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TAXATION - CONSTITUTIONALITY OF A CONCLUSIVE PRESUMPTION THAT A TRANSFER EXECUTED WITHIN A LIMITED PERIOD BEFORE DEATH IS MADE IN CONTEMPLATION OF DEATH

TAXATION — CONSTITUTIONALITY OF A CONCLUSIVE PRESUMPTION THAT A TRANSFER EXECUTED WITHIN A LIMITED PERIOD BEFORE DEATH IS MADE IN CONTEMPLATION OF DEATH — Motion for a refund by the plaintiff on the ground that certain transfers made within two years of the death of the

decedent should not have been subjected to the federal estate tax as they were not in fact made in contemplation of death. The defendant filed a statutory demurrer on the ground that section 302 of the Revenue Act as amended in 1926 (26 U. S. C. A. sec. 1049C) renders such property taxable irrespective of what impelled the transfer. The section reads, "Where within two years prior to his death and without consideration the decedent has made a transfer, . . . and the value is in excess of $5,000, then to the extent of such excess such transfer shall be deemed and held to have been made in contemplation of death within the meaning of the title." *Held*, the statute was a violation of the Fifth Amendment to the federal Constitution since it denies equal protection of the laws, and amounts to a taking of private property without due process of law. *Donnan v. Heiner* (W. D. Pa. 1931) 48 F.(2d) 1058; *Hall v. White* (D. C. Mass. 1931) 48 F.(2d) 1060.

Gifts made in contemplation of death are subject not only to federal estate tax but also to the inheritance tax in thirty-five of our states. A collection of cases on the general subject of gifts made in contemplation of death can be found in 43 A. L. R. 1224. In twenty-one of these states the statutes provide for the raising of a presumption that gifts made within a limited period, from eighteen months to five years, are made in contemplation of death, such presumption being expressly declared to be rebuttable by the use of the words "unless shown to the contrary" or merely by "prima facie presumed." Such rebuttable presumptions have been held to be constitutional. *Shawb v. Doyle* (C. C. A. 6th 1920) 269 Fed. 321, which was reversed in 258 U. S. 529, 42 Sup. Ct. 391, 66 L. ed. 747 (1922) on other grounds. Also see *Rea v. Heiner* (W. D. Pa. 1925) 6 F.(2d) 389. But conclusive presumptions such as the one incorporated in the federal estate tax law have been held to be in violation of due process. In *State v. Eberling*, 169 Wis. 432, 172 N.W. 734 (1919) the Wisconsin supreme court sustained the constitutionality of a statute which provided that any gift made within six years preceding death should be conclusively presumed to have been made in contemplation of death, on the ground that it constituted a reasonable classification of gifts *inter vivos*. But in a later case, *In re Schlesinger's Estate*, 184 Wis. 1, 199 N.W. 951 (1924), the same court held that such a statute was not a reasonable classification of gifts *inter vivos*, but upheld the statute upon the theory that it was necessary to include these cases in order to have an effective administration of the inheritance tax. On appeal, the United States Supreme Court declared the statute unconstitutional as a violation of the Fourteenth Amendment. *Schlesinger v. Wisconsin*, 270 U. S. 230, 46 Sup. Ct. 260, 70 L. ed. 557 (1926). Mr. Justice McReynolds, in writing the opinion of the court, made the statement that the length of time set up could not affect the result reached. "Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty, and property." See also *Manley v. State of Georgia*, 279 U. S. 1, 49 Sup. Ct. 215, 73 L. ed. 575 (1929). Mr. Justice Holmes, in the *Schlesinger* case, wrote a dissenting opinion which set up the same grounds as those of the Wisconsin court for upholding the constitutionality of the act. In support of this theory Mr. Justice Holmes cited cases in which the prohibition of the sale of unintoxicating malt liquors was forbidden in order to make effective the prohibition against the sale of beer. *Purity Extract and Tonic Co. v.*

Lynch, 226 U. S. 192, 33 Sup. Ct. 44, 57 L. ed. 184 (1912); *Rupert v. Caffey*, 251 U. S. 264, 40 Sup. Ct. 141, 64 L. ed. 260 (1920). Three state inheritance tax laws have used words similar to those in the federal law in setting up their presumptions, i.e., "gifts shall be deemed and held to have been made in contemplation of death"; one state merely says "presumed to be in contemplation of death . . ." but fails to state whether such presumption is to be conclusive or rebuttable; four states use the phrase "construed to be in contemplation of death." In one of these states the act has been passed upon and interpreted as raising a conclusive presumption, and hence has been held unconstitutional. *State Tax Commission v. Robinson*, 234 Ky. 415, 28 S.W. (2d) 491 (1930). In view of the decisions it would seem that a rebuttable presumption to the effect that a gift made within a reasonable time before death shall be deemed in contemplation of death is valid; but that a conclusive presumption to the same effect cannot be sustained, and as soon as the question is raised in the few remaining states having conclusive presumptions, the provisions in question will be held valid.