of husband and wife on the basis of the combined total of their incomes as shown by separate returns, treating the aggregate as the income of the husband.

⁶³ 287 U. S. 509, 53 S. Ct. 244 (1933).

⁶⁴ *Blodgett v. Guaranty Trust Co.*, 114 Conn. 207, 158 A. 245 (1932).

process clause of the Fourteenth Amendment. Although due process as guaranteed by the Fourteenth Amendment is the same as that under the Fifth Amendment, this decision was believed to give little indication of the probable attitude of the Court toward the question of the application of the federal estate tax to such a transfer, because of the differences in the two systems of taxation.⁶⁵

In *Porter v. Commissioner*⁶⁶ the rule was stated (about which there had been little doubt since the decisions in the *Reinecke*⁶⁷ and *Tyler*⁶⁸ cases) that the net estate upon the transfer of which the tax is imposed is not limited to property which passes from the decedent *at death*, but any property transferred *inter vivos* over which the decedent retained any power of control, ceasing at death, is properly subject to the tax.

By far the most important decision on the question of the valid exercise of the power of Congress in levying the estate tax, prior to that in *Helvering v. Bullard*, was *Helvering v. City Bank Farmers' Trust Co.*⁶⁹ In upholding the validity of the tax in that case, the Court defined the limits within which Congress might exercise the taxing power to classify transfers *inter vivos* with transfers at death in order to subject the former to the death tax, as follows:

"A legislative declaration that a status of the taxpayer's creation shall, in the application of the tax, be deemed the equivalent of another status falling normally within the scope of the taxing power, *if reasonably requisite to prevent evasion*, does not take property without due process. But if the means are unnecessary or inappropriate to the proposed end, are unreasonably harsh or oppressive, when viewed in the light of the expected benefit, or arbitrarily ignore recognized rights to enjoy or to convey individual property, the guarantee of due process is infringed."⁷⁰

The words "if reasonably requisite to prevent evasion" were the keystone of this decision. In holding that section 302 (d) of the Revenue Act of 1926, construed to tax as a part of the transferor's gross estate transfers *inter vivos* where the transferor reserved the right

⁶⁵ See Lowndes, "The Constitutionality of the Federal Estate Tax," 20 VA. L. REV. 141 at 157 (1933).

⁶⁶ 288 U. S. 436, 53 S. Ct. 451 (1933).

⁶⁷ *Reinecke v. Northern Trust Co.*, 278 U. S. 339, 49 S. Ct. 123 (1929).

⁶⁸ *Tyler v. United States*, 281 U. S. 497, 50 S. Ct. 356 (1930).

⁶⁹ 296 U. S. 85, 56 S. Ct. 70 (1935). For discussion of this decision, see Lowndes, "A Day in the Supreme Court with the Federal Estate Tax," 22 VA. L. REV. 261 (1936).

⁷⁰ 296 U. S. 85 at 90, italics supplied.

to alter, amend, or revoke the transfer only in conjunction with a person having a substantial adverse interest, did not violate the Fifth Amendment, Justice Roberts, writing the opinion, said:

“The purpose of Congress in adding clause (d) to the section as it stood in an earlier act was to prevent avoidance of the tax by the device of joining with the grantor in the exercise of the power of revocation someone who he believed would comply with his wishes. Congress may well have thought that a beneficiary who was of the grantor’s immediate family might be amenable to persuasion or be induced to consent to a revocation in consideration of other expected benefits from the grantor’s estate. Congress may adopt a measure reasonably calculated to prevent avoidance of a tax.”⁷¹

The question remained, under the *City Bank* decision, however, whether the prevention of tax evasion was of itself sufficient to justify the classification of completed transfers inter vivos not testamentary in character with transfers at death in order to subject them to the death tax, or whether such classification would be held a denial of due process where Congress might reach the transfer by some other means, as by the imposition of a gift tax.

In *Helvering v. Bullard*,⁷² the question with respect to the constitutional exercise of the taxing power by Congress to subject completed non-testamentary transfers to the death tax by means of classification, left unanswered in the earlier cases, came squarely before the Court. Here the decedent had created an inter vivos trust on February 17, 1932, subsequent to enactment of the 1931 Joint Resolution⁷³ but prior to enactment of the 1932 amendment.⁷⁴ The income from the trust property was reserved to decedent during her lifetime, and to a daughter-in-law of decedent for life after the decedent’s death, contingent upon the daughter-in-law surviving the decedent. The ultimate remainders were vested in the decedent’s two daughters in equal shares at the time of the transfer. The trust was in fact irrevocable from the time of its creation.⁷⁵

⁷¹ 296 U. S. 85 at 90.

⁷² (U. S. 1938) 58 S. Ct. 565.

⁷³ 46 Stat. L. 1516 (1931). See text at note 54, supra.

⁷⁴ 47 Stat. L. 279, § 803 (a). See note 55, supra.

⁷⁵ The trust instrument provided that the settlor might alter, amend, or revoke the trust during the lifetime of the settlor but only after the death of the daughter-in-law to whom the life estate in remainder was given. The daughter-in-law survived decedent. Under the decisions in *Helvering v. St. Louis Union Trust Co.*, 296 U. S. 39, 56

The executor of the decedent's estate contested the determination of the Commissioner of Internal Revenue that the trust corpus was to be included in the decedent's gross estate for purposes of the federal estate tax, upon three principal grounds: (1) that the transfer was not testamentary in character merely by reason of the reservation to the transferor of the income from the trust property until her death;⁷⁶ (2) that such a transfer, being a pure gift inter vivos, was not within the purview of the federal estate tax;⁷⁷ (3) that the classification of such a transfer with transfers at death and transfers testamentary in character, for the purpose of subjecting it to the death tax, overstepped the limitations upon the constitutional exercise of the taxing power by means of classification, which limitations were defined in *Helvering v. City Bank Farmers Trust Co.*⁷⁸ This latter contention was based upon the proposition that since it was well established that Congress properly might subject such a transfer inter vivos, complete when made, to a gift tax,⁷⁹ the classification made by the statute was unnecc-

S. Ct. 74 (1935), and *Becker v. St. Louis Union Trust Co.*, 296 U. S. 48, 56 S. Ct. 78 (1935), the transfer therefore was treated as irrevocable when made.

⁷⁶ This contention was based upon language in *May v. Heiner*, 281 U. S. 238, 50 S. Ct. 286 (1930), discussed at notes 51, 53, *supra*, where, in construing a federal estate tax statute [§402(c), Revenue Act of 1918] taxing transfers intended to take effect in possession or enjoyment at or after the transferor's death not to be applicable to a transfer inter vivos with remainders vested but with reservation of income to the transferor for life, the Court said (281 U. S. 238 at 243): "The transfer of October 1st, 1917, was not made in contemplation of death within the legal significance of those words. *It was not testamentary in character* and was beyond recall by the decedent. At the death of [the transferor] 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." (Italics supplied.)

⁷⁷ The chief authority on this point was the statement in *Heiner v. Donnan*, 285 U. S. 312 at 322, 52 S. Ct. 358 (1931), that the estate tax does not include pure gifts inter vivos. A similar statement was made by Justice Sutherland in *Helvering v. St. Louis Union Trust Co.*, 296 U. S. 39 at 41, 56 S. Ct. 74 (1935), a statutory construction case. It has been contended by the government that the statement referred to in *Heiner v. Donnan* was merely dictum. It would seem not unrelated to the decision, however, in view of the fact that the transfer inter vivos there attempted to be taxed as a transfer in contemplation of death was held to have no necessary relation to death.

⁷⁸ 296 U. S. 85, 56 S. Ct. 70 (1935), discussed at note 69, *supra*.

⁷⁹ The constitutionality of the gift tax was upheld by the Supreme Court in *Bromley v. McCaughn*, 280 U. S. 124, 50 S. Ct. 46 (1929). The original gift tax law, enacted in 1924, was repealed by Congress as of January 1, 1926. The present gift tax, enacted as a part of the Revenue Act of 1932, became effective June 6, 1932. Since the gift tax has been held by the Supreme Court to be invalid applied retroactively [*Untermeyer v. Anderson*, 276 U. S. 440, 48 S. Ct. 353 (1928)]; *Blodgett*

essary to the proposed end: the taxing of such transfers under one form of excise or the other.⁸⁰

In contending that the tax upon such a transfer was a denial of due process, the executor also pointed out that in a case where the value of the property has appreciated greatly between the time of the transfer and the date of the transferor's death, to the extent of the appreciation in value of the corpus of the vested remainder the estate is called upon to pay a tax upon property never owned by the decedent, and in which his only interest was the right to receive the income therefrom.

In support of the tax, it was urged by the government (1) that a transfer of this type, by its very nature, serves as a substitute for a testamentary disposition, and (2) that Congress, having the power to tax substitutes for testamentary disposition in order to prevent avoidance of the estate tax, may classify this type of transfer with transfers coming normally within the scope of the tax. In support of the first contention the government relied upon the state succession tax cases, and in support of the second proposition it relied upon the cases expounding the "adjunct" theory of taxation,⁸¹ where particular classifications within the scope of the taxing acts were held justifiable by reason of the general power of Congress to prevent avoidance of a tax.

Presented to it upon these issues⁸² the Supreme Court upheld the validity of the tax, prospectively applied,⁸³ but adopted neither the

v. Holden, 275 U. S. 142, 48 S. Ct. 105 (1927)], and since the transfer in the Bullard case was completed on February 17, 1932, it was not subject to gift tax.

⁸⁰ It was held in *Burnet v. Guggenheim*, 288 U. S. 280, 53 S. Ct. 369 (1933), that the estate, tax and gift tax statutes are "*in pari materia*," the gift tax supplementing the estate tax in a general scheme of taxation.

⁸¹ See note 7, *supra*.

⁸² In *Helvering v. Bullard*, (U. S. 1938) 58 S. Ct. 565, there was also decided a question based solely upon the peculiar facts involved in that case, which facts made it necessary to determine whether a trust created in 1927 or one created in 1932 (which latter trust, consisting of a part of the assets of the 1927 trust, was created by virtue of a family settlement agreement under which the 1927 trust was terminated) was the proper transfer with respect to which the question of exaction of the tax should be determined. The first part of the Supreme Court opinion concerns the decision on this point, it being held that the 1932 trust was the proper transfer for imposition of the tax.

⁸³ In *Hassett v. Welch* and *Helvering v. Marshall*, (U. S. 1938) 58 S. Ct. 559, two cases argued together at the same time as *Helvering v. Bullard*, the Court held that the 1931 and 1932 amendments to § 302 (c), Revenue Act of 1926, must be construed to apply only to transfers with reservation of life income made subsequent to the dates of their enactment respectively, and that neither amendment may be construed to have retroactive operation. The question of the constitutionality of such a tax retroactively applied to such transfers was argued but not decided in these cases.

contentions of the taxpayer nor those of the government in deciding the constitutional question. It primarily rested its decision upon the following proposition:

“Since Congress may lay an excise upon gifts, it is of no significance that the exaction is denominated an estate tax or is found in a statute purporting to levy an estate tax. Moreover, Congress having the right to classify gifts of different sorts might impose an excise at one rate upon a gift without reservation of a life estate and at another rate upon a gift with such reservation. Such a classification would not be arbitrary or unreasonable.”⁸⁴

This language goes far beyond that of any other Supreme Court opinion in a federal estate tax case. It also goes beyond the contentions of the government in any case since *Heimer v. Donnan*. It is believed that in no later case has the government urged that no distinction should be drawn between the estate tax and the gift tax in order to apply the estate tax statute to transfers inter vivos not normally within the scope of a death tax. In *Helvering v. Bullard* the government did not seek to uphold the tax upon the theory that the tax was valid merely because Congress has the power to levy an excise upon *gifts* inter vivos, but it sought to bring the transfer within the scope of the *death* tax by showing that it necessarily operated as a substitute for a testamentary disposition. Furthermore, it was not contended by the government that Congress might levy an excise upon one type of transfer inter vivos at the same rate as that applied to testamentary transfers, whereas other types of transfers inter vivos, not so discriminated against, would be subject only to the lower rate imposed by the gift tax statute. But such power is found by the Court in the general power of Congress to levy an excise upon gifts.

There can be but little doubt but that the effect of the above quoted language in *Helvering v. Bullard*, a decision by a unanimous Court, is to repudiate the reasoning upon which the decision in *Heimer v. Donnan* was based, if not to overrule the decision itself. There seems, under the rule enunciated in *Helvering v. Bullard*, little to prevent Congress reaching all gifts inter vivos by the device of a conclusive presumption that such gifts, made within a reasonable time before death, were made in contemplation of death. The *Bullard* decision stated it to be of no significance that the tax is found in an estate tax statute and to make no difference that a different rate is applied to such

⁸⁴ *Helvering v. Bullard*, (U. S. 1938) 58 S. Ct. 565 at 567.

gifts than to transfers inter vivos in general, despite the express holding of *Heiner v. Dorman* that the conclusive presumption clause there involved *was not intended as a gift tax*.⁸⁵ It could hardly be said that the provisions of the 1931 and 1932 amendments to section 302 (c) subjecting to federal estate tax transfers inter vivos with reservation of a life estate were *intended* to operate as a gift tax.

The Court cites no authority in support of the proposition quoted above, but finds "further vindication" for the tax in "the authority of Congress to treat as testamentary transfers with reservation of a power or an interest in the donor."⁸⁶ Whether by this language it is meant to bring transfers with reservation of a life estate within the "reservation of interest or control" category of cases described hereinabove is not clear. After stating that the legislative history of the 1931 Joint Resolution demonstrates that the purpose of the statute was to prevent avoidance of estate taxes, the Court quotes the New York Court of Appeals in a succession tax case⁸⁷ as follows: "It is true that an ingenious mind may devise other means of avoiding an inheritance tax, but the one commonly used is a transfer with reservation of a life estate." Reference also is made to the decisions in *Helvering v. City Bank Farmers' Trust Co.*,⁸⁸ in *Milliken v. United States*,⁸⁹ and in *Tyler v. United States*,⁹⁰ as cases sustaining the validity of exactions the purpose of which was to prevent avoidance of tax.

It would seem that the decision in the *Bullard* case might have rested solely on the ground that if the transfer is a reasonable substitute for a testamentary disposition, Congress may classify it with testamentary transfers in order to prevent avoidance of the tax. Since the decision was based principally upon the broader ground, however, it seems to have opened the way to a sweeping revision of the federal estate and gift taxes. The attitude of the courts in confining the application of the gift tax to those transfers inter vivos which are not subject to the death tax⁹¹ has blasted the hope of the Treasury

⁸⁵ See 36 MICH. L. REV. 1034 at 1036 (1938).

⁸⁶ *Helvering v. Bullard*, (U. S. 1938) 58 S. Ct. 565 at 567.

⁸⁷ *Matter of Keeney's Estate*, 194 N. Y. 281 at 287, 87 N. E. 428 (1906), *affd.* 222 U. S. 525, 32 S. Ct. 105 (1912).

⁸⁸ 296 U. S. 85, 56 S. Ct. 70 (1935).

⁸⁹ 283 U. S. 15, 51 S. Ct. 324 (1931).

⁹⁰ 281 U. S. 497, 50 S. Ct. 356 (1930).

⁹¹ Thus, in *Hesslein v. Hoey*, (C. C. A. 2d, 1937) 91 F. (2d) 954, it was held that, where under the rule in *Porter v. Commissioner*, 288 U. S. 436, 53 S. Ct. 451 (1933), discussed at note 32, *supra*, a transfer by way of inter vivos trust would be subject to the estate tax upon the settlor's death by reason of a reserved power to

Department that immediate revenue might be garnered under the gift tax from transfers which might also be subjected to an additional tax on the donor's death.⁹² If the only limitation upon the exercise of the taxing power by Congress in this regard is that the tax levied be an excise tax, as the opinion in *Helvering v. Bullard* seems to imply, then there can be no objection to the combination of the gift and estate taxes into a transfer tax system designed to reach both completed transfers inter vivos and testamentary dispositions. Under such a taxing scheme, valuation as of the time of the transferor's death of property absolutely transferred long prior to his death might present administrative difficulties with respect to tracing the property and might also furnish a due process question in cases where the value of such property had greatly decreased in the interval. To avoid these problems, it has been suggested that completed transfers inter vivos might continue to be subjected to a gift tax as at present, but that all such gifts be cumulated for the purpose of determining the rate of tax to be imposed upon the estate passing at death, such estate being taxed in the highest brackets.⁹³ Thus the government would derive the benefit, both of immediate revenue from transfers inter vivos and of increased tax upon whole estates, through the prevention of the present practice of tax avoidance by means of planned transfers of the bulk of estates during life made to keep both gift and estate taxes in the low taxing brackets.

But whatever method of assessment and collection of the tax may be adopted, it is certain that the reason for the loss in revenue occasioned by wholesale transfers inter vivos has been removed, and in the future the federal tax may be considered as levied upon the transfer of entire estates, irrespective of whether such transfer is effected during the transferor's life or at the time of his death.

alter the beneficial interests in any manner not beneficial to the settlor or his estate, the transfer cannot be reached by the gift tax.

⁹² As pointed out in *Hesslein v. Hoey*, (C. C. A. 2d, 1937) 91 F. (2d) 954, the completed transfer made in contemplation of death is an exception. Such a transfer may be subjected to the gift tax, and later also be included in the transferor's estate upon his death for estate tax purposes, the statutory credit being allowed for the gift tax previously paid.

⁹³ Altman, "Combining the Gift and Estate Taxes," 16 TAX MAG. 259 (1938).