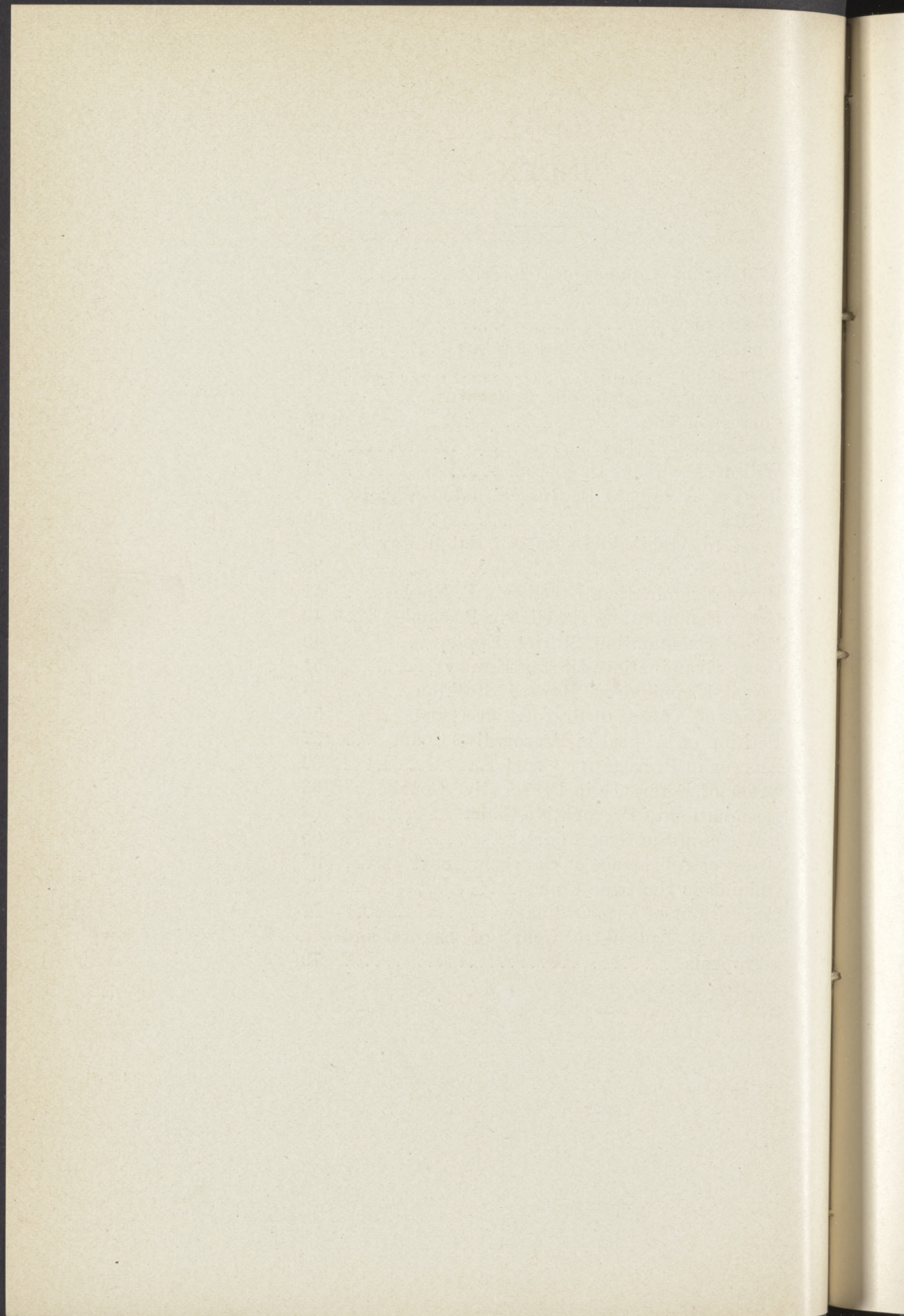


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New Jersey Supreme Court.

CITY BANK FARMERS TRUST COMPANY (formerly known as The Farmers' Loan and Trust Company) as executor of the last will and testament of Archibald D. Russell, deceased,

Prosecutor.

against

JOHN McCUTCHEON, as Comptroller of the Treasury of the State of New Jersey, and ALBERT C. MIDDLETON, as Treasurer of the State of New Jersey and JOSEPH F. S. FITZPATRICK, as Register of the Prerogative Court of the State of New Jersey,

Defendants.

On Certiorari 10

AFFIDAVIT IN SUPPORT OF APPLICATION 20 FOR WRIT

(Filed October 17, 1929)

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

Henry N. Tifft, being duly sworn, upon his oath, according to law, deposes and says: that he is a trust officer of City Bank Farmers Trust Company (formerly known as The Farmers' Loan and Trust Company) which corporation is the executor of the last will and testament of Archibald D. Russell, deceased.

Deponent further says, upon information and belief, that the said Archibald D. Russell died a resident of the County of Mercer, State of New Jersey, on the 29th day of November, 1919, leaving a last will and testament which was duly admitted to probate in the Surrogate's Court of said county, on the 15th day of December, 1919. Letters testamentary were issued by the said Surrogate's Court, on or about said date to The Farmers' Loan
10 and Trust Company, the executor in said will named. The said executor proceeded to duly administer the estate and in connection therewith and on or about April 21, 1921, filed with the Comptroller of the State of New Jersey, an affidavit setting forth the assets of the estate of said decedent, insofar as they were then known to the petitioner, and also setting forth a list of the debts, funeral and administration expenses insofar as they were then
20 known to the petitioner, for the purpose of having fixed and assessed the New Jersey transfer inheritance tax upon the taxable transfers of the said estate. On or about the 26th day of November, 1920, the said executor paid and deposited with the Comptroller of the Treasury of the State of New Jersey, the sum of \$200,000, to be applied on account of any transfer inheritance tax which may have been duly and properly fixed and assessed by the Comptroller of the Treasury in the estate of said decedent.

30 Deponent further says, upon information and belief, that the Comptroller of the Treasury on or about the 20th day of March, 1928, issued an assessment of transfer inheritance tax in said estate, in and by which he found that the total gross estate of said decedent in New Jersey amounted to the sum of \$8,602,656.94, subject to the deduction of \$1,450,331.35 representing debts, expenses, administration, etc., leaving a net estate for distribution and taxation of \$7,152,325.59. The

transfer inheritance tax upon the transfer of said net estate, as fixed by the Comptroller amounted to the sum of \$153,008.99 in addition to which the said Comptroller fixed and assessed a tax upon the transfer of certain contingent remainders provided for in said will in the sum of \$9,472.15, making a total New Jersey transfer inheritance tax in said estate, as fixed and assessed by the said Comptroller of the sum of \$162,481.14. The difference between the said sum of \$162,481.14, the actual 10 amount of tax assessed, and the sum of \$200,000, the amount deposited by the executor to pay said tax, or the sum of \$37,519.86, has been refunded to the executor.

Deponent further says, upon information and belief, that in arriving at the gross estate of said decedent, and at the net estate for taxation, the Comptroller of the Treasury in contravention of the provisions of the Transfer Inheritance Tax Law as enacted by Chapter 228 of the Laws of 1909 20 and the amendments and supplements thereto, erroneously and illegally included therein and fixed a tax upon the transfer of the sum of \$292,800, representing the purported value of real property known as the Edgerstoune, located at Princeton, State of New Jersey, in the sum of \$275,000, and personal chattels located therein at the sum of \$17,800, which property was transferred and conveyed by the decedent prior to his death by a duly executed instrument dated May 15, 1918, to Ethel- 30 berta Pyne Eppley, Archibald Douglas Russell, Jr., Helen Rutherford Russell (now known as Helen R. Benson) and Constance Rivington Russell (now known as Constance R. Winant). The basis of the Comptroller's action in so including the said property in the taxable estate was that the transfer was intended by the decedent to take effect in possession and enjoyment at or after his death. The executor appealed to the Prerogative Court

from the assessment of said tax, among other things upon the grounds that the act of the Comptroller of the Treasury in including said property in the estate of said decedent for taxation was erroneous and illegal, which appeal was referred to and heard by the Honorable M. G. Buchanan, one of the Vice-Ordinaries of the Prerogative Court. The said Vice-Ordinary in his conclusions, found that the action of the Comptroller in including said property in the taxable estate was not erroneous or illegal, and on the 25th day of July, 1929, an order was entered in the New Jersey Prerogative Court, decreeing among other things, that the assessment of transfer inheritance tax as made by the Comptroller of the Treasury on March 20, 1928, insofar as it included a tax upon the transfer of the real and personal property so conveyed by the decedent under date of May 15, 1918, was in all respects affirmed.

20 Deponent further says, upon information and belief, that the conveyance by the decedent of the real and personal property was by a warranty deed which was thereafter recorded in the office of the Clerk of the County of Mercer, so that at the date of his death, the record title to the real property was in the name of the four grantees. On or about the date of the conveyance, the four grantees executed a lease of the property to the grantor for the term of ten years, at a nominal rental. Deponent
30 is advised and therefore alleges that the Comptroller specifically waived the contention that the conveyance by the decedent was made in contemplation of death and the real point in issue is as to whether or not the leasing of the property by the grantees back to the grantor so affected the whole transaction as to indicate that the transferor did not intend his conveyance to be effective in possession or enjoyment until at or after his death. An almost analogous situation was the

subject of the litigation which culminated in the decision of the United States Supreme Court, in *Nichols v. Coolidge*, reported in 274 U. S., 531. This Court held as to the conveyance in the Coolidge case, that the deed conveyed an absolute and indefeasible title to the real property and that any rights which Mrs. Coolidge had in the premises were governed by the terms of the lease. The Court further held that the rights of the grantees to come into full possession and enjoyment of the 10 property so conveyed to them did not depend in the slightest degree upon the death of the grantor, and that the effect of the transaction was to vest in the grantees full and complete title to the property including the right of disposition. Upon these principles the Court held that such a transfer was not subject to the Federal Estate Tax, as being intended to take effect at or after death.

Deponent is advised and therefore contends that there is no decision of the courts of this State dealing 20 with a situation wherein the facts are analogous and that therefore the matter is *res nova* in this State. For this reason, and for the additional reason that there is now on record a decision of a lower court in this State, which is apparently in conflict with a pronouncement of the Supreme Court of the United States, the matter should be submitted to a court of higher jurisdiction so that the questions involved may be definitely settled and the law with relation to such transaction clarified. 30 As an additional reason your deponent is advised and therefore alleges that the Comptroller has interpreted the law with reference to the taxation of the said conveyance, and has been upheld by the Prerogative Court therein, erroneously and illegally and this Court should review the action of the Comptroller and the finding of the lower court and render a decision on the issues presented.

Deponent therefore respectfully asks this Court to grant a writ of certiorari to the Comptroller of the Treasury of the State of New Jersey, the Treasurer of the State of New Jersey and the Register of the Prerogative Court, directing them, and each of them, to certify and send under seal to the Justices of the Supreme Court of Judicature at Trenton, the record in this case and that the said court review the assessment of transfer inheritance tax made therein, under date of March 20, 1928, and the conclusions of the Ordinary of the Prerogative Court rendered upon the appeal taken from said assessment, and the final decree entered thereon in the Prerogative Court under date of July 25, 1929, insofar as they concern the taxation of the transfer of the real and personal property of the decedent of a value of \$292,800 so transferred by him by deed of conveyance, dated May 15, 1918, to the said Ethelberta Pyne Eppley, Archibald Douglas Russell, Jr., Helen Rutherford Russell (now known as Helen R. Benson) and Constance Rivington Russell (now known as Constance R. Winant).

HENRY N. TIFFT.

Sworn to before me, this 2d day of October, 1929.
[SEAL] E. J. KORDULA,

A Foreign Commissioner of Deeds for New Jersey in New York.

The within mentioned defendants hereby consent to the issuance of a writ of certiorari in the above mentioned matter, without prejudice, however, to their claim as to the correctness of the assessment intended to be reviewed.

W. A. STEVENS,
Attorney General of New Jersey,
Attorney for Defendants.

WRIT

(Filed October 24, 1929)

NEW JERSEY, ss.:

[SEAL] The State of New Jersey, to John
 McCutcheon, as Comptroller of the
 Treasury of the State of New Jer-
 sey; Albert C. Middleton, as Treas- 10
 urer of the State of New Jersey;
 and Joseph F. S. Fitzpatrick, as
 Register of the Prerogative Court
 of New Jersey:

We, being willing for certain reasons to be certi-
fied of a certain assessment of transfer inheritance
tax, made by the Comptroller of the Treasury
under date of March 20, 1928, in the Estate of
Archibald D. Russell, deceased, insofar as it con-
cerns the taxation of the transfer of real and 20
personal property of the decedent of the value of
\$292,800, transferred by the said decedent during
his lifetime by deed dated May 15, 1918, to Ethel-
berta Pyne Eppley, Archibald Douglas Russell, Jr.,
Helen Rutherford Russell (now known as Helen
R. Benson) and Constance Rivington Russell (now
known as Constance R. Winant) and a final decree
of the Prerogative Court of New Jersey, dated
July 25, 1929, on an appeal of the executor of the
will of said decedent on the assessment of transfer 30
tax upon the said transfer, as set forth in said
assessment, dated March 20, 1928, which final
decree ratified and affirmed the said assessment of
tax, do command you, that you certify and send
under your seal to our Justices of our Supreme
Court of Judicature at Trenton, on the 29th day of
October, 1929, the said assessment of the said
Comptroller, together with the record of the Prero-
gative Court in said matter, and the final decree

of the Prerogative Court, dated July 25, 1929, and all things touching and concerning the same as fully and completely as they remain before you together with this our writ, that we may cause to be done thereupon what of right and justice and according to the laws of the State of New Jersey ought to be done.

Witness, Honorable William S. Gummere, Chief Justice of our Supreme Court at Trenton, this 18th
 10 day of October, in the year of our Lord one thousand nine hundred and twenty-nine.

FRED L. BLOODGOOD,
Clerk.

WALTER E. COOPER,
Attorney for Prosecutor,
 Cranford, New Jersey.

I allow the above writ. Let it be sealed.

20 SAMUEL KALISCH,
 Dated October 12, 1929. *J. S. C.*

NEW JERSEY PREROGATIVE COURT.

RETURN

(*Filed October 25, 1929*)

30 In obedience to the command of this writ to me directed, I, Joseph F. S. Fitzpatrick, Register of the Prerogative Court, Do Hereby Certify and send to the Honorable Justices of the Supreme Court within mentioned, the order or decree made by Hon. Edwin Robert Walker, Ordinary or Surrogate General and Judge of the Prerogative Court of the State of New Jersey, on the twenty-fifth day of July, 1929, by virtue of the powers conferred upon me by an act entitled, "An act to tax the

transfer of property of resident and non-resident decedents by devise, bequest, descent, distribution by statute, gift, deed, grant, bargain and sale in certain cases," approved April 20, 1909, and the supplements and amendments thereto, in a certain proceeding before me on appeal from the assessment heretofore made by the Comptroller of the Treasury of the State of New Jersey, entitled, "In the matter of the Estate of Archibald D. Russell, deceased," together also with the petition of appeal 10 theretofore presented to me and the answer to said petition of appeal and all other proceedings and matters touching and concerning said petition of appeal and the proceedings thereunder, as fully as the same remain before me or under my control, as by the transcript of the same under my hand and the seal of the Prerogative Court certified and annexed more fully appears.

[SEAL] JOSEPH F. S. FITZPATRICK,
Register of the Prerogative Court 20
of the State of New Jersey.

NEW JERSEY PREROGATIVE COURT.

IN THE MATTER OF THE ESTATE }
 OF ARCHIBALD D. RUSSELL, DE- } On Appeal.
 CEASED.

FINAL DECREE 30

(Filed July 25, 1929)

The cause coming on to be heard in the presence of William A. Stevens, Attorney General of the State of New Jersey, Proctor for the Respondent, State of New Jersey, and Walter E. Cooper, Proctor for the Petitioner, The Farmers' Loan and Trust Company, as executor of the last will and testament of Archibald D. Russell, deceased, and

the record having been examined and the argument of respective counsel having been heard and considered,

And the Court being of the opinion that the Comptroller of the Treasury did not err in determining that a certain transfer by Archibald D. Russell of certain real property and the contents thereof, all located at Princeton, Mercer County, New Jersey, by deed dated May 15, 1918, to his
10 four children; namely, Ethelberta Pyne Eppley, Archibald Douglas Russell, Jr., Helen Rutherford Russell and Constance Rivington Russell, was intended by said decedent to take effect in beneficial possession and enjoyment at or after his death,

And the Court being further of the opinion that the Comptroller of the Treasury in making the assessment of transfer inheritance taxes in the estate of Archibald D. Russell erred in refusing to allow as a deduction the entire amount of Federal
20 estate taxes actually paid to the United States Government by said estate,

It is on this twenty-fifth day of July, 1929, by his Honor, Edwin R. Walker, Ordinary of the State of New Jersey,

Ordered, adjudged and decreed, that the assessment of transfer inheritance taxes as made by the Comptroller of the Treasury on March 20, 1928, insofar as it includes a tax upon the transfer of the real property and contents thereof located at
30 Princeton, Mercer County, New Jersey, by deed dated May 15, 1918, as having been made to take effect in beneficial possession and enjoyment at or after death be and the same is hereby in all respects affirmed, and

It is further ordered, adjudged and decreed that the record be remitted to the Comptroller of the Treasury for the reassessment of transfer inheritance taxes and that the said Comptroller of the Treasury allow as a deduction in arriving at the

net taxable estate of said decedent the full amount of Federal estate taxes actually paid by the estate of said decedent to the United States Government.

E. R. WALKER,
Ordinary.

Respectfully advised,
MALCOLM G. BUCHANAN,
Vice-Ordinary.

A true copy.

JOSEPH F. S. FITZPATRICK,
Clerk.

10

PREROGATIVE COURT OF NEW JERSEY.

IN THE MATTER OF THE ESTATE OF ARCHIBALD D. RUSSELL, DE- CEASED.	}	On Petition on Appeal.
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STIPULATION

20

(*Filed February 26, 1929*)

It is hereby stipulated and agreed, by and between the parties to the above entitled appeal, that the following is an agreed statement of certain facts to be considered in the determination of the appeal herein, to wit:

(a) That the Comptroller included the real and personal property formerly of the decedent, located at Princeton, New Jersey, in the gross estate at a value of \$292,800 on the ground that the decedent had transferred and conveyed the same during his lifetime to take effect in possession and enjoyment at or after his death, and not on the ground that the transfer was made in contemplation of death.

(b) That the deed of the decedent dated May 15, 1918, conveying the real and personal property known as Edgerstoune and located at Princeton, County of Mercer, State of New Jersey, was duly recorded in the Clerk's office of the County of

30

Mercer, on June 25, 1918, in Book 412 of Deeds at pages 97, etc.

(c) That the sole point in issue at this time with reference to the deductibility of the Federal Estate Tax, is as to whether or not the full amount thereof should be deducted in the New Jersey proceeding, or whether the said Federal Estate Tax should be apportioned as between the property subject to the jurisdiction of the State of New Jersey and the
 10 property not subject to the jurisdiction of the State of New Jersey and only that portion thereof which represents the tax on the New Jersey property deducted.

(d) That the Comptroller allowed under the schedule of deductions in the New Jersey proceeding, the amount of \$484,327.20, as the Federal Estate Tax deductible in said proceeding, which represents that proportion of the Federal Estate Tax paid in the sum of \$1,144,405.80, as the ratio
 20 of the New Jersey property valued at \$3,200,756.97 bears to the total estate of \$7,563,996.52., and disallowed as a deduction that proportion of said Federal Estate Tax as the ratio of the property not subject to the jurisdiction of the State of New Jersey (New York real property) valued at \$4,362,239.55 bears to the said total estate.

(e) That the amount of the Federal Estate Tax was increased after the computation by the Comptroller referred to in Point (d) from \$1,444,405.80
 30 to \$1,166,073.11 which latter amount was paid to the United States Collector of Internal Revenue for the First District of New Jersey as the final and ultimate Federal Estate Tax, as follows:

April 10, 1921	\$279,604.00
May 25, 1921	884,825.98
October 24, 1923	55,198.72
December 13, 1923	22,698.20
August 5, 1927	35,416.60

\$1,237,743.50

less refunds received as follows:

August 10, 1928.. \$48,694.36

December 10, 1928 22,976.03

71,670.39

\$1,166,073.11

(f) That it is hereby agreed that whether the full amount of the Federal Estate Tax in the sum of \$1,166,073.11 or only a portion thereof is finally 10 held to be deductible in the New Jersey proceeding, the Comptroller will reapportion or allow the deduction of the Federal Estate Tax based on the corrected figure of the actual amount paid the United States Collector of Internal Revenue in the said sum of \$1,166,073.11.

(g) That Archibald D. Russell, the decedent herein, was born on May 28, 1853, and was, therefore, on the date of the execution of the deed to the said real and personal property, to wit, May 15, 20 1918, of the age of 64 years, 11 and a fraction months.

Dated: February 23, 1929.

WALTER E. COOPER,
*Attorney for and Counsel of
The Farmers' Loan and Trust
Co. as executor, Appellant.*

WILLIAM A. STEVENS, 30
*Attorney General of the State
of New Jersey, Proctor for and
of counsel of the Respondent,
The Comptroller of the Treas-
ury.*

A true copy.

JOSEPH F. S. FITZPATRICK,
Register.

PREROGATIVE COURT OF NEW JERSEY.

IN THE MATTER OF THE ESTATE
OF ARCHIBALD D. RUSSELL, } On Appeal.
DECEASED.

TRANSCRIPT OF RECORD

(Filed February 26, 1929.)

10

I, John McCutcheon, Comptroller of the Treasury of the State of New Jersey (an officer without seal), being duly sworn, according to law, depose and say:

1. As Comptroller of the Treasury I am the officer chargeable by statute with the assessment and collection of Transfer Inheritance Taxes and the custody of the records pertaining thereto.

20 2. That the copies of bill, analysis, letters, will, deed, lease, statements, etc., hereto attached are true copies of said documents as appear of record in my office in the matter of the Transfer Inheritance Tax proceeding in the estate of Archibald D. Russell, deceased, late of Mercer County, New Jersey.

JOHN MCCUTCHEON,
*Comptroller of the Treasury of the
State of New Jersey.*

30 Sworn and subscribed to before me this 20th day
of February, 1929.

[SEAL]

OWEN W. KITE,
N. P. of N. J.

Trenton, New Jersey, May 15, 1928.

*Messrs. Taylor, Blanc, Capron & Marsh,
22 William Street,
New York City.*

GENTLEMEN:—Your letter of May 11 in re estate of Archibald D. Russell, deceased, late of Mercer County, New Jersey, received.

The assessment of Inheritance Taxes in the 10
above estate in reaching the amount of tax charge-
able against the three daughters and one son of the
decedent sets forth that a one-fourth interest in
real property and contents thereof known as
"Edgerstoune" was transferred to each of said
children to take effect at the death of the decedent.
Schedule "B" was amended to include the follow-
ing item: "Transfer to take effect at death of real
property and contents thereof known as 'Edger-
stoune,' located at Princeton, Mercer County, New 20
Jersey, being more particularly described in deed
recorded in Book 412 of Deeds, page 97 for Mercer
County, New Jersey."

Real Estate	\$275,000.00
Contents	17,800.00

Total	\$292,800.00
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From the foregoing you will observe that the 30
transfer of this property was considered by the
Department as intended to take effect in beneficial
possession and enjoyment at or after the death of
the decedent and has been so taxed.

Very respectfully,

N. A. K. BUGBEE,
Comptroller of the Treasury.

By _____

*State Supervisor of the Transfer
Inheritance Tax Bureau*

AKN-EWC

TAYLOR, BLANC, CAPRON & MARSH
THE FARMERS' LOAN AND TRUST COMPANY BUILDING
22 WILLIAM STREET, NEW YORK

Cable Address "Melopoeia"

May 11, 1928

File No. 2713

10 *Comptroller of the Treasury,*
Transfer Tax Department,
State House,
Trenton, N. J.

Archibald D. Russell Estate.

20 DEAR SIR:—In the assessment of transfer tax of the estate of the decedent above named which you made under date of March 20, 1928, there was included a tax upon the transfer of certain real estate and the contents thereof located at Princeton, N. J., which the decedent had conveyed over a year and a half prior to his death. There was no indication in the assessment as to the basis upon which you considered the transfer of this property taxable, although we understand from your representative in conversation, that your contention was that the property was conveyed by the decedent to take effect in possession or enjoyment at or after death.

30 We should like very much to have you inform us in writing what your basis was for including this transfer in the gross estate. We shall be very grateful if you will so inform us at the earliest possible moment.

Yours very truly,
(Signed) TAYLOR, BLANC, CAPRON & MARSH

Trenton, N. J., April 11, 1928.

*Taylor, Blanc, Capron & Marsh,
22 William Street,
New York City.*

GENTLEMEN:—Your letter of April 5 in re estate of Archibald D. Russell, deceased, late of Mercer County, New Jersey, received.

In accordance with your request, herewith enclosed find refund voucher covering the amount of taxes over-paid in this estate. The voucher should be signed by the executors at the bottom thereof and the affidavit regularly taken. Upon receipt of the voucher properly executed, the matter of refund will receive prompt attention. 10

The acceptance of the compromise heretofore suggested by the Department will not be taken to in any way effect your right to an appeal from the assessment as heretofore made. 20

It is requested that, when returning the refund voucher, you also return the memorandum receipt issued by this Department under date of November 26, 1920, as well as the bill forwarded to you under date of March 20, 1928, in order that the memorandum receipt may be canceled of record and an official receipt issued in lieu thereof.

Very respectfully,

30

N. A. K. BUGBEE,
Comptroller of the Treasury.

By _____
*State Supervisor of the Transfer
Inheritance Tax Bureau.*

AKN-EWC
ENC*

Trenton, New Jersey, March 20, 1928.

*Messrs. Taylor, Blanc, Capron & Marsh,
22 William Street,
New York, N. Y.*

10 GENTLEMEN:—Herewith enclosed find bill setting forth the amount of direct inheritance taxes chargeable in the matter of the estate of Archibald D. Russell, deceased, late of Mercer County, New Jersey. The bill is, of course, forwarded only for your information since a payment on account in the amount of \$200,000 made under date of November 26, 1920, fully adjusts this tax.

20 The attention of the executors of the estate is called to the fact that the ultimate disposition of several portions thereof, amounting to \$1,578,-692.34, depends upon the happening of certain contingencies and as a result thereof the Department cannot at this time determine the amount of taxes chargeable thereon.

30 The sixth clause of the last will and testament directs that the residuary estate be held in trust and the income therefrom paid equally to the decedent's four children, namely, Ethelberta Pyne Eppley, age thirty-three, Archibald Douglass Russell, Jr., age thirty, Helen Rutherford R. Benson, age twenty-two, and Constance R. R. Winant, age twenty, during the terms of their natural lives. Upon the death of each child the corpus of the trust from which he or she has been receiving the income is to be distributed among said child's issue in such proportions as the child may by his or her last will and testament direct and in default of such direction to distribute the same among the issue of such child in equal shares. In the event of death of any of said children without issue him or her surviving, the principal of the share then held in trust for such child shall be distributed among the issue of the decedent then

surviving in equal portions per stirpes and not per capita.

According to the record four children survived the decedent; names and ages being set out above. There were no deceased children of the decedent at the time of his death leaving issue entitled to share in the distribution of the estate. It further appears from the record that Ethelberta Pyne Eppley, a daughter, now aged forty-one years has no issue; Helen R. R. Benson, now age thirty years, 10 has no issue; Constance R. R. Winant, now age twenty-eight years, has three children; and Archibald D. Russell, Jr., son, now aged thirty-eight years, has two children.

If Ethelberta Pyne Eppley dies without issue survived by her brother and one or two sisters; Archibald D. Russell, Jr., dies survived by two children; Helen R. R. Benson dies without issue survived by her brother and—or one or two sisters, and Constance R. R. Winant dies survived by three 20 children, the ultimate tax will amount to \$34,945.31. Should, however, Ethelberta Pyne Eppley leave one child, Archibald D. Russell, Jr., leave two children; Helen R. R. Benson leave one child, and Constance R. R. Winant leave three children the additional tax will amount to \$27,845.31. Should, however, Ethelberta Pyne Eppley die without issue survived by her brother and one or two sisters; Archibald D. Russell leave two children; Helen R. R. Benson die without issue and Ethelberta Pyne 30 Eppley predecease her without issue; Archibald D. Russell, Jr., predecease her survived by two children and Constance R. R. Winant survive her; and Constance R. R. Winant die survived by three children, the additional tax will amount to \$31,652.45. Of course, there are many different ways in which the contingencies might happen and in which event the amount of the ultimate tax would vary to some extent. However, the three proposi-

tions above outlined appear to give a fair range of the ultimate tax which will be chargeable in this case.

In order to presently adjust the matter the Department suggests a compromise based upon the immediate payment of the sum of \$9,472.15, representing a tax on the entire contingent fund at the rate of .006 per cent.

If this suggested compromise meets with the acceptance of the representatives of the estate the Department will, upon receipt of a letter to that effect, promptly proceed with a refund of overpaid taxes in the amount of \$37,518.86, determined as follows:

Payment on account November 26, 1920,	\$200,000.00
Direct Tax (as shown by	
bill)	\$153,008.99
Compromise Tax	9,472.15 162,481.14

20 Amount to be refunded.....\$37,518.86

If, however, it is decided to defer the adjustment of the contingent tax until the termination of the trust estates then, of course, it will be necessary to file a surety company bond in double the amount of the highest possible tax chargeable in this matter.

You will, of course, understand that the amount of the compromise herein suggested is in addition to the direct tax set forth in the bill enclosed.

30 When replying to this letter kindly return the enclosed bill for taxes together with memorandum receipt heretofore issued under date of November 26, 1920, in order that an official receipt may be issued in conformity with the actual situation as determined upon.

Very respectfully,

N. A. K. BUGBEE,

Comptroller of the Treasury.

By _____

*State Supervisor of the Transfer
Inheritance Tax Bureau.*

AN:S

DEPARTMENT OF COMPTROLLER OF THE
TREASURY

TRANSFER INHERITANCE TAX BUREAU

238437

TRENTON, March 20, 1928.

The Farmers' Loan and Trust Company,

Executor of the Estate of Archibald D. Russell,
late of Mercer County.

10

Messrs. Taylor, Blanc, Capron and March,
22 William St.,
New York City.

You are hereby notified that there is due the
State of New Jersey by the above-named estate a
transfer inheritance tax assessed pursuant to the
laws pertaining thereto, amounting to \$153,008.99.

Compromise tax 9,472.15

\$162,481.14 20

Amount of refund 37,518.86

Paid account Nov. 26, 1920 \$200,000.00

Ethelberta Pyne Eppley \$36,548.96

Archibald Douglass Russell, Jr. 37,447.55

Helen Rutherford R. Benson 39,321.02

Constance R. R. Winant 39,691.46

DUPLICATE

PAID M. M. R.

N. A. K. BUGBEE, 30

Comptroller.

Decedent died November 29, 1919.

If paid subsequent to November 29, 1920, add
interest at rate of 10% per annum from said date
to date of payment.

TRANSFER INHERITANCE TAX BUREAU

ASSESSMENT

Estate of Archibald D. Russell of Mercer County, late resident of Princeton. Date of death, November 29, 1919.

Amount of estate:

Personal (including transfer)	\$8,538,398.60	
Real	64,258.34	
Total		\$8,602,656.94
Debts, expenses, &c.		1,450,331.35
Net estate for distribution		\$7,152,325.59
Exempt and contingent		1,598,692.34
Taxable interests		\$5,553,633.25
Tax		153,008.99
(Will)		

Assessment

	<i>Beneficiaries and Bequests</i>	<i>Value of Devise or Bequest</i>	<i>Relationship</i>	<i>Age</i>	<i>Exempt</i>	<i>Taxable</i>
1	Payment of debts					
2	Revoked by codicil					
3	“ “ “					
4	“ “ “					
5	“ “ “					
6	Ethelberta Pyne Eppley		Daughter	33	\$5,000.00	\$1,331,632.02
6	Life estate in $\frac{1}{4}$ of Residue	\$1,263,432.02				36,548.96
	$\frac{1}{4}$ interest in real property and contents thereof known as Edgerstoune transferred to take effect at death of de- cedent	73,200.00				
		\$1,336,632.02				

Assessment

<i>Beneficiaries and Bequests</i>	<i>Value of Devise or Bequest</i>	<i>Relationship</i>	<i>Age</i>	<i>Exempt</i>	<i>Taxable</i>
6 Remainder of $\frac{1}{4}$ residue is:	Contingent			451,449.38	
6 Archibald Douglass Russell, Jr.		Son	30	5,000.00	1,361,584.99
6 Life estate in $\frac{1}{4}$ of residue	\$1,293,384.99				37,447.55
$\frac{1}{4}$ interest in real property known as Edgerstoune, and contents thereof transferred to take effect at death of decedent	73,200.00				
	\$1,366,584.99				
6 Remainder of $\frac{1}{4}$ of residue is:	Contingent			421,496.40	

ANALYSIS OF ESTATE

6 Helen Rutherford R. Benson		Daughter	22	\$5,000.00	\$1,424,034.12
6 Life interest in $\frac{1}{4}$ of residue	\$1,355,834.12				39,321.02
$\frac{1}{4}$ interest in real property known as Edgerstoune, and					

	contents thereof transferred to take effect at death of decedent	73,200.00			
6	Remainder of $\frac{1}{4}$ of residue is: Contingent	\$1,429,034.12			
6	Constance R. R. Winant		Daughter	20	359,047.28
6	Life interest in $\frac{1}{4}$ of residue	\$1,368,182.12			5,000.00
	$\frac{1}{4}$ interest in real property known as Edgerstoune, and contents thereof transferred to take effect at death of decedent	73,200.00			1,436,382.12
					39,691.46
6	Remainder of $\frac{1}{4}$ of residue is: Contingent	\$1,441,382.12			
					346,699.28
					\$1,598,692.34
					\$5,553,633.25
					153,008.99

Assessment

Computation of Tax

Ethelberta P. Eppley—\$1,336,632.02:

	Exempt	\$5,000.00	
	1 %	45,000.00	\$450.00
	1½%	100,000.00	1,500.00
	2 %	100,000.00	2,000.00
	3 %	1,086,632.02	32,598.96
10			
		\$1,336,632.02	\$36,548.96

Archibald D. Russell—\$1,366,584.99:

	Exempt	\$5,000.00	
	1 %	45,000.00	\$450.00
	1½%	100,000.00	1,500.00
	2 %	100,000.00	2,000.00
	3 %	1,116,584.99	33,497.55
20			
		\$1,366,584.99	\$37,447.55

Helen R. R. Benson—\$1,429,034.12:

	Exempt	\$5,000.00	
	1 %	45,000.00	\$450.00
	1½%	100,000.00	1,500.00
	2 %	100,000.00	2,000.00
	3 %	1,179,034.12	35,371.02
		\$1,429,034.12	\$39,321.02

30

Constance R. R. Winant—\$1,441,382.12:

	Exempt	\$5,000.00	
	1 %	45,000.00	\$450.00
	1½%	100,000.00	1,500.00
	2 %	100,000.00	2,000.00
	3 %	1,191,382.12	35,741.46
		\$1,441,382.12	\$39,691.46

I, Archibald D. Russell, of Princeton, New Jersey, do make, publish and declare this to be my Last Will and Testament, hereby revoking all wills by me at any time heretofore made.

First. I direct that all my just debts and funeral expenses be paid as soon as possible after my death, and that all inheritance taxes be paid out of my general estate.

Second. I give and bequeath to my son-in-law, 10
Marion Eppley, the sum of fifty thousand dollars.

Third. I give and bequeath to Princeton University the sum of fifty thousand dollars.

Fourth. I give and bequeath to The Five Points House of Industry, whose office is now located at number 454 West Twenty-third Street, in the Borough of Manhattan, City of New York, an institution with which I have been associated for many years, the sum of twenty-five thousand dol- 20
lars.

Fifth. I give and bequeath to the Trinity Protestant Episcopal Church of Princeton, New Jersey, the sum of twenty-five thousand dollars.

Sixth. All the rest, residue and remainder of my property, both real and personal and wheresoever situated, of which I shall die seized or possessed or to which I may be entitled at the time of my death, I give, devise and bequeath to The 30
Farmers' Loan and Trust Company, a corporation organized and existing under the laws of the State of New York, having its principal place of business at number 22 William Street, in the Borough of Manhattan, City, County and State of New York, IN TRUST, to divide the same into so many equal shares that there shall be one equal share for each of my children me surviving, and one equal share for the issue collectively of any child of mine who

may have predeceased me of whom issue shall survive me, such shares for such issue to be apportioned for their benefit among them per stirpes; and in the event that there shall be more than one issue of any such deceased child entitled per stirpes to the benefit of a share, to divide the share applicable to such issue into equal sub-shares, one for each of such issue so entitled, and to set aside said shares and sub-shares accordingly for such children and issue; to hold said shares and sub-shares upon the following further trusts; to collect and receive the rents, issues and profits thereof and to apply the net income of each share and sub-share so held in trust to the use of the beneficiary for whom the same is set apart, during the life of such beneficiary, and upon his or her death to distribute the principal of the share or sub-share of such beneficiary, among such of said beneficiary's issue, and in such proportions, as such beneficiary may, by his or her last will and testament, direct, and in default of such direction by will, to distribute the same among the then surviving issue of such beneficiary, in equal parts, per stirpes and not per capita. In the event of the death of any issue of a deceased child for whom a sub-share of my said residuary estate shall have been held in trust as above provided, without issue him or her surviving, the principal of the sub-share then held in trust for such issue shall be distributed among his or her then surviving brothers and sisters (if any), in equal portions, the then surviving issue of any such brother or sister who may be then dead to take (per stirpes) the portion which such brother or sister would have taken if then living, and in default of such brothers and sisters and their issue, the principal of said sub-share shall be distributed among my issue then surviving, in equal portions, per stirpes and not per capita. In the event of the death of any child of mine, or any issue of a de-

ceased child for whom an entire share of my residuary estate shall have been held in trust as above provided, without issue him or her surviving, the principal of the share then held in trust for such child or issue shall be distributed among my issue then surviving, in equal portions, per stirpes and not per capita.

Seventh. I nominate, constitute and appoint said The Farmers' Loan and Trust Company to be the Executor of and Trustee under this my Last Will and Testament, and I direct that it shall not be required to give any bond in either capacity. The said Trust Company, as Trustee, and any trust company appointed to succeed it as trustee as hereinafter provided, are sometimes herein referred to as "corporate trustee." 10

Eighth. I authorize and empower my Trustee to retain, so long as to it may seem proper, any securities left by me at the time of my decease, and also to sell the same, and, from time to time, in its discretion, to invest and reinvest the proceeds thereof, and also any other cash at any time in its hands as Trustee, in such securities as to it may seem wise, it being my intention that in the making of new investments my said Trustee shall not be limited to the class of securities in which trustees are authorized by law to invest trust funds. I direct that all stock dividends shall be treated as capital and not as income. 20 30

Ninth. In setting aside any particular securities for any of the trusts hereby created, my Trustee may take them at such valuations as to it may seem proper, and I direct that such valuations so fixed by it shall be binding upon all persons interested in my estate.

Tenth. My Trustee may pay any income to any beneficiary hereunder directly, notwithstanding the

minority of such beneficiary, and the receipt of such beneficiary for such income shall be sufficient.

10 *Eleventh.* At the request of any beneficiary the money or moneys applicable to the use of such beneficiary may, in the discretion of my Trustee, be deposited to the credit of such beneficiary in any bank or financial institution named by said beneficiary, and such deposit shall be a sufficient discharge to my Trustee hereunder without further receipt.

Twelfth. No sinking fund shall be maintained from the income of any securities at any time forming part of the trust funds hereby created to guard against the diminution of the premium on such securities.

20 *Thirteenth.* My Trustee is authorized and empowered, in its discretion, to deposit any of the securities at any time forming part of said trust funds under any plan or plans of reorganization that may commend themselves to its good judgment, and to accept the new securities which may be offered under any such plan or plans in exchange for such original securities, and to pay any and all assessments levied or imposed under such plan or plans of reorganization, and to charge the amount thereof against the principal of said trust funds.

30 *Fourteenth.* I authorize and empower my Executor and Trustee to sell, at either public or private sale, at such times and upon such terms and conditions as to it may seem proper, any real property, or interest in real property, of which I may die seized or to which I may be entitled at the time of my death, and to make, execute and deliver good and sufficient deeds of conveyance thereof.

Fifteenth. I authorize and empower my Trustee to make, execute and deliver from time to time,

for the purpose of taking up any mortgage or mortgages upon my real property, or of raising money for any other purpose or purposes connected with the administration of my estate or with the improvement or management of my real property, a bond or bonds secured by mortgage or mortgages upon my real property, or any part thereof, such bonds and mortgages to be upon such terms as to time of payment and rate of interest, and to contain such other proper provisions, as to 10 my said Trustee may seem proper.

Sixteenth. I authorize and empower my Trustee, at any time and from time to time in its discretion, to lease any and all of the real property held by it in trust for such term or terms of years as to it may seem proper, and without application to any court, even though such lease or leases shall be for more than five years, such lease or leases to be drawn with or without covenants of renewals 20 of the same and with or without covenants for the purchase of any improvements that may be made by the lessees upon the demised premises, and upon such other covenants, conditions and agreements as to said Trustee may seem proper, and to that end to make, execute and deliver any and all lease or other instruments that may be necessary, proper or desirable in the premises.

Seventeenth. I authorize and empower my Trustee to make such improvements and repairs to 30 any of my real property as to it may seem proper, and generally to manage such real property in such manner as I personally might or could do if I were living.

Eighteenth. I authorize and empower all my children at any time surviving, by a written instrument signed by all of them and acknowledged in the manner required for the acknowledgment of a deed of real estate to entitle the same to be

recorded in the states of New Jersey and New York, and delivered to said The Farmers' Loan and Trust Company or to the corporate trustee then acting, to appoint (if I shall not have made such appointment by a codicil to this Will) not to exceed two individuals as additional trustees hereunder to act in conjunction with said The Farmers' Loan and Trust Company or said corporate trustee, the additional trustee or trustees so appointed, upon
10 qualifying as such, to have and possess, in conjunction with said The Farmers' Loan and Trust Company or said corporate trustee, all the duties, powers, discretionary or otherwise, authorities and obligations by this my Will and any codicil thereto imposed upon and granted to said The Farmers' Loan and Trust Company, as Trustee.

Nineteenth. At any time, and from time to time, after my death, all my children at any time surviving, by written instrument signed by all of them
20 and acknowledged in the manner required for the acknowledgment of a deed of real estate to entitle the same to be recorded in the states of New Jersey and New York, executed in duplicate, one original delivered to said The Farmers' Loan and Trust Company or the then acting corporate trustee, and the other original delivered to the new corporate trustee, shall have power to appoint another corporate trustee in succession to said The Farmers' Loan and Trust Company, or in succession to any
30 corporate trustee then acting in place of said Trust Company. Any such successor corporate trustee so appointed shall be a trust company having a capital of at least one million dollars and incorporated under the laws of the state of New York or under the laws of any other state of the United States, and thereupon the corporate trustee then acting shall, upon the payment of the charges to which it may be entitled, transfer and deliver to such successor corporate trustees the funds and

property then in its hands hereunder, and the corporate trustee so delivering said funds and property shall thereupon be absolutely discharged from any and all liability for its acts or defaults as trustee under this Will. Any corporate trustee so appointed shall succeed to all the duties, powers, discretionary or otherwise, authorities and obligations by this my Will and any codicil thereto imposed upon and granted to said The Farmers' Loan and Trust Company.

10

I authorize and empower all my children at any time surviving, from time to time, by a written instrument signed by all of them and acknowledged in the manner required for the acknowledgment of a deed of real estate to entitle the same to be recorded in the states of New Jersey and New York, and executed in duplicate, one original delivered to the then acting trustee who is to be superseded and the other delivered to said The Farmers' Loan and Trust Company or to the corporate trustee then acting, to appoint an individual trustee in place of any individual trustee at any time acting (whether appointed by me or by my children after my death), and also, by an instrument similarly executed and acknowledged, and delivered to said The Farmers' Loan and Trust Company or to the corporate trustee then acting, to appoint an individual trustee in place of any trustee who shall have died or resigned or for any reason ceased to act, and upon such appointment being made, the trustee in whose place such appointment shall have been made (if such appointment be made in substitution of a trustee then acting) shall cease to be trustee, and, in any event, the trustees so appointed shall have and possess, in conjunction with said The Farmers' Loan and Trust Company, or the corporate trustee then acting, all the duties, powers, discretionary or otherwise, authorities and obligations in this Will and

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any codicil thereto imposed upon and granted to said The Farmers' Loan and Trust Company, as Trustee.

My said children shall have the right to provide, in the appointment of any corporate or individual trustee, that such corporate or individual trustee may not be required to give any bond for the faithful performance of the duties of such trustee.

10 *Twentieth.* Notwithstanding the provisions hereinbefore made for appointment of individual trustees and successors and substituted trustees, all the discretions, duties, powers, authorities and obligations imposed by this instrument upon the trustees may be exercised by the trustee or trustees at any time acting hereunder, however many in number, and the word "Trustee" as herein used, except where the context requires a different meaning, shall mean the trustee or trustees acting at any particular time.

20 *Twenty-first.* None of the beneficiaries hereunder, nor any of their issue, shall have any power to assign, anticipate or in any way incumber any of the income from the trust funds herein created, or any part of the principal thereof, nor shall the said income or principal be liable to the claims of their creditors; and any attempted assignment, anticipation or incumbrance of the said income or principal, or any part thereof, shall be absolutely
30 void.

In Witness Whereof, I have hereunto set my hand and seal this twenty-fifth day of October, in the year one thousand nine hundred and eighteen.

ARCHIBALD D. RUSSELL. (SEAL.)

The Foregoing Instrument was signed, sealed, published and declared by the above-named Testator, Archibald D. Russell, as and for his Last Will and Testament, in the presence of us, who, in

his presence, at his request, and in the presence of each other, have hereunto subscribed our names as witnesses the day and year last above written, at the City of New York, this attestation clause having first been read aloud.

J. D. SILVERMAN,

350 West 118th St., New York, N. Y.

EDWARD H. BLANC,

125 East 72nd St., New York, N. Y.

FREDERICK GELLER,

Bronxville, N. Y.

10

At this point there is a copy of the deed and a copy of the lease covering the following pages: 17, 18, 19, 20, 21, 22 23.

This indenture, made the fifteenth day of May, in the year of our Lord one thousand nine hundred and eighteen, between Archibald D. Russell (Widower), of the Township of Princeton, in the County of Mercer and State of New Jersey, of the first part; and Ethelberta Pyne Eppley, Archibald Douglas Russell, Jr., Helen Rutherford Russell and Constance Rivington Russell, all of the said Township of Princeton, in the County of Mercer and State of New Jersey, of the second part; witnesseth, That the said party of the first part, for and in consideration of One Dollar and other good and valuable considerations, lawful money of the United States of America, to him in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part, therewith fully satisfied, contented and paid, hath given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents doth give, grant, bargain, sell, alien, release, enfeoff,

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convey and confirm to the said party of the second part, and to their heirs and assigns forever. All that certain tract or parcel of land and premises, hereinafter particularly described, situate lying and being in the Township of Princeton, in the County of Mercer and State of New Jersey, bounded and described as follows, to wit:

- Being all that tract of land and premises, together with the buildings thereon erected, and the
- 10 contents thereof, now occupied by the said party of the first part, and known as Edgerstoune, comprising all of the land between the Rosedale Road on the northerly side thereof, and the lands of Josephine P. Morgan on the easterly side thereof; and the Lawrenceville and Princeton Road on the southerly side thereof, and the westerly bank of the westerly branch of Stony Brook (being the line of the lands of Grace M. Schirmer and of Gerard B. Lambert and wife), and the line of lands of the
- 20 estate of Joseph H. Bruere, deceased, to said Lawrenceville and Princeton Road, on the westerly side thereof, including any rights, restrictions or options which the said party of the first part now has in lands on the westerly side of Stony Brook for a distance of five hundred (500) feet therefrom, as mentioned and described in two certain deeds, one from Archibald D. Russell and wife to Grace M. Schirmer bearing date October 15, 1913, and recorded in the Mercer County Clerk's Office in
- 30 Book 362 of Deeds, page 366, etc., and the other deed from Archibald D. Russell and wife to Gerard B. Lambert and wife, bearing date November 26, 1913, and recorded in said Clerk's Office in Book 366 of Deeds, page 354. etc.

44—\$5 I. R. Stamps and 1—\$2 I. R. Stamp.

Together with all and singular the houses, buildings, trees, ways, waters, profits, privileges and advantages, with the appurtenances to the same belonging or in anywise appertaining:

Also, all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof.

To have and to hold, all and singular the above described land and premises, with the appurtenances, unto the said party of the second part, their heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, their heirs and assigns forever; 10

And the said Archibald D. Russell doth for himself and his heirs, executors and administrators covenant and grant to and with the said party of the second part, their heirs and assigns, that he the said Archibald D. Russell, is the true, lawful and right owner of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and 20 delivery of these presents, are not encumbered by any mortgage, judgment, or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged altered, or defeated in any way whatsoever.

And also, that the said party of the first part now has good right, full power and lawful authority, to grant, bargain, sell and convey the said 30 land and premises in manner aforesaid.

And also, that the said Archibald D. Russell, his heirs and assigns, will warrant, secure, and forever defend the said land and premises unto the said parties of the first part herein, their heirs and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrance whatsoever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

ARCHIBALD D. RUSSELL (L. S.)

Signed, sealed and delivered in the presence of
BAYARD STOCKTON.

STATE OF NEW JERSEY, } ss.
COUNTY OF MERCER.

10 Be it remembered, that on this twenty-second day of June in the year of our Lord one thousand nine hundred and eighteen, before me a Master in Chancery of New Jersey personally appeared Archibald D. Russell, who, I am satisfied is the grantor mentioned in the within indenture, and to whom I first made known the contents thereof, and thereupon, he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed:
20 And the said Bayard Stockton, Master in Chancery of New Jersey being by me privately examined, separate and apart from husband, acknowledged that signed, sealed and delivered the same as voluntary act and deed, freely, without any fear, threats or compulsion of said husband.

ENDORSED:

30 Received in the Clerk's Office of the County of Mercer, on the 25th day of June, A. D. 1918, at 4:00 o'clock, in the afternoon and recorded in Book 412 of Deeds for said County, on pages 97, &c.

JOHN H. FETTER,
Clerk.

This indenture, made the sixteenth day of May one thousand nine hundred and eighteen, between Ethelberta P. Eppley, Archibald Douglas Russell, Jr., Helen Rutherford Russell and Constance Rivington Russell, all of the Township of Princeton, County of Mercer and State of New Jersey, parties of the First Part, and Archibald D. Russell, of the Township of Princeton, County of Mercer and State of New Jersey, of the second part, witnesseth, That the said parties of the first part 10 have letten, and by these presents do grant, demise, and to farm let unto the said party of the second part

All of the property known as "Edgerstoune" in the Township of Princeton, County of Mercer and State of New Jersey, bounded on the North by Pennington Road, on the South by Stockton Road, on the East by property of Mrs. Junius Morgan and on the West by Stony Brook, with the appurtenances, for the term of Ten (10) Years from 20 the 16th day of May one thousand nine hundred and eighteen at the yearly rent or sum of One Dollar (\$1.00) and other valuable considerations, to be paid in equal annual payments. And it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said parties of the first part to re-enter the said premises, and to remove all persons therefrom. And the said party of the second part does covenant to pay 30 to the said parties of the first part the said yearly rent as herein specified. And at the expiration of the said term, the said party of the second part will quit and surrender the premises hereby demised, in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted. And the said parties of the first part, do covenant that the said party of the second part, on paying the said yearly rent, and perform-

ing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid.

In consideration of the letting of the premises within mentioned to the within named and the sum of one dollar to me paid by the said part of the first part do hereby covenant and agree, to and with the part of the first part above named, and legal representatives, that if
10 default shall at any time be made by the said in the payment of the rent and performance of the covenants contained in the within lease on part to be paid and performed, that will well and truly pay the said rent, or any arrears thereof, that may remain due unto the said part of the first part, and also all damages that may arise in consequence of the non-performance of said covenants, or either of them, without requiring notice of any such default from the said part of the
20 first part.

Witness hand and seal this day of
in the year one thousand nine hundred and eighteen.

ARCHIBALD DOUGLAS RUSSELL, JR.
HELEN RUTHERFORD RUSSELL.
CONSTANCE RIVINGTON RUSSELL.
ETHELBERTA P. EPPLEY.

30 Witness,
JOHN HAINING.

EDWARD STIMPSON.

It is hereby consented that the within lease be cancelled. The within lease is hereby surrendered by The F. L. & T. Co. as Exr. Etc. and such surrender is hereby accepted by Ethelberta Pyne Eppley, A. D. Russell, Jr. Constance Rivington Winant & Helen Rutherford Benson.

The Farmers Loan & Trust Co. as Exr. of the
Will of A. D. R.

(SEAL.)

W. B. CARDOZO,
V. P.

Attest:

A. V. HEELY,
Secy.

Original handed to Mr. Walsh 5/26/20.

10

BEFORE THE STATE COMPTROLLER OF THE
STATE OF NEW JERSEY.

IN THE MATTER OF THE APPRAISE-
MENT OF THE ESTATE OF ARCHI-
BALD D. RUSSELL, LATE OF
MERCER COUNTY.

Hearing in the above matter held at the office of
Taylor, Blanc, Capron & Marsh, 22 William Street, 20
New York City, on November 29, 1927, at 10:30
o'clock in the forenoon and in the presence of

TAYLOR, BLANC, CAPRON & MARSH, attorneys
for the Estate represented by

HENRY C. ELDELT, RUSSELL L. BRADFORD and
WALTER E. COOPER.

MRS. ETHELBERTA PYNE EPPLEY, called and sworn
as a witness, testified as follows: 30

Direct examination by Mr. Rurode:

Q. Mrs. Eppley, you are a daughter of Archibald
D. Russell? A. Yes.

Q. Where do you live? A. At Newport, Rhode
Island.

Q. What was your father's age at the time of his
decease? About what? A. I should say, roughly
speaking, 65, but that may not be absolutely ac-
curate. I am really not sure.

Q. He lived at Princeton, New Jersey? A. Yes.

Q. Your mother predeceased him, did she not?

A. She did.

Q. How long before your father's death? A. My mother died the 11th or 12th of February, 1918. She died three days before she was 60 and she would have been 60 on the 15th of February.

Q. Approximately two years? A. But it was not exactly two years.

10 Q. Did you live with your father at Princeton at the time of his death? A. My father died in New York. I was in New York at the time of his death. I visited him but I lived in Newport.

Q. At his home in Princeton in 1918 who lived with him—of your father's family? A. My brother and my two sisters and my mother, of course, was there until she died. She died in New York.

Q. You had not lived home? A. No, but I visited a great deal.

20 Q. Did you visit in 1918? A. Yes, I visited every year.

Q. Did you know that your father executed four deeds of trust in favor of his children in May 1918? A. I did.

Q. How did you learn about that? A. Because he told me.

Q. Where? A. In Princeton. He talked about it a great deal before he died.

30 Q. And he told you about it? A. It was a topic of conversation discussed in the family a great deal.

Q. Where? A. I don't know where he mentioned it first but it was talked about a few days before.

Q. You say he talked about it a few days before he made it? A. Yes.

Q. He had made a trust before that? A. Yes, several years before, which he talked about and he talked about this trust.

Q. The trust which he made several years before, what became of it? Was that revoked? A. That trust was made by my father and mother.

Q. That was a trust made by your mother and father together? A. Yes.

Q. Was that made in 1916? A. I cannot answer that question but it could easily be looked up. I do not know when it was made but it was made sometime before.

Q. You say you remember about the execution 10 of these four trusts? A. Yes.

Q. The last ones. A. Of May 15, 1918, yes.

Q. And you say your father spoke to you about them? A. Very often.

Q. What did he say to you—the purport of his conversation? A. Well, he wanted his children to have the money which my mother wanted us to have.

Q. Was that after your mother died that he spoke to you? A. It was probably placed in trust 20 before my mother died. My mother did not die until a while after the first trust had been created.

Q. Do you remember just what your father said to you about these last four trusts and why he was making them? A. He wanted his children to have the money—his children were all practically grown up and he wanted them to have the income that my mother had wished them to have.

Q. Do you mean by that that it was money which your father had received from your mother's estate 30 and he wanted his children to have that instead of himself? A. His children were grown up and—well, I was married and my sisters were grown up and he felt that they should have their own income.

Q. Had your father been ill prior to that time? A. I don't think so.

Q. Who was his doctor at Princeton? A. The doctor to whom he really went was a New York doctor—the family doctor in Princeton was Dr.

Carrington but he was not his doctor. I don't know whether his doctor treated him or not. If any member of the household were hurt Dr. Carrington was always the doctor.

Q. And his New York doctor, who was that? A. His New York doctor was Dr. Savage.

Q. He is dead? A. I think he died. He took care of my father and he died after my father's death.

Q. During 1918 did your father spend much of
10 his time in Princeton? A. Yes.

Q. Did he go to business? A. Yes, he went to his office at all times.

Q. To your knowledge, was he suffering from any disease or ailment which was progressive? A. Not that I knew of.

Q. Did he ever complain to you of anything? A. No, I did not think he seemed very ill.

Q. The cause of your father's death given in the certificate of death is diabetes, did you know that?
20 A. Yes.

Q. How long did he suffer, to your knowledge? A. Well, I do not know.

Q. Did he keep on a diet for a time prior to his death? A. He was not on a strict diet, no.

Q. He was on some diet? A. I don't think so. Before he died he had been up on this trip to the mountains and he had eaten enough breakfast to kill most people. I don't think he was on a diet.

Q. Do you know whether Dr. Savage specializes
30 in any form of medicine or any particular disease?

A. I do not know how to answer that question. He took care of the family and I do not know whether he was a specialist or not. I went to him, my sister had gone to him and my mother had gone to him.

Q. On May 18 of 1918 your father made a deed of certain property in Princeton known as Edgerstoune to all of the children, do you remember about that? A. I do.

Q. When did you first hear about that? A. Well, he talked about doing that a long time before. My mother had died and I was married and my sisters were growing up—one was engaged and I don't know about the other—and he thought that place was rather large. My brother had an idea that he might like to go to Long Island and my father wanted to give the place to his children and let them take the responsibility which he had and not feel that he had when the family decreased in size 10 necessarily to keep a large establishment like that.

Q. How did he explain to you that that would obviate the keeping up of the establishment? A. I don't think he explained that. He said that he did not want the responsibility but wanted his children to have it.

Q. Did you ever see this deed to Edgerstoune? A. I don't know exactly how to answer this question. I think I have a copy of the deed.

Q. At that time he told you that he was going to 20 deed the property and gave a reason for it, namely, that it was a burden that he wanted to get rid of, as I understand it, did he make any arrangements about staying at Edgerstoune himself? A. Well, if he wanted to—he naturally knew that his children would let him stay.

Q. Did he say anything about it? A. He said that he knew his children were all—would be willing to have an amicable arrangement about it. I think he wanted them to have the responsibility 30 and not feel that he had to have a tremendously large place to keep up and he preferred the sea-shore, always had.

Q. Do you remember executing any paper or lease to your father? A. No.

Q. At the time your father said he was going to give his children Edgerstoune did he at that time mention anything about a lease for a term of years to himself? A. I do not think he mentioned a lease.

I think that he said that if he wanted to live there that of course he could continue to live there. But he did not want the responsibility of it.

Q. In other words, you were given to understand that your father would deed the place to the children, the understanding being that if he wanted to live there he could live there? A. I suppose so. Most children would naturally let their father live in the place.

10 Q. You say you do not remember anything about the execution of a lease on the same day that the deed was made or the next day? A. I do not believe a lease was ever executed. It may have been. If a lease was executed it probably was for about a dollar a year. It was not a very important thing and it escaped my memory.

Q. You remember now that there was a lease made? A. I am not sure about that.

Q. Well, after your father made this deed to
20 Edgerstoune and up to the time of his death who paid the taxes? A. I cannot tell you that. That would have to be looked up.

Q. Did you pay the taxes or contribute any part to the taxes? A. I will have to look that up.

Q. Did your father continue to live there? A. Yes.

Q. And who maintained the place, paid for the help and the servants? A. My father.

Q. Up to the time of his death he continued to
30 run the place and maintain it as he had before, is that right? A. Yes.

Q. Just try to refresh your recollection and see if you can remember that at the time he made the deed to his children whether or not he did not have a specific understanding with the children that he should have the use of the place for a nominal rent? A. Well, he may have done that. I do not know. If it was a nominal rent it did not amount to anything.

Q. It was understood that he was to have the use of the place as long as he desired, is that correct?

A. Well, I do not think that question ever came up because I think he felt that his children would not turn him out of the place if he decided to and wanted to live there. He may have had a lease for a dollar a year.

Q. Who lived with him at that time—who of his children? A. His son and two unmarried daughters. I was the only one who was away and at that time we had another house on the place and had been living there until we went to Newport. My husband was in the Reserves and we went to Newport during the war. 10

Q. This lease that was executed, do you remember whether you signed it? A. I do not remember that.

Q. You do not remember whether you signed it? A. I do not remember excepting that you say there was a lease. I do not remember signing one. 20

Q. And you do not remember anything about the deed itself, ever having seen it or that it was delivered to you or not? A. I do not remember that.

Q. How long was he ill before he died? A. I do not know whether it was one week or three weeks.

Q. A short time? A. Yes.

Q. In May, 1918, or just about that time did you see very much of your father? A. Yes.

Q. You were at Princeton a great deal yourself? 30
A. We went up to Newport in March, 1918, and after that my father came up to see me in Newport and I was always going to Princeton and I saw him all the time.

Q. Do you recollect what his activities were at that time? What did he do with himself? A. Well, he used to motor a great deal, he used to walk.

Q. Go to business? A. He always went to business. He took a motor trip each summer; one year

he was up in North East Harbor and the next year after my mother's death he went on a motor trip with my sister.

Q. What year was that? A. It was the year before he died.

Q. Did you ever walk with him? A. I walked with him and I went out calling with him, we walked all over Mrs. Auchincloss' place and went through the garden of Mrs. Spencer's place and
10 went over to the Training Station. He took a great interest in Newport.

Q. Did he engage in any other sports? A. He did not play golf or tennis but he walked a lot.

Q. He did walk? A. I say he walked all over Mrs. Auchincloss' place and Mrs. Spencer's place and did a lot of sightseeing and he was perfectly all right.

Q. At the time he was with you in Newport in 1918 was he attended there by any doctor? A. In
20 Newport, no, he was perfectly all right.

Q. Have you any general idea on how often he saw a doctor just prior to 1918? A. I do not know anything about it but I should say about two or three times a winter.

Q. Did he talk about his diabetic condition? A. No.

Q. You say he saw a doctor about two or three times a winter? A. I do not know it but I think so. He did not talk about going to the doctor. We all
30 used to go to the doctor.

Q. Did he do any war work at that time, just as he could do for a man of his age? A. Not that I know of.

Q. Was he interested in Liberty Loan drives or anything of that kind and participate in them? A. I do not know about that. He was very much interested in a great many charities and was quite a hard worker and went to meetings.

Q. What business activities did he have? Was he president of any companies? A. I don't think he was president of any company but he was a director of good many companies.

Q. Do you know whether he attended meetings of these companies? A. I am pretty sure he did. I know that because he used to come back with ten and twenty dollar gold pieces. All his life he would put them in a certain place and perhaps buy some certain thing with them. I don't know 10 whether they were \$10 or \$20 gold pieces. He was on a good many boards but I don't know whether he was president of any companies.

Cross-examination by Mr. Bradford:

Q. Mrs. Eppley, you said your father visited you in 1918, was this in June or July or May or August of 1918? A. I cannot tell you that. I think it was probably in June.

Q. At that time did he indicate in any way to you 20 by his looks or his appearance that he was suffering with any illness just a short time prior to that? A. No, he looked very well and he acted very well and I think gave the appearance of being in very good health.

Q. You could have signed, could you not, a lease for this real estate known as Edgerstoune without remembering at this time what you signed? A. I signed a great many papers that I cannot remember signing. 30

MR. MARION EPPLEY, called and sworn as a witness, testified as follows:

Direct examination by Mr. Bradford:

Q. What is your full name? A. Marion Eppley.

Q. You are a son-in-law of Archibald D. Russell?

A. I am.

Q. You have heard Mrs. Eppley testify, do you remember what time in 1918 Mr. Archibald D.

Russell visited your place in Newport? A. I think it was in the month of June. I know it was in the early summer.

Q. From your recollection now of him at that time, what was his appearance as to health? A. Very good as far as my recollection goes.

Q. Did his appearance then indicate to you in any way, and if it did say so, that he had been ill or that any disease indicated any physical ravaging within a short time, say, a month or a month and a half or two? A. My recollection of him is that he was in very good health, as far as appearance indicated.

Q. Did Mr. Russell ever discuss with you personally the making of these four trusts that would bear date of May 15, 1918, made to The Farmers' Loan and Trust Company? A. Mr. Russell did not discuss with me the making of that trust but he informed me that he had made a trust. He did
20 discuss with me as early as 1913, after the passage of the income tax law, the advisability of making a trust.

Q. When he discussed with you the trusts of May 15, 1918, after they were made did he indicate to you in any way why he had made the trusts and what prompted him to make the trusts? A. He did.

Q. Will you state for the record what he told you or now remember what he told you? A. He informed me, and my memory is that when he came
30 to Newport in 1918 in June or the early summer that he had formed a trust for his children. That the purpose of this trust was to permit him to transfer out of his possession the holdings that Mrs. Russell had left him which he felt she had left him to distribute to the children; that he also did not wish to have her property mixed up with his own as he had enough of his own to live on and that he was going to put all of Mrs. Russell's property eventually in this trust that he had created for

the benefit of his children as soon as it was cleared out of the estate; and that he also would terminate the trust that Mr. Pyne was a trustee of and place those securities in the trust so that he would have one trust for the benefit of the children.

Cross-examination by Mr. Rurode:

Q. You say he said something about income tax laws in 1913. A. In 1913 shortly after the passage of the law he complained to me about the iniquity 10 of the surtax and I said, "Why can't you form trusts distributing in some way property to your children so as to cut out the surtax." He said that there was no way that he could do this and still keep parental control. He said, "The children are very young and if they have an independent income there is no way we can control them." We discussed this at least once more, just when I do not remember but the first time is fixed very clearly in my memory, and I suggested that it must be possible 20 legally to form a trust whereby the income could be given to one beneficiary or another so that control could be exercised over the children. I don't know the circumstances of its formation but such a trust was formed about 1916. I think Mrs. Russell formed that.

Mr. Rurode: That was a joint trust.

Q. You say these other trusts were discussed by him with you after they were executed by him in 1918? A. Yes, he said he had formed a trust. He never said "trusts." 30

Q. Then it was in the early part of 1918 that he discussed this with you? A. Yes, that he had formed it.

Q. He did not say that he was doing that for the purpose of getting out of income tax, did he? A. No. I don't think he mentioned it with regard to that trust. He probably thought I would know it,

but he said he had done that to carry out his wife's wishes.

Q. Did he say anything about the deed for the Princeton property? A. No, I don't remember him saying anything about that. I have various things in mind. I cannot actually place them, whether it was hearsay or whether he said it to me.

Q. Did you know anything about the lease to him of the Princeton property? A. I don't remember
10 him ever saying anything but I have heard it said that he was thinking of moving to Long Island, that he wanted to be in a position where he would be free to go and do as he wanted. He had been in the place, I think, much against his tastes. He always used to tell me how he liked the seashore and I have heard that he had mentioned renting the place for \$1 a year from the children so that he could be in a position to get out any time he wanted. That is an impression I got but I cannot
20 say where I got it.

Q. Did Mr. Russell ever speak to you about his condition? A. No. I knew Mr. Russell very intimately. I was the oldest one in contact with him of the second generation and he used to talk very frankly with me on all sorts of subjects. He seldom, if indeed ever, spoke about his health. The only time he spoke about his health was once when he had eczema on his arm, and he asked me whether I knew of a certain medicine and I told him I did
30 not. I afterward found out it was a "patent" medicine. When he was dying and the doctor told me that he was in a diabetic coma it was a great surprise to me to hear that he had a thing of that sort which I had always regarded as chronic. I asked the doctor and he said his condition was probably due to his having caught cold or something of that sort. That is my recollection of the doctor's statement at Mr. Russell's death bed.

IN THE MATTER OF THE ESTATE }
OF ARCHIBALD D. RUSSELL, DE- }
CEASED.

TESTIMONY

(Filed February 26, 1929)

Deposition taken in re the above matter at the office of Bayard Stockton, Room 812, American Mechanic Building, Trenton, N. J., on the 20th day of December, 1927. 10

BAYARD STOCKTON, being duly sworn according to law, testifies as follows:

Examination by Mr. Rurode:

Q. Mr. Stockton, did you know Mr. Archibald D. Russell? A. Yes.

Q. Do you remember drawing a deed for him in 1918? A. Yes. 20

Q. Did you know Archibald D. Russell for any length of time? A. I knew him for twenty or thirty years before his death.

Q. Did you know anything about his state of health about the time he executed this deed? A. He was in a low state mentally, but physically he was all right.

Q. I show you this photostatic copy of a deed. Is that the deed you drew for him? A. Yes, that is a copy of the deed which I drew. 30

Q. When did Mr. Russell first speak to you about drawing this deed? A. I should say about two weeks before it was drawn.

Q. Do you remember what he said about it? A. He told me he wanted to make a deed of the Princeton real estate to his children, and I told him I had no proper description, and asked him to have it surveyed or plotted and let me have it, and I suppose it took about two weeks to get that.

Q. Did he tell you why he wanted to have this deed drawn? A. Yes.

Q. What did he say about that? A. He said that he was much broken mentally by his wife's death and that he had quite lost interest in this real estate in which he had taken very great interest; that it would go to his children ultimately and that he preferred to deed it to them now because it was a very great bother to manage and he did not want
10 to have that on his shoulders.

Q. Did he say anything at that time about any arrangement by which he was to have the use of the premises by any arrangement made by his children? A. No, he did not.

Q. Did you draw a lease for him also? A. I did not draw the lease, so far as I remember.

Q. How often did you see Mr. Russell just about the time that the deed was made? A. I should say two or three times a week. He called at my house
20 quite frequently, and when he got into trouble when his wife died I called upon him pretty often.

Q. After his wife's death and before the making of this deed, did Mr. Russell ever talk to you about his health, his physical condition? A. I cannot recall that he did.

Q. Did you ever know of any illness that he had just prior to the making of the deed? A. I do not think he had any.

Q. How far was your place of residence from
30 Mr. Russell's? A. About a quarter of a mile.

Q. I suppose he motored when he came? A. No, he most always walked when he came to see me.

(Signed) BAYARD STOCKTON.

PREROGATIVE COURT OF NEW JERSEY.
IN THE MATTER OF THE ESTATE }
OF ARCHIBALD D. RUSSELL, DE- } On Appeal.
CEASED. }

NOTICE OF APPEAL

(Filed May 18, 1928)

The Farmers' Loan and Trust Company, as 10
executor of the last will and testament of Archibald
D. Russell, late of the County of Mercer, State of
New Jersey, deceased, hereby appeals to theordi-
nary of the Prerogative Court of New Jersey, from
the assessment made by the Comptroller of the
Treasury of the State of New Jersey, dated March
20, 1928, against the said estate and the executor
thereof, of a purported transfer inheritance tax,
and from certain findings of the Comptroller of
the Treasury in arriving at the amount of said 20
alleged inheritance tax, upon the following
grounds, among others, to wit:

1. That in arriving at the amount of said tax, the
Comptroller of the Treasury erroneously and illeg-
ally included as a part of the gross estate of said
decedent for taxation, and assessed a transfer
inheritance tax upon the transfer of, the sum of
\$275,000, representing the value of real property
known as Edgerstoune, located at Princeton, State
of New Jersey, conveyed by the decedent prior to 30
his death, by deed dated May 15, 1918, to his four
children, namely, Ethelberta Pyne Eppley, Archi-
bald Douglas Russell, Jr., Helen Rutherford Rus-
sell and Constance Rivington Russell, which prop-
erty was not a part of the gross estate of the said
decedent within the meaning of the Transfer Inher-
itance Tax Act of the State of New Jersey, enacted
by Chapter 228 of the Laws of 1909, and the amend-
ments and supplements thereto, in effect on the

date of the decedent's death, to wit: November 29, 1919, nor was the transfer thereof subject to the tax imposed by said enactment.

2. That in arriving at the amount of said tax, the Comptroller of the Treasury erroneously and illegally included as a part of the gross estate of said decedent for taxation, and assessed a transfer inheritance tax upon the transfer of, the sum of \$17,800, representing the value of personal property and chattels located in the real property of the decedent known as Edgerstoune, located at Princeton, State of New Jersey, transferred by the decedent to his four children, namely, Ethelberta Pyne Eppley, Archibald Douglass Russell, Jr., Helen Rutherford Russell and Constance Rivington Russell, prior to his death, and on or about May 15, 1918, which property was not a part of the gross estate of the said decedent within the meaning of the Transfer Inheritance Tax Act of the State of New Jersey, enacted by Chapter 228 of the Laws of 1909, and the amendments and supplements thereto, in effect on the date of the decedent's death, to wit, November 29, 1919, nor was the transfer thereof subject to tax imposed by said enactment.

3. That in arriving at the net estate of said decedent for the purpose of the transfer inheritance tax, the Comptroller of the Treasury erroneously and illegally disallowed as a deduction from the gross estate of said decedent, the sum of \$753,416.30 of the federal estate tax properly due and payable in the estate of said decedent and paid by the executor in the sum of \$1,237,743.50, and allowing as a deduction for the federal estate tax paid in said estate only the sum of \$484,327.20, the disallowance of the said sum of \$753,416.30 of the federal estate tax duly paid, being in violation of the provisions of the Transfer Tax Act enacted by Chapter 228 of the Laws of 1909, and the amend-

ments and supplements thereto in effect on the date of the death of said decedent, to wit, November 29, 1919.

Dated: New York, N. Y., May 14, 1928.

THE FARMERS' LOAN AND TRUST COMPANY,
As Executor of Archibald D. Russell, Deceased,
Appellant

By W. B. CARDOZO,
Vice-President

Attest:

10

JAMES B. LITTLE,
Asst. Secretary

(Seal)

WALTER E. COOPER,
Proctor for Appellant,
Cranford, N. J.

A true copy.

JOSEPH F. S. FITZPATRICK,
Register

20

PREROGATIVE COURT OF NEW JERSEY.

IN THE MATTER OF THE ESTATE }
OF ARCHIBALD D. RUSSELL, DE- } On Petition on
CEASED. } Appeal.

PETITION

(Filed June 15, 1928)

*To the Honorable Edwin Robert Walker, Ordinary
of the Prerogative Court:* 30

The petition of the Farmers' Loan and Trust Company, a corporation organized under the laws of the State of New York, with its principal place of business at No. 22 William Street, in the Borough of Manhattan, City, County and State of New York, shows that:

1. Petitioner is the executor of the last will and testament of Archibald D. Russell, who died a resident of the County of Mercer, State of New

Jersey, on the 29th day of November, 1919, leaving a last will and testament which was duly admitted to probate in the Surrogates' Court of said county on the 15th day of December, 1919. Letters testamentary were issued to your petitioner by said court on or about said date.

2. That your petitioner thereafter and on or about April 21, 1921, filed with the Comptroller of the Treasury of the State of New Jersey, an affidavit setting forth the assets of the estate of said decedent insofar as they were then known to the petitioner, and also setting forth a list of the debts of the decedent, funeral and administration expenses insofar as they were then known to the petitioner, for the purpose of the fixing and assessment of the New Jersey inheritance tax upon the taxable transfers in said estate. That thereafter other and further affidavits of the executor or its representatives, relative to the New Jersey transfer inheritance tax proceeding, the property constituting the assets of said estate, and the items properly deductible therefrom were filed with the State Comptroller.

3. That on or about the 26th day of November, 1920, the executor paid and deposited with the Comptroller of the Treasury of New Jersey the sum of \$200,000 on account of any transfer inheritance tax which may have been duly and properly assessable and assessed by the State Comptroller in the estate of said decedent.

4. That on or about the 20th day of March, 1928, the Comptroller of the Treasury issued an assessment in said estate, in and by which he found that the total gross taxable estate of said decedent amounted to the sum of \$8,602,656.94, which was subject to the payment of debts and expenses, etc., in the sum of \$1,450,331.35, leaving a net estate for distribution and taxation of \$7,152,325.50.

5. That the tax as found by the Comptroller, and which was assessed by him amounted to the sum of \$153,008.99, and in addition thereto, the said Comptroller fixed and assessed a tax upon certain contingent remainders provided for in said will in the sum of \$9,472.15, making a total New Jersey transfer inheritance tax in said estate as fixed and assessed by the said Comptroller of \$162,481.14.

6. That in arriving at the gross estate of the said decedent for the purpose of the transfer inheritance tax, the Comptroller of the Treasury *in contravention* of the provisions of the transfer inheritance tax law as enacted by Chapter 228 of the Laws of 1909, and the amendments and supplements thereto, *erroneously and illegally, included* therein, and fixed a tax upon the transfer, of the sum of \$275,000.00, representing the purported value of real property known as Edgerstoune, located at Princeton, State of New Jersey, which property was conveyed by the decedent prior to his death by warranty deed dated May 15, 1918, to Ethelberta Pyne Eppley, Archibald Douglass Russell, Jr., Helen Rutherford Russell and Constance Rivington Russell. 10 20

7. That in arriving at the amount of the gross estate of said decedent, the Comptroller of the Treasury *in contravention* of the provisions of the Transfer Inheritance Tax Law as enacted by Chapter 228 of the Laws of 1909, and the amendments and supplements thereto, *erroneously and illegally* included therein, and assessed a transfer inheritance tax upon the transfer of, the sum of \$17,800, representing the purported value of personal property and chattels transferred by the decedent, on or about May 15, 1918, to Ethelberta Pyne Eppley, Archibald D. Russell, Jr., and Helen Rutherford Russell, and Constance Rivington Russell. 30

8. That said real and personal property so conveyed by said decedent and referred to in para-

graphs "6" and "7" respectively hereof, were not property of the said decedent on the date of his death, and did not constitute a part of the estate of the said decedent at that time, nor was the transfer thereof subject to the tax imposed by the provisions of the New Jersey Transfer Inheritance Tax Law as enacted by Chapter 228 of the Laws of 1909 and the amendments and supplements thereto.

9. That petitioner as executor of the last will and
10 testament of the said decedent, paid to the Collector of Internal Revenue, of the First District of New Jersey, the sum of \$1,237,743.50, representing the federal estate tax properly due and payable to the United States Government in the estate of said decedent as provided by law, which sum was paid in the respective amounts and on the respective dates as follows:

	April 10, 1921	\$279,604.00
	May 25, 1921	844,825.98
20	October 24, 1923	55,198.72
	December 13, 1923	22,698.20
	August 5, 1927	35,416.60

10. That the Comptroller of the Treasury in
arriving at the net estate of said decedent for the purpose of the transfer inheritance tax in contravention of the provisions of the Transfer Inheritance Tax Law as enacted by Chapter 228, Laws of 1909, and the amendments and supplements thereto; erroneously and illegally disallowed as a
30 deduction from the gross estate of said decedent, the sum of \$753,416.30 of the said federal estate tax so properly due and payable in the estate of said decedent and paid by the executor, and allowed as a deduction from the gross estate as representing the federal estate tax only the sum of \$484,327.20.

Your petitioner therefore prays that this Court may hear and determine this appeal and

(a) That this Court decree that the action of the Comptroller of the Treasury in including in the

gross estate of said decedent, the purported value of real and personal property referred to in paragraphs sixth and seventh respectively hereof, to be erroneous and illegal;

(b) That this Court decree that the said assessment of tax be set aside insofar as it attempts to fix a tax upon the transfer of the sum of \$292,800, representing the purported aggregate value of the said real and personal property;

(c) That this Court decree the action of the 10
Comptroller of the Treasury in disallowing as a deduction from the gross estate of said decedent, the federal estate tax paid in the sum of \$753,416.30 to be erroneous and illegal;

(d) That this Court decree that the said assessment of tax be set aside insofar as it attempts to fix a tax upon the gross estate of said decedent undiminished by the said sum of \$753,416.30;

(e) That this Court remit the record to the
Comptroller of the Treasury for reassessment of 20
the transfer inheritance tax in said estate;

(f) That this Court grant such other and further relief to the appellant as to it may seem proper.

And your petitioner will ever pray.

Dated: June 13th, 1928.

THE FARMERS' LOAN AND TRUST COMPANY,
Individually and as Executor as aforesaid
(Petitioner)

(Corporate Seal)

By A. V. HEELY,
Vice-President 30

Attest:

J. B. LITTLE,
Asst. Secretary

WALTER E. COOPER,
Proctor for Petitioner,
511 Central Avenue,
Cranford, N. J.

A true copy.

JOSEPH F. S. FITZPATRICK,
Register

PREROGATIVE COURT OF NEW JERSEY.

IN THE MATTER OF THE ESTATE }
OF ARCHIBALD D. RUSSELL, DE- } On Petition.
CEASED.

ANSWER OF RESPONDENT

10 (Filed June 25, 1928)

*Answer of Respondent, Newton A. K. Bugbee,
Comptroller of the Treasury, to the Petition of
Appeal.*

Respondent, answering the petition, says:

1. Paragraphs one, two, three, four, five and
nine are admitted.

2. Paragraphs six, seven, eight and ten are
denied.

20 Respondent prays that the assessment and levy
of tax as heretofore made by him be in all respects
affirmed.

EDWARD L. KATZENBACH,
*Attorney General of New Jersey,
Proctor for and of Counsel
with Respondent*

A true copy.

JOSEPH F. S. FITZPATRICK,
Clerk

30

PREROGATIVE COURT OF NEW JERSEY.

IN THE MATTER OF THE ESTATE }
OF ARCHIBALD D. RUSSELL, DE- } On Petition of
CEASED. } Appeal.

ORDER OF REFERENCE

(*Filed July 24, 1928*)

This matter being opened to the Court by Walter 10
E. Cooper, Esq., Proctor for and of Counsel of the
appellant in the above entitled appeal, and it
further appearing that due notice of this applica-
tion has been given to the Attorney General, and
also that the Attorney General consents hereto.

Now, on motion of Walter E. Cooper, Esq.,
Proctor for and of counsel for the appellant, on the
24th day of July, 1928, ordered, that the above
entitled matter be referred to Honorable M. G. 20
Buchanan, one of the Vice-Ordinaries of this Court,
to hear the same for and on behalf of the Ordinary
and to report thereon to him and to advise what
order or decree should be made herein.

E. R. WALKER,
Ordinary

I hereby consent to the signing and entry of the
above order.

EDWARD L. KATZENBACH,
Attorney General of New Jersey, 30
Proctor for and of Counsel
with Respondent

A true copy.

JOSEPH F. S. FITZPATRICK,
Register

PREROGATIVE COURT OF NEW JERSEY.

IN THE MATTER OF THE ESTATE }
 OF ARCHIBALD D. RUSSELL, DE- } On Petition of
 CEASED. } Appeal.

DESIGNATION

(Filed October 13, 1928)

10 The matter being opened to the Court by Walter
 E. Cooper, Proctor for and of counsel of The
 Farmers' Loan and Trust Company as executor of
 the Will of Archibald D. Russell, deceased, ap-
 pellant, and application being made to fix a time
 and place for a hearing on an appeal from a trans-
 fer tax assessment in the above estate, and the
 Attorney General of the State of New Jersey
 consenting to the same;

It is thereupon on this sixth day of September,
 20 1928,

Ordered that the hearing in the said cause be
 held at the Chancery Chambers in the State House,
 Trenton, New Jersey, on the twenty-sixth day of
 February, 1929, at 10:30 o'clock in the forenoon.

MALCOLM G. BUCHANAN, E. R. WALKER,
Vice-Ordinary *Ordinary*

I hereby consent to the making of the above
 designation of the time and place of hearing.

30 WALTER E. COOPER,
 Proctor for Appellant
 EDWARD L. KATZENBACH,
 Attorney General of the
 State of New Jersey

A true copy.
 JOSEPH F. S. FITZPATRICK,
Register

NEW JERSEY SUPREME COURT.

CITY BANK FARMERS TRUST COMPANY (formerly known as The Farmers' Loan and Trust Company) as executor of the last will and testament of Archibald D. Russell, deceased,

Prosecutor,

against

JOHN McCUTCHEON, as Comptroller of the Treasury of the State of New Jersey, and ALBERT C. MIDDLETON, as Treasurer of the State of New Jersey and JOSEPH F. S. FITZPATRICK, as Register of the Prerogative Court of the State of New Jersey,

Defendants.

On Certiorari

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REASONS

(Filed October 29, 1929)

The prosecutor herein, City Bank Farmers Trust Company (formerly known as The Farmers' Loan and Trust Company) as executor of the last will and testament of Archibald D. Russell, deceased, by Walter E. Cooper, its attorney, comes and prays that an alleged assessment of transfer inheritance tax made by the Comptroller of the Treasury in the estate of said decedent under date of March 20, 1928, and a final decree entered in the Prerogative Court under date of July 25, 1929, upon the appeal taken by the said executor from said assessment, may be set aside and reversed and for nothing holden, for the following reasons, to wit:

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1. The said final decree of the Prerogative Court dated July 25, 1929, is illegal and erroneous in that

it ratifies and confirms an assessment of an alleged transfer inheritance tax made by the Comptroller of the Treasury under date of March 20, 1928, in which said assessment the said Comptroller erroneously and illegally taxed the transfer of the sum of \$292,800.00 representing the purported value on the date of decedent's death, of certain real and personal property transferred by the said decedent by deed dated May 15, 1918, to his four children,
10 namely, Ethelberta Pyne Eppley, Archibald Douglas Russell, Jr., Helen Rutherford Russell (now known as Helen R. Benson) and Constance Rivington Russell (now known as Constance R. Winant).

2. That the transfers provided for in said deed were not made by the decedent in contemplation of death, nor were the said transfers intended by the grantor to take effect in possession or enjoyment at or after his death within the meaning and
20 scope of the provisions of "An Act to Tax the Transfers of Property of resident and non-resident decedents by devise, bequest, descent, distribution by statute, gift, deed, grant, bargain and sale in certain cases, approved April 20, 1909," and the amendments and supplements thereto; nor was the said real and personal property so conveyed by the said deed to the said grantees therein mentioned, or the proceeds thereof, the property of the decedent on the date of his death, nor was the transfer
30 thereof subject to, or taxable under, the provisions of said act.

3. That the fact that the grantees, either simultaneously or otherwise, leased the said premises to the said Archibald Douglas Russell, the said grantor, for a term of ten years, for a consideration nominal or otherwise, did not render the transfers provided for in said deed of conveyance of said property to the said grantees, subject to the transfer inheritance tax of the State of New Jersey

upon the ground that the said transfers were intended by said grantor to take effect in possession or enjoyment at or after his death, within the purview of the said law, or upon any other ground.

4. The evidence submitted in the said proceeding does not justify in law the assessment of a tax upon the transfer of the said property.

5. That the said final decree of the Prerogative Court, dated July 25, 1929, and the said assessment of tax by the Comptroller of the Treasury under 10 date of March 20, 1928, is for divers other reasons erroneous, illegal, unjust and oppressive and should be set aside and for nothing holden.

October 29, 1929.

WALTER E. COOPER,
Attorney for Prosecutor,
Cranford, N. J.

NEW JERSEY SUPREME COURT.

20

January Term 1930

CITY BANK FARMERS TRUST COM- PANY, Executor &c. ARCHIBALD D. RUSSELL, deceased, <i>Prosecutor,</i>	) On Certiorari
<i>vs.</i>	
JOHN McCUTCHEON, Comptroller, etc. &c., et als., <i>Respondents.</i>	)

3)

ORDER OF AFFIRMANCE

(*Filed August 18, 1930*)

This cause coming on to be heard at the January Term, 1930, and the Court having inspected the return to the writ of certiorari issued therein and having considered the reasons assigned for the reversal of the decree of the Prerogative Court

entered in the matter of the estate of the above named decedent and being of the opinion that said decree should be affirmed:

It is on this 10th day of July, 1930, Ordered that the decree of the Prerogative Court removed by the writ of certiorari in this cause be and the same is hereby affirmed.

On motion of

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W. A. STEVENS,
Attorney General of New Jersey,
Attorney for Defendants.

Entered July 10th, 1930.

I, Fred L. Bloodgood, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the notice of appeal filed and also of a rule entered in the minutes of the Court in the above-stated cause.

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[SEAL.]

In testimony whereof I have set my hand and the seal of said Court at Trenton, this fifteenth day of August, A. D. nineteen hundred and thirty.

FRED L. BLOODGOOD,
Clerk.

CITY BANK FARMERS TRUST Co. *et al.* v. McCUTCHEON, Comptroller, *et al.*

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Argued January Term, 1930, before GUMMERE, C. J., and CAMPBELL, J.

* * * * *

PER CURIAM:

This writ brings up for review that portion of a decree of the Prerogative Court of July 25, 1929, which affirms a transfer inheritance tax assessment upon certain real and personal property of Archibald D. Russell, deceased, who died, intestate, November 29, 1919, a resident of Princeton, Mercer County, this State. The net estate subject to the

jurisdiction of this State was \$7,152,325.59, which includes \$392,800 of value of real and personal property transferred by decedent to his four children by deed dated May 15, 1918, and which is the subject of the tax now under review.

The records show that Archibald D. Russell, on May 15, 1918, then being the owner of real property located at Princeton, as well as the contents of the homestead situate thereon, conveyed such property, by warranty deed, bearing that date, to his four children. On May 16, 1918, the day immediately succeeding such conveyance, they executed and delivered a lease to their father of the same premises and property for a period of ten years at a nominal rental of \$1 per year. The father died approximately one and one-half years thereafter, and down to the time of his death he was and from the date of the before-mentioned transfer or conveyance remained, in full possession and enjoyment of the property, both real and personal.

The Comptroller found and held that this deed and lease constituted and made for a single transaction, and was one, intended by the decedent, to take effect in beneficial possession and enjoyment, only at and after the decease of the donor.

The learned Vice Ordinary confirmed this, and found that at the time of the transfer the decedent, Russell, was sixty-five years of age, with a life expectancy of eleven years; that he died in one and one-half years after the transaction in question of diabetes, a progressive disease; that there was sufficient proof to support the conclusion that at the date of the gift the donor was not in average health, but much below it; and that this he knew, and hence he contemplated that a term of ten years, in all probability, would be greater than this remaining years of life.

In this finding we think the Vice Ordinary was justified upon the proofs before him, and the decree under review should be affirmed.

The prosecutor now seems to contend, and devotes a large portion of its brief thereto, that, if there should be a tax against this property, the present assessment is made upon an improper and illegal basis, as it is made upon the actual market value of the lands and chattels, and should have been made only upon the value of the leasehold thereof in the estate of Russell.

10 We think this is without legal or factual merit, and, furthermore, this question does not appear to have been raised or argued in the Prerogative Court, and therefore may not be raised here. The decree below and the assessment under review should be affirmed, with costs, and the writ dismissed.

BUCHANAN, V. O.

The executor of Archibald D. Russell, deceased, late of Princeton, N. J., appeals from the assessment and levy of transfer inheritance tax made by the Comptroller in respect to the estate of said decedent, and raises two issues.

Testator, about a year and a half before his death, conveyed his residence, "Edgerstoune," with its furnishings and other personalty therein contained, to his four children, by deed dated May 15th, 1918. The Comptroller determined that this was a transfer intended to take effect in possession or enjoyment at or after the death of the transferor, and assessed the taxes under the statute accordingly. Appellant contends that this was error. 10

A Federal estate tax of over \$1,000,000 was assessed against, and paid by, decedent's estate. About one half of decedent's total estate was composed of real estate situate in New York, the transfer of which was of course not taxable by New Jersey, under our statute. In determining the value of the property, the transfer whereof was taxable in this State, the Comptroller refused to allow deduction of the full amount of the Federal estate tax,—disallowing deduction of such portion thereof as was proportionate to the ratio between the New York real estate and the total estate. Appellant contends that this was error. 20

Considering first, the transfer of the residence and contents: 30

That which is to be determined is, of course, as appellant's proctor concedes, the substance of the entire transaction,—not the mere effect of the deed of conveyance, standing alone, if there be other factors entering into the transaction.

The deed bears the typewritten date May 15th, 1918. It was drawn by, executed in the presence of, and acknowledged before, the late Bayard

Stockton,—well known as a careful practitioner. The date of the acknowledgment is June 22d, 1918,—in Mr. Stockton's handwriting. The deed was recorded by Mr. Stockton on June 25th, 1918. There is no other evidence as to the date of its actual execution and delivery. Assuredly the inference is justifiable that it was executed and delivered June 22d, 1918, and not before.

The four children executed a lease back to their
10 father. The lease bears typewritten date May 16th, 1918. There is no other evidence as to the date of its execution,—which was presumably therefore on that date. It is a justifiable inference therefore that the lease was executed and delivered prior to the deed; and hence that decedent intended them both as a part of the one transaction,—that the execution of the deed was conditioned upon the execution of the lease.

The lease is for a rent of one dollar a year.
20 Admittedly it was executed by all four children, yet the oldest one,—the only one who testified,—did not remember anything about executing any such paper. The inference is justifiable that the reason it made no impression on her mind,—or the others; for they were not called to testify,—was that it was of no importance to them; they simply signed a paper at their father's request. The same daughter testified that at the time her
30 father told her he was going to deed the place to the children he said he knew his children all would be willing to have an amicable "arrangement" about his staying at the residence.

The reason put forward as the motive for the gift is that Mr. Russell had lost interest in the place after his wife's death a year or so before, and preferred the seashore as a residence, and wanted to relieve himself of the responsibility of keeping up the large establishment and turn that burden over to his children. Yet the evidence is

uncontroverted and unexplained that after the deed he continued to live at the place and to run it, maintain it, and pay the expenses just as he had before,—although his son, aged 29, and his two unmarried daughters lived there too, and had large means of their own.

If the lease back had been for the period of the grantor's life, instead of for a term of years, the inevitable conclusion from the evidence would be that the deed and lease were all a part of one transaction by which the grantor intended to transfer the legal title but to retain himself the possession and enjoyment until his death. Does the fact that the lease back was for a term of ten years prevent such a conclusion? Under the circumstances of the case it would seem not. 10

The substance of the whole transaction was,—at least such a conclusion is entirely justified by the evidence,—that the grantor conveyed the property to his children, reserving to himself the possession and enjoyment thereof, rent-free, for a period of ten years. 20

The grantor was within a few days of 65 years of age at the time. If in average health his expectancy of life would have been admittedly, a trifle over 11 years. But he died in a year and a half,—of diabetes. It is a matter of common knowledge that diabetes is a progressive disease,—at that time (which was prior to the development of the insulin treatment) usually fatal eventually. 30

The daughter testifying as to the year 1918 said she did not think he seemed very ill; that she did not know how long he suffered before his death; that he was not on a strict diet, &c. There is contrary evidence it is true, but bearing in mind that the daughter's interest was adverse to that of the State, the inference is justifiable, from these admissions, and from the nature of the disease which caused his death so soon afterwards, that the

grantor was ill in 1918 with diabetes: and that some kind of a diet had been prescribed, even if not strict, or even if he did not adhere to it.

There would seem to be sufficient evidence to support the conclusion that at the time of the gift the grantor was not in average health but much below it, and that he knew it, and hence that he contemplated that a term of ten years would in all probability be longer than the period of his remaining years of life.

Since there is evidence to support the several inferences and conclusions mentioned, it is concluded, that the appellant has failed to establish that the Comptroller erred therein. The presumption is in favor of the determination below; the burden is on the appellant.

Adopting these conclusions as valid, therefore, there remains but a single legal question,— to wit: Where man makes a substantial transfer, by gift, reserving to himself the beneficial possession and enjoyment of such property for a term of years which he thinks will probably be longer than his remaining life, is such transfer taxable under our statute?

The statute makes such a transfer subject to tax, if the gift made was *intended* to take effect in possession or enjoyment at or *after* the transferor's death. It seems beyond argument that a donor who reserves to himself the entire beneficial possession and enjoyment of the property given, for a definite term of years, expecting that he will die before the expiration of that term, *intends* the gift to take effect in possession and enjoyment at or *after* his death. It is concluded therefore that such gift is taxable, and the tax in question on this ground of appeal will be affirmed.

It may be added, that examination of the several cases relied on by appellant discloses an utter failure of those cases to support its argument. In

Re Dolan's Estate, 279 Pa. State 582, a tax was imposed, under a statute passed in 1919, in respect to a trust created in 1908, (eleven years before the passage of the act). Nothing was reserved to the grantor, except a right of revocation, which was never exercised. The Orphans' Court set aside the tax and the Supreme Court affirmed this ruling, on the ground that the reservation of the right of revocation did not make the transfer one intended to take effect at or after the grantor's death. In 10
Shukert v. Allen, 273 U. S. 545, a grantor had created a trust whereof the income was to be accumulated, and neither income nor principal paid over to the beneficiaries until thirty years from the date of the trust. The grantor expected to live not more than fifteen or twenty years. The District Court (300 Fed. 754) upheld the tax on the ground that thirty years was a time intended to be at or after the grantor's death. The Supreme Court in no wise controverted *that* reasoning, but 20
set aside the tax, because nothing whatever had been reserved to the grantor's own use or enjoyment. In *Nichols v. Coolidge*, 247 U. S. 531, the facts were much like the case at bar, but with two very important differences:—(1) The deed had been made in 1917, two years *before* the enactment of the Federal statute in 1919; and (2) the lease back by the children was for one year, with provisions for renewal, but "always subject to the right in the lessors" (the children) "to terminate 30
the term in any year." Although "the parties contemplated that the premises would be enjoyed by decedent and her husband as long as they might desire," * * * "the decedent had no valid agreement to that effect." In the case at bar the deceased did have a valid agreement giving him the possession and enjoyment for a time expected and intended to continue until after his death.

Turning now to the second ground of appeal: it seems clear that the determination in the case of *In re Roebling's Estate*, 89 N. J. Eq. 163; affirmed *sub. nom. Bugbee v. Roebling*, 94 N. J. Eq. 438, is dispositive of the issue raised in the case at bar. Appellant says that the point now *sub judice* was decided in the *Roebling* case. This is not strictly correct,—for the *Roebling* case involved the Federal tax under the Act of 1916, while the
10 present case deals with the Federal tax under the act of 1918; moreover in the *Roebling* case the point was not raised as to the validity of a proportionate division of the Federal tax deduction.

It was held, however, by the Court of Errors and Appeals as well as by this Court, in the *Roebling* case, that the Federal estate tax was to be deducted in computing the value of the property “transferred” for the purpose of ascertaining the tax under the New Jersey statute, for the reason
20 that the Federal tax was a tax on the transfer of property *from the decedent*, while the New Jersey tax was a tax on the transfer *to the executor*, administrator or beneficiary; that “the property comes to the executor, or administrator *already burdened* with the federal (tax) lien.” The Federal tax under the act of 1918 is precisely the same kind of tax as under the act of 1916; the amendment of 1922, to the New Jersey statute,
30 (providing for proportionate allowance or deduction, only), had not been enacted at Mr. Russell's death; and hence the determination here must be the same as in the *Roebling* case.

Since the succession to the decedent's property is burdened with the Federal estate tax, it must be burdened with the whole of such tax.

Moreover, the Federal statute makes the executor or administrator personally liable for the whole of the Federal tax. Since he is so liable, and suable, for the whole of this tax, he necessarily

has the right to exonerate himself from such liability by payment of the entire tax, out of the estate in his hands, without waiting for suit. That which passes to the residuary legatee or distributees therefore is the estate thus diminished by the Federal tax, and (in the absence of the subsequent provision in our statute making specific provision for only partial deduction) the New Jersey tax can be computed only on the basis of the estate so diminished.

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It is argued on behalf of the State that such a result is inequitable in that it burdens the beneficiary receiving the New Jersey property with the Federal tax imposed on the transfer of the New York property in addition to the Federal tax imposed on the transfer of the New Jersey property. If the result be inequitable, it cannot be helped by this Court or any other Court. The remedy must come from Congress, or, so far as computation of the New Jersey tax is concerned, from the 20 legislature.

It may be noted that the effect of the 1922 amendment in this behalf makes the situation still more onerous than before, to a residuary legatee or distributees,—for that amendment deals simply with the computation of the New Jersey transfer tax, and does not affect the distribution of the estate by the executor or administrator. By the 1922 amendment the amount of the New Jersey tax is increased and the residuary estate correspondingly 30 decreased, as compared with the situation prior to 1922.

The inequity argued by the Attorney General however would seem more apparent than real. In the instant case the beneficiaries of the New York property and of the New Jersey property are practically indetical. Moreover, (except where a decedent dies without having had the time or opportunity so to do) the decedent may prevent the

alleged inequity, if he so desires, by appropriate provision in his will.

On the second ground of appeal, then, the appellant is entitled to relief,—and the record will be remitted to the Comptroller with directions to reassess the tax, allowing the deduction of the entire Federal tax.

NEW JERSEY SUPREME COURT.

CITY BANK FARMERS TRUST COMPANY, (formerly known as The Farmers' Loan and Trust Company) as executor of the last will and testament of ARCHIBALD D. RUSSELL, deceased,

Prosecutor-Appellant,
vs.

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JOHN McCUTCHEON, as Comptroller of the Treasury of the State of New Jersey, and ALBERT C. MIDDLETON, as Treasurer of the State of New Jersey and JOSEPH F. S. FITZPATRICK, as Register of the Prerogative Court of the State of New Jersey,

Defendants-Respondents.

On Certiorari

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NOTICE OF APPEAL FROM ORDER OF
AFFIRMANCE OF THE SUPREME COURT
AND GROUND OF APPEAL

(Filed August 5, 1930)

To William A. Stevens, Attorney General of New Jersey, Attorney for Defendants-Respondents.

SIR: Please take notice that the prosecutor appellant appeals to the Court of Errors and Appeals from the order of affirmance entered in the above stated cause on July 10, 1930, on the following ground, to wit:

1. The Supreme Court erred in affirming the final decree of the Prerogative Court, dated and filed the 25th day of July, 1929, in so far as said decree affirmed an assessment of New Jersey Transfer Inheritance Tax by the Comptroller of the Treasury upon the transfer of real and per-

sonal property by Archibald D. Russell by deed dated May 15, 1918, in that:

(a) The said final decree of the Prerogative Court dated July 25, 1929, is illegal and erroneous in that it ratifies and confirms an assessment of an alleged transfer inheritance tax made by the Comptroller of the Treasury under date of March 20, 1928, in which said assessment the said Comptroller erroneously and illegally taxed the transfer
10 of the sum of \$292,800.00 as representing the purported value on the date of decedent's death, of certain real and personal property transferred by the said decedent by deed dated May 15, 1918, to his four children; namely, Ethelberta Pyne Eppley, Archibald Douglas Russell, Jr., Helen Rutherford Russell (now known as Helen R. Benson) and Constance Rivington Russell (now known as Constance R. Winant).

(b) The transfers provided for in said deed
20 were not made by the decedent in contemplation of death, nor were the said transfers intended by the grantor to take effect in possession or enjoyment at or after his death within the meaning and scope of the provisions of "An act to tax the transfers of property of resident and non-resident decedents by devise, bequest, descent, distribution by statute, gift, deed, grant, bargain and sale in certain cases, approved April 20, 1909", and the amendments and supplements thereto; nor was the said real and
30 personal property so conveyed by the said deed to the said grantees therein mentioned, or the proceeds thereof, the property of the decedent on the date of his death, nor was the transfer thereof subject to, or taxable under, the provisions of said act.

(c) The fact that the grantees, either simultaneously or otherwise, leased the said premises to the said Archibald Douglas Russell, the said grantor, for a term of ten years, for a considera-

tion nominal or otherwise, did not render the transfers provided for in said deed of conveyance of said property to the said grantees, subject to the transfer inheritance tax of the State of New Jersey upon the ground that the said transfers were intended by said grantor to take effect in possession or enjoyment at or after his death, within the purview of the said law, or upon any other ground.

(d) The evidence submitted in the said proceeding does not justify in law the assessment of a tax upon the transfer of the said property. 10

(e) The said final decree of the Prerogative Court, dated July 25, 1929, and the said assessment of tax by the Comptroller of the Treasury under date of March 20, 1928, is for divers other reasons erroneous, illegal, unjust and oppressive and should be set aside and for nothing holden.

WALTER E. COOPER,
Attorney for and of Counsel with
Prosecutor-Appellant. 20

Sat Below:

ON CERTIORARI

C. J. Gummere,

J. Campbell

ON APPEAL TO PREROGATIVE COURT

V. O. Buchanan

Service of within notice of appeal and grounds of appeal duly acknowledged this fourth day of August, 1930. 30

W. A. STEVENS,
Attorney General of New Jersey,
Attorney for Defendants-Respondents.

New Jersey Court of Errors and Appeals

CITY BANK FARMERS TRUST COMPANY
(formerly known as The Farmers'
Loan and Trust Company) as ex-
ecutor of the Last Will and Testa-
ment of Archibald D. Russell, De-
ceased,

Prosecutor-Appellant,

against

On Appeal.

JOHN McCUTCHEON, as Comptroller of
the Treasury of the State of New
Jersey, ALBERT C. MIDDLETON, as
Treasurer of the State of New Jer-
sey, and JOSEPH F. S. FITZPATRICK,
as Register of the Prerogative
Court of the State of New Jersey,
Defendants-Respondents.

Reply Brief of Prosecutor-Appellant.

The briefs of the respondents have wholly misapprehended the significance of the leasehold, or of the property rights retained by the grantor, assuming for purposes of argument the theory of the State that the lease constituted a reservation of the income. The error into which the State falls is that possession or uses of the property passed to the children upon the death of the father. This is not so. The children were not

the legatees under the will of their father nor was the property transferred to them at death. The Farmers' Loan and Trust Company as trustee was the legatee of the estate of Archibald D. Russell and all of the net assets of the estate were received by the said trustee to be held by it for the benefit of unascertained remaindermen. Among the assets received by the estate was this leasehold which had a period of approximately eight and one-half years to run.

The death of Archibald D. Russell gave to his four children, the owners of the real estate, no more property right than existed in them prior to his death. They were no richer nor poorer in so far as this property was concerned by reason of his death. They could not enter into possession of it any more so than they could have during his life, until the expiration of the leasehold. On the other hand they could sell and borrow upon the same without let or hindrance.

It is true that after the death of Archibald D. Russell the executors surrendered the lease because they thought the leasehold of no value. But this was by act of the executors in their judgment and discretion, and not the act of the grantor.

The point in fine is that this was not a transfer under any theory that took effect upon the death of the transferor, and the leasehold (or reservation if it be necessary to call it that) excludes the hypothesis that Mr. Russell *intended* the transfer to take effect only at his death. If this had been so the lease no doubt would have been of a different nature, assumedly, and would have ceased or terminated at or about his death. It may be noted also that there was no right of renewal in this leasehold.

**Many of the cases cited by the State are not
pertinent to the facts in suit.**

In nearly all of the cases cited by the State in support of this contention, it will be found, that the transfer subjected to tax were cases where the transfers constituted practically all of the property of the grantor or a substantial portion thereof and it was thought by the courts that an intention to avoid the tax could be read from the fact of the transfer. It will be noted that this element runs prominently through practically all of the cases cited by the State. This is not so in the case in suit. It would border upon the ridiculous to suggest that Archibald D. Russell had any idea in making this transfer of avoiding the New Jersey inheritance tax or any other inheritance taxes. The whole value of the property transferred was inconsequential when measured by the full value of the estate that he actually left at the time he died. We have reckoned that it is less than one-fortieth of his estate.

**In Respect of some of the cases cited by the
State.**

At page 17 of the State's brief it is stated "It is also worthy of note that the *Schmidlapp* case, supra, is, in many details, not unlike the case at bar." This observation has been read with amazement. The differences between the facts in the case in suit and those in the *Schmidlapp* case are so pronounced and so antagonistic that it seems impossible that anyone could confuse the two. In the *Schmidlapp* case (236 N. Y. at p. 281, et seq., per Cardozo, J.) the deed not only reserved the income to the grantor for his life but

not after a certain date, but also reserved the right at any time during the continuance of the trust to "modify or alter in any manner, or revoke in whole or in part this indenture, or any or all of the trusts then existing and the limitations and estates and interest in property hereby created and provided for subsequent to such trusts." In addition the grantor reserved the right to control and direct all investments and reinvestments of the trust fund.

In other words in the *Schmidlapp* case practically every element of ownership was reserved to the grantor. It has frequently been said by lawyers in referring to the *Schmidlapp* case that there was relatively nothing more than an agency created. A close examination of the deed in that case will indicate that there was practically no property right transferred to the trustee or to anyone else.

This is not so in the case in suit. Mr. Russell irrevocably transferred the real property and the tangible personalty comprising its contents. The grantees were fee owners. No act of the grantor or any law could undo what had been done. The grantees from May 15, 1918, had the absolute right to dispose of and sell this property subject, of course, to the outstanding leasehold of ten years. It was liable for the payment of their debts. They were liable for taxes upon the property. We submit that probably no two states of fact could be set up opposite each other which would more definitely illustrate the difference between an irrevocable completed transfer and an incomplete, tenuous and ambulatory transfer. In the *Schmidlapp* case the transfer was testamentary in character. In the *Russell* case in suit the transfer was anything but testamentary.

But the State misapprehends the application of the decisions of the courts even more definitely when it approaches the decisions of the United States Supreme Court in *Shukert v. Allen*, 273 U. S. 545, and in *Nichols v. Coolidge*, 274 U. S. 531.

At pages 15, 16, and again at page 30 of the brief of the respondent the State quotes with approval the opinion of the lower court in *Shukert v. Allen*, and then assumes that the United States Supreme Court had not reversed the lower court upon the point for which it is citing the lower court opinion. They make the point that the Supreme Court of the United States rested in full its decision in the *Shukert* case solely upon the ground that no income was reserved to the grantor. At page 547 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.
* * * *Of course, it was not argued that every vested interest that manifestly would take effect in actual enjoyment after the grantor's death was within the statute.*” (Italics ours.)

We do not understand how it is possible in view of the United States Supreme Court decision to cite the lower court opinion which was repudiated by the United States Supreme Court. If this need illustration and support it may be found in the decision of the United States Supreme Court in

May v. Heiner, 281 U. S. 238, wherein the Court held the transfer was not one intended to take effect in possession or enjoyment at or after death notwithstanding the remaindermen could not come into possession of the property until at or after the death of the grantor, and further notwithstanding there was a possibility of the use of the property by the grantor.

Nichols v. Coolidge we submit is wholly decisive of the case in suit. The facts are practically on all fours. It seems idle to us to say that because the case of *Nichols v. Coolidge* arose under the Federal law, and the *Russell* case is presented under a state law, notwithstanding that the facts of the two cases are almost identical, that the United States Supreme Court's opinion and decision is without force. The doctrine is the same. The facts upon which the doctrine is announced are the same. Is a transfer that is wholly complete, even though subject to a leasehold, a transfer intended to take effect in possession or enjoyment at or after death? The Supreme Court says not. The doctrine it announces is as true under the state law as it is under the Federal law. It is bound to be true because there is no property right reserved to the grantor (if by a forced construction it may be assumed that there has been a reservation at all in the case in suit) other than the leasehold.

The State has permitted itself to become mentally confused at page 33 of the brief wherein it refers to the opinion in *Saltonstall v. Saltonstall*, 276 U. S. 261, at p. 270, in which decision the United States Supreme Court referred to the decision in *Nichols v. Coolidge*, and treated of the character of the tax. This had nothing to do with the transfer of this real estate. This

language of the United States Supreme Court in both the *Saltonstall* case and in the case of *Nichols v. Coolidge* had to do with the trust created by Mrs. Coolidge in which trust she had reserved the income to herself for the period of her life but prior to her death had relinquished the same. It had to do also with a trust that was measured by the life of the grantor. The quotation on page 33 of the brief has nothing in the world to do with the case in suit in theory, in fact or in law.

We stated in the original brief that we knew of no case in which the question of the health of the grantor was pertinent in the determination of whether or not a transfer was one intended to take effect in possession or enjoyment at or after death. The State refers us to the decision of an Indiana court in the case of *Conway's Estate v. State*, 120 N. E. 717. It is true that in that case the Court said at page 719 what is quoted in the State's brief herein at p. 43. But obviously the Attorney General has overlooked that this was not the decision of the Court in the *Conway* case but was an observation made in the opinion and mere dictum. The decision of the case is set out at p. 721, and is as follows:

"The view we have taken of the statute makes it unnecessary for us to determine whether the evidence tends to prove that the transfers were intended to take effect at or after the death of the grantor.

There being some evidence tending to prove that the conveyances were made in contemplation of the death of the grantor, the decision is sustained by sufficient evidence."

The tax as applied is unconstitutional.

We think the State has misapprehended the right of the appellants herein to argue and contend that the statute is a violation of the Fourteenth Amendment of the Constitution of the United States in so far as it attempts to impose a tax upon the transfer in suit as it has been imposed by the State Comptroller. As pointed out in our main brief, in the Prerogative Court and in the New Jersey Supreme Court, the briefs of the appellants definitely claim that the Constitution of the United States was violated. It is claimed again herein. We submit that if the gift was not made in contemplation of death (and it is stipulated that it is not) then if no property is transferred at death the State may impose no tax. There was no shifting of economic benefits by virtue of death herein. The only asset in respect of this transaction owned by the decedent was a leasehold which had approximately eight and one-half more years to run. If this leasehold had a value it could have been subjected to tax. A tax on anything else is in violation of the Fourteenth Amendment of the Constitution of the United States, the protection of which amendment the appellants herein invoke.

Respectfully submitted,

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NEW JERSEY

Court of Errors and Appeals

CITY BANK FARMERS TRUST
COMPANY (formerly known as
the Farmers' Loan and
Trust Company) as executor
of the last will and testament
of Archibald D. Russell, de-
ceased,

*Prosecutor-Appellant,
against*

On Certiorari.

JOHN McCUTCHEON, as Comp-
troller of the Treasury of
the State of New Jersey, and
ALBERT C. MIDDLETON, as
Treasurer of the State of
New Jersey and JOSEPH F. S.
FITZPATRICK, as Register of
the Prerogative Court of the
State of New Jersey,

Defendants-Respondents.

On Appeal.

BRIEF FOR DEFENDANTS-RESPONDENTS.

This appeal is from a judgment of the Supreme Court, entered July 10, 1930 (S. C. 67), sustaining that portion of a decree of the Prerogative Court, entered July 25, 1929 (S. C. 9), in the Matter of the Estate of Archibald D. Russell, deceased, late of Mercer County, New Jersey, which affirmed a transfer inheritance tax assessment by the Comp-

troller of the Treasury on the transfer of certain property, real and personal, by deed dated May 15, 1918, and determined by him to have been made as a transfer intended to take effect in beneficial possession and enjoyment at or after the death of said decedent.

STATEMENT OF FACTS.

Archibald D. Russell died, testate, November 29, 1919, a resident of Princeton, Mercer County, New Jersey. The net estate of said decedent, subject to the jurisdiction of the State of New Jersey, was found by the Comptroller to have a fair market value at the time of death of \$7,152,325.59 (S. C. 22). This figure includes the value of the real and personal property (\$292,800.) transferred by the decedent to his four children by deed dated May 15, 1918, which is now the subject of this review, but is exclusive of the value of decedent's real property located in the State of New York of an approximate value of \$4,362,000, which is not subject to the jurisdiction of the State of New Jersey. It might be noted that the amount of the net estate, as aforementioned, will be considerably reduced, however, by reason of the decree of the Prerogative Court which directs the allowance of Federal Estate Taxes paid the U. S. Government in an amount greatly in excess of that determined by the Comptroller in reaching the value of the net taxable estate.

On March 20, 1928, the Comptroller completed his assessment which showed a direct tax liability of \$153,008.99 (S. C. 21). At the same time he suggested a compromise tax of \$9,472.15 in order to presently adjust all taxes which would in the future accrue on certain contingent portions of the estate (S. C. 20). This suggested compromise was accepted by the estate and all taxes, direct and compounded, were subsequently adjusted.

The records show that Archibald D. Russell, on May 15, 1918, being then the owner of real property located in Princeton, New Jersey, and hereinafter referred to as "Edgerstoune", as well as the contents thereof, conveyed said property by warranty deed bearing that date, to his four children, namely, Ethelberta Pyne Eppley, Archibald D. Russell, Jr., Helen Rutherford Russell and Constance Rivington Russell (S. C. 35, 38).

On May 16, 1918, the four children executed a lease to their father covering said property whereby he was entitled to the full possession and enjoyment of said premises for a period of ten years from the date thereof at a nominal annual rental of \$1.00 (S. C. 39, 41).

Mr. Russell died approximately one year and six months subsequent to the execution of said lease and the record shows that right down to the time of his death he was in full possession and enjoyment of said property.

The Comptroller of the Treasury, in completing the transfer inheritance tax assessment, determined that said deed and lease constituted a single transaction and that under all of the circumstances of the case the transfer was one intended by the decedent to take effect in beneficial possession and enjoyment only at or after his decease and that said transfer was, therefore, taxable under the provisions of the Transfer Inheritance Tax statute. The Prerogative Court, on the appeal agreed with this conclusion and accordingly affirmed the assessment in this regard. The Supreme Court, on review by *certiorari*, sustained the decree below.

POINT AT ISSUE.

The only point at issue before this Court is whether the transfer by the decedent on May 15, 1918, of the real and personal property located at Princeton, New Jersey, to his four children was

intended by him and did, in fact, take effect in beneficial possession and enjoyment at or after his death within the intendment of the Transfer Inheritance Tax Act of this State, Chapter 228, Laws of 1909, sec. 1, sub-section 3, as amended by Chapter 151, Laws of 1914.

While the appeal before the Prerogative Court raised another issue, viz.; whether the Comptroller of the Treasury erroneously determined the amount to be allowed as a deduction on account of Federal Estate Taxes paid to the United States Government, this question is not at issue here since said court held against the contention of the Comptroller of the Treasury and no review of the determination of that court in respect thereto has been taken.

ARGUMENT.

POINT I.

THE TRANSFER BY THE DECEDENT ON MAY 15, 1918, WAS INTENDED TO TAKE EFFECT IN BENEFICIAL POSSESSION AND ENJOYMENT AT OR AFTER HIS DEATH.

(A) Transfers Intended to Take Effect at or After the Death of the Donor are, by Statute, Taxable.

Chapter 228, Laws of 1909, as amended by Chapter 151, Laws of 1914, section 1, sub-section 3, (P. L. 1914, p. 267) provides for the taxation of transfers:

“by deed, grant, bargain, sale or gift * * * intended to take effect in possession or enjoyment at or after death.”

This provision of the statute, which is common to all our inheritance tax acts from the passage of the first in 1892 (P. L. 1892, Chap. 122) down to the present date, has been held, in several cases, to include all transfers where the actual beneficial possession and enjoyment of the property trans-

ferred does not accrue to the transferee until at or after the death of the transferor.

Carter v. Bugbee, 91 N. J. Law, 438

Aff'd 92 N. J. Law, 390

American Board of Comm'r's, etc., v. Bugbee, 98 N. J. Law, 84

Aff'd 101 N. J. Law, 214

In re Harvey, 2 N. J. Misc. Rep. 247

Aff'd 3 N. J. Misc. Rep. 435, 102 N. J. L. 720

Writ of Error dismissed 49 Sup. Ct. Rep. 36

In re Honeyman, 98 N. J. Eq. 638

Aff'd 4 N. J. Misc. Rep. 99, 103 N. J. L. 173

In re Fosdick, 6 N. J. Adv. Rep. 28

Farmers' Loan & Trust Co. Ex'r's of Muller v. Bugbee, 6 N. J. Misc. Rep. 415, 141 Atl. Rep. 579

In fact, respondents do not understand that appellant denies the taxability of such transfers or the right of the state, constitutionally, to include such transfers within the scope of the statute. That question, it would seem, has long since ceased to be a mooted one.

Carter v. Bugbee, supra.

Saltonstall v. Saltonstall, 276 U. S. 260, 271

Keeney v. New York, 222 U. S. 525

Rather, the claim seems to be that since the present transfer took on the form that it did, it must be considered, not as a transfer intended to take effect at or after death, but as a completed gift *inter vivos*.

It is well, first, to point out the fact that it is beyond argument in matters of this kind that the substance, essential character and practical result of the entire transaction must control and not its mere legal form.

In re Hall, 94 N. J. Eq. 398, 404

In re Huggins, 96 N. J. Eq. 275, 281

In re Honeyman, 98 N. J. Eq. 638, 639

In re Harvey, 2 N. J. Misc. Rep. 247

Phillips v. Gnitchel, 27 Fed. (2d) 662

In re Orvis, 223 N. Y. Rep. 1

Matter of Gould, 156 N. Y. Rep. 423

Reish, Adm'r, v. Commonwealth of Pa.,
106 Pa. St. 521

Kelly v. Woolsey, 177 Cal. 325, 328

In re Hall, *supra*, (p. 404)

"It is the essential character of the transaction which is to be looked at, not the mere legal form thereof."

In re Huggins, *supra*, (p. 281)

"The fact that, technically, there was an immediate transfer from Louis to William of only a half interest in his original estate, is of no significance; *it is the net substantial result of the entire transaction that is to be looked at.*" (Italics by respondent)

In re Honeyman, *supra*, (p. 639)

"The question is not of the form but of the substance of the transaction."

Phillips v. Gnitchel, *supra*, (p. 664)

"* * * Escape from taxation does not rest on the form of what has been done, for the law searches out the reality and is not halted or controlled by the form. *Matter of Gould*, 156 N. Y. 423, 51 N. E. 287. What determines liability to the tax is the nature, the essence, the effect of the transaction. If in truth it, in effect, bestowed a bounty or benefaction, and is not a transfer for money's worth it is taxable. In *matter of Orvis*, 223 N. Y. 1, 119 N. E. 88, 3 A. L. R. 1636."

The Vice Ordinary in the case *sub judice* so held, as evidenced by the following excerpt from his conclusions: (S. C. 71.)

“That which is to be determined is, of course, as appellant’s proctor concedes, the substance of the entire transaction,—not the mere effect of the deed of conveyance, standing alone, if there be other factors entering into the transaction.”

This principle, which acknowledges substance and practical result rather than mere legal form, permits the treatment of separate instruments executed at or about the same time as a single transaction, for the purpose of ascertaining the practical effect of the entire transaction.

In re Miller’s Estate, 43 Nev. 12, 28

Matter of Brandreth, 169 N. Y. Rep. 437

In re Dobson’s Estate, 132 N. Y. Supp. 472

Reish, Adm’r, v. Commonwealth of Pa.,
106 Pa. St. 521

In re Miller’s Estate, *supra*, (p. 28)

“* * * The execution of the will, the deed, and the transfer of the stock was one transaction. To determine whether the indenture immediately vested the legal title to the stock so as to exempt the transfer from a transfer tax under the statute, the instruments must be construed together as a single instrument. *In re Brandreth*, 58 App. Div. 575, 69 N. Y. Supp. 142; *State v. Pabst*, 139 Wis. 561, 121 N. W. 360 * * *”

Matter of Brandreth, *supra*, (p. 440)

“* * * * * The two instruments, the transfer of the stock to the daughters and the grant of the dividends and right to vote from the daughters to their father, being executed at the same time, must be construed together as a single agreement. * * *”

In re Dobson’s Estate, *supra*, (p. 473)

“It seems clear that the deed and lease, having been executed and delivered on the same day pursuant to agreement therefor, constitute

one transaction, and must be considered as a single agreement."

Vice Ordinary Buchanan applied this well established principle of law to the case at bar: (S. C. 72)

"* * * It is a justifiable inference therefore that the lease was executed and delivered prior to the deed; and hence that decedent intended them both as a part of the one transaction,—that the execution of the deed was conditioned upon the execution of the lease."

The Supreme Court also approved this rule as will be seen from the following statement taken from the opinion of that Court: (S. C. 69)

"The Comptroller found and held that this deed and lease constituted and made for a single transaction, * * *"

It is the application of these two general principles which supports the broad policy of the law that

"* * * the owner of an estate cannot defeat the payment of a tax by any device which secures to him for life the income, profits or enjoyment thereof."

(In re Choate's Estate, 192 N. W. 857)

To the same effect are:

State Street Trust Co. v. Treasurer and Rec'r General, 209 Mass. 373

Reish v. Commonwealth, 106 Pa. 521

Lilly v. State, 156 Md. 94, 101

The aim of the law is to reach property where, by reasonable deduction, the donor intended to retain its enjoyment until death.

In re Cochrane's Estate, 190 N. Y. Supp. 895

Further, it can be safely said to be the general rule that if the actual intention of the grantor in a deed is that the grantee's possession or enjoyment of the land shall be postponed until after the

grantor's death, the transfer will be subject to inheritance tax, *even though such intention is not evidenced in writing, and despite the fact that the deed is absolute on its face.*

49 A. L. R. 866.

Kelly v. Woolsey, 177 Cal. 325

People v. Moir, 207 Ill. 180, 190

People v. Shaffer, 291 Ill. 142, 148

People v. Porter, 287 Ill. 401, 404

Re Jones, 120 N. Y. Supp. 862

Arnold's Estate, 83 Pa. Sup. Ct. 264

Reish v. Commonwealth of Pa., 106 Pa. 521

The rule and the well recognized principle of law supporting it are aptly stated by the Supreme Court of California in *Kelly v. Woolsey supra*, at page 329:

"The character of the transaction is not wholly determined by the terms of the written instrument employed to accomplish it. Parol evidence of the real agreement is permitted with a latitude similar to that indulged to show a resulting trust or to transform a deed absolute on its face into a mortgage."

If the failure to evidence in writing that a transfer was not intended to take effect in possession and enjoyment during the life of the donor would defeat the inheritance tax, it must be clear that the tax could be defeated in every case by a parent executing a deed to his children relying upon their parol promise to account to him, during his life, for the rents of the property conveyed, or to permit him the unrestricted possession and enjoyment of such property until death.

49 A. L. R. 866,

People v. Moir, 207 Ill. 180, 190

The Supreme Court of Illinois in *People v. Moir, supra*, clearly points out the possibilities of tax evasion if the rule were otherwise, (p. 190)

“If the rents from the lands had been reserved by Robert Moir, during his life, in the deed or by other writing, it would be plain that the deed was not intended to take effect in possession or enjoyment during the life of the grantor. If that was the intention of the parties to the deed, can an inheritance tax on said lands be defeated by reason of the fact that the intention to postpone the possession and enjoyment of the lands until after the death of the grantor is not evidenced in writing. We think not. If the failure to evidence such intention in writing would defeat the inheritance tax, such tax could be defeated in every case by the parent executing a deed to his children and prospective heirs, relying upon their parol promises to account to him for the rents of the lands conveyed during the life of the grantor.”

So the Courts, generally, repudiate the contention that surrounding circumstances and extrinsic facts are immaterial in determining the nature of the transfer, and that the intent as to possession and enjoyment must be ascertained solely from the language of the instrument of transfer.

The statement of Surrogate Baker in *In re Jones' Estate*, (p. 864) is in point:

“* * * The deeds are absolute upon their face as to the title and immediate right of possession and enjoyment and it is contended by the appellant that the intent as to the possession and beneficial enjoyment must be ascertained solely from the language of the deeds, and that the surrounding circumstances and extrinsic facts are immaterial.

I do not believe that the courts of our state have adopted such a rule for cases like this. That rule would be a tempting instrument in the hands of persons disposed to avoid the

burden imposed by the transfer tax law. It is unfortunately true that many of our citizens are disposed to look on a breach of our tax laws as a matter of thrift, and to believe that they may violate such laws without being conscious of moral turpitude. The application of such a rule would permit persons so disposed to execute conveyances of their property, retain possession of the property and conveyances after a technical delivery of the deeds, and, at the death of the grantor, the grantee could maintain that, because the deeds so recited, the transfer was intended to take effect in possession and enjoyment at the date of the deeds, and was not taxable."

So it is, in matters of this kind, that the State is permitted to establish the fact that there was a retention by the grantor of the beneficial possession and enjoyment of the property until the time of his death, even though such evidence of intention may not be in writing. This fact may be established by (a) proof of an oral agreement between the transferor and transferees as to the reservation of possession and enjoyment as long as the transferor might desire, or (b), by proof showing that the transferor, whatever may have been their understanding, verbal or written, was, in fact, in actual beneficial possession and enjoyment of the property, or its income, down to the time of his death.

While it is true, as contended by appellant, that legal title passed when the deed was executed and delivered, nevertheless the equitable estate, i. e., the right to beneficial possession and enjoyment of the property transferred, was deferred or postponed until the grantor's death, and it is the passing into possession and enjoyment of the property which our courts have concluded on numerous occasions brings the transfer within the scope of the

statute, notwithstanding that the legal title may have passed at the date of the deed.

American Bd., etc. v. Bugbee, 98 N. J. L.

84

Congregational, etc. Society v. Bugbee,
101 N. J. L. 214.

In re Harvey's Estate, 129 Atl. Rep. 393

Farmers L. & T. Co. Ex. of Muller v.

Bugbee, 141 Atl. Rep. 579.

American Board of Comm'r's, etc. v. Bugbee,
supra (p. 85)

"It is quite obvious that the deeds of trust were no more than transfers to the prosecutor of the mere naked legal title to the property, in which the donor expressly reserved and postponed the happening of an actual transfer of the full possession or enjoyment of the property by the prosecutor till after the death of himself and his wife."

Farmers' L. & T. Co., Ex. of Muller v. Bugbee,
supra (pp. 579, 580)

"The answer to this is that, while the paper purports to vest title at once in the two brothers, it does not vest such title in possession and enjoyment until the death of the survivor, and consequently, the property would be subject to a tax imposed by an act in force at the time of the death of such survivor."

District Judge Hickenlooper in the case of *Stark v. U. S.* (14 F. (2d) 616) expresses the rule in the following language: (p. 619.)

"* * * So far as it applies to trust estates, the portion of the act (Federal Estate Tax) quoted has reference to the actual possession and enjoyment of the beneficial interest. *It has no reference to the conveyance of the legal title or to the vesting of either legal or equitable interests. So far as it operates to convey a property right taking effect "in possession or*

*enjoyment" at or after death, such trusts are testamentary in character, performing the same practical function as a will. * * **

(Italics respondents.)

With the foregoing general principles in mind let us consider for a moment the facts of the case *sub judice*.

(B) The Lease and its Effect.

Mr. Russell's residence was for years in Princeton, New Jersey, and remained such right down to the date of his death, November 27, 1919. He maintained a palatial home there commonly referred to as "Edgerstoune". His wife, until the time of her death in February, 1918, resided there, and his four children were reared there and looked upon it as their home until they married. In fact, three of the four children resided at Edgerstoune in 1918 when the transfer in question was made. Two of the children were at that time still minors. (S. C. 51.)

On May 15, 1918, Mr. Russell, then a man approximately sixty-five years of age, executed a deed of "Edgerstoune", and its contents, to his four children. (S. C. 39, 42.) It was in form an absolute conveyance of all the decedent's right, title and interest in and to the property, real and personal, covered thereby and, standing alone, would never have raised any question as to its taxable status since, notwithstanding the fact that the decedent was advanced in years and died within a reasonably short time thereafter, the Comptroller found that the transfer was not made in contemplation of death, within the ambit of the Inheritance Tax Act.

However, on the same day, or the day following the preparation of the deed, the decedent prepared, or had prepared, a lease of "Edgerstoune" by his four children back to him for a period of ten years

at a nominal rent of \$1.00 (S. C. 42, 44). It bears the date, May 16, 1918.

It is the substantially contemporaneous execution of this instrument with the execution and delivery of the deed, considering the other extraneous facts, which will be fully stressed hereafter, that, in respondents' opinion, gives the entire transaction all of the ear-marks of a transfer intended to take effect in beneficial possession and enjoyment at or after Mr. Russell's death, and, therefore, within the specific provisions of Section 1, sub-section 3 of the statute.

Mr. Russell, at the time of the execution of the deed and lease, was approximately six^{ty}-five years of age with an expectancy, according to the American Experience Table of Mortality, of 11.1 years (Wolfe's Inheritance Tax Calculations, p. 5). It is not at all unreasonable to infer that the term of this lease was decided upon with purpose. It was a period which could reasonably be looked upon by decedent as his normal expectancy of life. Vice Ordinary Buchanan who advised the decree in the instant matter agreed with this conclusion as is evidenced by the following excerpt from his opinion. (S. C. 24, 25.)

"There would seem to be sufficient evidence to support the conclusion that at the time of the gift the grantor was not in average health, but much below it, and that he knew it, and hence that he contemplated that a term of ten years would in all probability be longer than the period of his remaining years of life."

Where the date fixed in the instrument, when full possession and enjoyment of the property transferred is to take effect, as in the instant case, reasonably authorizes the inference that in fixing such date the grantor contemplated that his death would occur on or before the date so named, the courts of other jurisdictions have adopted the view

that such a transfer is one intended to take effect at or after the death of the grantor if he, in fact, died before that date:

Conway's Estate v. State, 120 N. E. 717

Shukert v. Allen, 300 Fed. 754

Aff'd, 6 Fed. (2d) 551

Reversed on another point, 273 U. S.

545

In *Conway's Estate v. State*, supra, the decedent deeded certain real property to his children by general warranty deeds dated December 22, 1914. Each deed contained the stipulation that the "grantor holds full possession of the within described land until March 1, 1916." The deeds following their execution were immediately delivered and recorded. The decedent died December 17, 1915.

The Appellate Court of Indiana, in sustaining the inheritance tax assessment, said: (p. 719)

"If the facts and circumstances shown by the evidence, in connection with the conveyances and the reservation of full possession by the grantor to the date named in the deeds, reasonably authorize the inference that in fixing such date the grantor contemplated that his death would occur on or before the date so named in such reservation, it would follow that the transfers were made to take effect at or after the death of the grantor within the meaning of the statute."

In *Shukert v. Allen*, supra, Gustave E. Shukert, the decedent, on May 5, 1921, transferred certain property in trust for the benefit of his three children, the income therefrom to be accumulated (with a single exception based on a very unlikely event) until February 1, 1951,—a period of approximately 30 years. There was a provision for earlier termination of the trust in order to avoid the rule against perpetuities if subsequent events

should so shape the trust. The decedent at the time of the creation of the trust was 57 years old with an expectancy, at the outside, according to the mortality tables, of only 17 years. The U. S. District Court, and affirmed for the same reasons by the U. S. Circuit Court of Appeals, held the transfer taxable as one intended to take effect in possession and enjoyment at or after death.

The following excerpt taken from the syllabus to the opinion of the U. S. District Court in that case bears directly upon the issue with which we are confronted: (p. 754)

“Where decedent, at a time where his expectancy, according to mortality tables, is only about 17 years, created a trust, the equitable possession and enjoyment of which was to come to his children 30 years after its creation, held, that trust was a gift intended to take effect after decedent's death, and hence was subject to federal inheritance tax.”

While it is true that the United States Supreme Court reversed the lower courts in *Shukert v. Allen*, supra, it is respectfully submitted that it did not deny the accuracy of the reasoning regarding the trust period. The basis for the reversal, as will be pointed out more fully in the argument to follow, was that the donor reserved no income from the trust property and therefore could not be said to have been in beneficial possession and enjoyment of the property while he lived. It will be remembered that the income from the trust was not reserved to the donor, but to the contrary was to be accumulated for the benefit of the ultimate beneficiaries. Of course, there is no question in the present case that the donor was in full beneficial possession and enjoyment of the property right down to the time of his death.

It is conceivable in the foregoing cases that the transferors might have survived the trust period,

in which event beneficial possession and enjoyment would have preceded death, but there is another rule which makes that fact unimportant, *i. e.*; that we must deal with the facts as they actually are and not as they might have been. (Matter of Schmidlapp, 236 N. Y. Rep. 278 at p. 286.)

“We are to view the sequence of events in the order of the actual rather than the possible. The transfer, as the events have shaped it, was ambulatory during life, and the fullness of finality came to it only upon death.”

Concededly, Mr. Russell *might* have survived the term of the lease in which event there *might* not have been a taxable transfer, but under the principle announced in the Schmidlapp case and applied in *Conway's Estate v. State*, *supra*, and *Shukert v. Allen*, *supra*, this contingency becomes unimportant. It is a fact, however, that had Mr. Russell survived the ten year lease and continued to exercise complete dominion over the property and had resided there as if no transfer had been made, the transfer, under the rule of the preceding cases would still have been taxable, since the question of reservation of beneficial possession and enjoyment of property is one of fact and if the donor continues, after the transfer, to treat the property as his own a taxable transfer results.

It is also worthy of note that the *Schmidlapp Case*, *supra*, is, in many details, not unlike the case at bar. In that case Jacob G. Schmidlapp, on January 14, 1915, created a trust, to pay him the income therefrom during his lifetime, but not after August 10, 1923, at which time his youngest son would attain the age of 35. On the death of the grantor, or on August 10, 1923, if he should still be living, the trust was to be used exclusively for the benefit of his two sons under conditions not here important. Jacob G. Schmidlapp died December 18, 1919, several years before the date fixed

in the deed and the Court of Appeals of New York in sustaining the tax on the transfer as one having been made to take effect at or after death said: (p. 285)

“Some point is made that the reservation of income during the life of the grantor was coupled with a direction that if he lived until August 10, 1923, the reservation should then end. In a possible contingency; therefore, the sons’ enjoyment of the income might have begun while the grantor was yet in being. We think this feature is insufficient to take the case out of the rule laid down in the cases of *Seaman*, *Bostwick* and *Dana*. The grantor did *not* live until August 10, 1923, and if he had, he might even then have revoked or modified the trust. We are to view the sequence of events in the order of the actual rather than the possible.”

It might also be noted that a Federal Estate Tax on the transfers by this same deed was sustained by the U. S. District Court (24 F. (2d) 237) and the U. S. Circuit Court of Appeals (32 F. (2d) 453) under the title of *U. S. v. Stark*.

Since it is imperative, under the decisions, to consider the lease and deed as a single transaction in order to ascertain the intent of the parties and the practical effect of the entire transaction, it seems certain that the arrangement respecting this gift of property by the donor to his children was such as to clearly warrant the conclusion that the beneficial possession and enjoyment thereof was not intended to pass, and did not in fact pass, until the time of his death. Every general principle hereinbefore stressed, when applied to the facts in this case, support this view. If this particular type of transfer is permitted to escape the burdens of the tax, either because the deed was absolute on its face and the lease cannot be considered as a

part of the entire transaction, or because the lease operated only until a fixed future date rather than during the remainder of the life of the grantor, it is apparent that a very easy and practical means of tax evasion will receive judicial approval. And there can be no dispute about the fact that the policy of the Courts has always been to refuse to sanction the exemption of any transfer which will open an avenue for tax evasion.

Matter of Miller, 236 N. Y. Rep. 290

Matter of Bostwick, 160 N. Y. Rep. 489

Matter of Cory, 177 App. Div. 871, 877

State St. Trust Co. v. Treasurer, 209 Mass.

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Rather, as stated by the Supreme Court of Massachusetts in the case of *State St. Trust Co. v. Treasurer*, supra:

“The policy of the law is, that the owner of property shall not defeat or evade the tax by any form of conveyance, or transfer, where after death the income, profit or enjoyment inures to the benefit of those who are not exempted. * * *”

(C) The Oral Agreement Respecting the Transfer.

Aside from the written instrument covering the transfer of this property by the decedent to his four children, there is considerable extrinsic evidence which throws light upon the intentions of all of the parties to the transaction and in defendants' opinion establishes conclusively that there was no intention to pass the beneficial possession and enjoyment of this property until the death of the transferor. It must, of course, be borne in mind that the statute taxes all transfers which are “intended” to take effect in beneficial possession and enjoyment at or after death. In other words, it is the *intent* of the transferor which must govern the taxability of the transfer.

Vice Ordinary Buchanan in writing his opinion in the matter *sub judice* fully recognizes this important phase of the statute as is clearly shown by the following excerpt taken from his opinion: (S. C. ⁷⁴25)

“The statute makes such a transfer subject to tax, if the gift made was *intended* to take effect in beneficial possession or enjoyment at or after the transferor’s death. It seems beyond argument that a donor who reserves to himself the entire beneficial possession and enjoyment of the property given, for a definite term of years, expecting that he will die before the expiration of that term, *intends* the gift to take effect in possession and enjoyment at or *after* his death. It is concluded therefore that such gift is taxable, and the tax in question on this ground of appeal will be affirmed.”

(Italics by Vice-Ordinary)

As hereinbefore pointed out, this “intent” may be gathered not only from evidence in writing but also from oral evidence. Respondents contend that, even though we assume for the purpose of argument that no written instrument evidencing the reservation of beneficial possession and enjoyment of the property transferred by the donor was ever made, still, the oral agreement of the parties at the time of the transfer would be sufficient to sustain the right of the state to tax the gift as one intended to take effect at or after death. The cases hereinbefore cited amply support the contention that the intent of the parties respecting the beneficial possession and enjoyment of the property may be established by extrinsic evidence, even though the deed may be absolute on its face.

The understanding between the grantor and the grantees was that the beneficial possession and enjoyment of the property should remain in the grantor as long as he might desire, as is con-

clusively proven, first, by the testimony of one of the grantees and, second, by facts showing the manner in which the property was treated by the grantor subsequent to the transfer and down to the time of his death.

Mrs. Ethelberta Pyne Eppley, a daughter of the decedent and one of the grantees under the deed—also a signer of the lease back to the donor—when asked as to any arrangement which the donor made with them as to his right of possession and enjoyment of “Edgerstoune” after the transfer, testified as follows: (S. C. 45, 46)

Q. At that time he told you that he was going to deed the property and gave a reason for it, namely, that it was a burden that he wanted to get rid of, as I understand it, did he make any arrangement about staying at Edgerstoune himself? A. Well, if he wanted to—he naturally knew that his children would let him stay.

Q. Did he say anything about it? A. He said that he knew his children were all—would be willing to have an amicable arrangement about it. I think he wanted them to have a responsibility and not feel that he had to have a tremendously large place to keep up and he preferred the seashore, always had.

Q. Do you remember executing any paper or lease to your father? A. No.

Q. At the time your father said he was going to give his children Edgerstoune did he at that time mention anything about a lease for a term of years to himself? A. I do not think he mentioned a lease. *I think that he said that if he wanted to live there that of course he could continue to live there. But he did not want the responsibility of it.*

Q. *In other words you were given to understand that your father would deed the place to*

the children, the understanding being that if he wanted to live there he could live there? A. I suppose so. Most children would naturally let their father live in the place.

* * *

Q. Just try to refresh your recollection and see if you can remember that at the time he made the deed to his children whether or not he did not have a specific understanding with the children that he should have the use of the place for a nominal rent? A. Well, he may have done that. I do not know. If it was a nominal rent it did not amount to anything.

The understanding of Mrs. Eppley, and presumably the same holds true as to the other grantees, was that her father should retain possession of the property as long as he wished notwithstanding the grant in fee. In testifying with regard to the purport of the lease she said: (S. C. 46)

“It was not a very important thing and it escaped my memory.”

It is quite likely that Mrs. Eppley's conception of the importance of the lease is about correct and at best it was more for form than substance. The Vice-Ordinary viewed the lease in the same light. He says: (S. C. 72)

“The lease is for a rent of one dollar a year. Admittedly it was executed by all four children, yet the oldest one—the only one who testified—did not remember anything about executing any such paper. The inference is justifiable that the reason it made no impression on her mind—or the others, for they were not called to testify—was that it was of no importance to them; they simply signed a paper at their father's request. * * *”

The understanding was apparently mutual that notwithstanding the deed Mr. Russell was to live

there as long as he cared to. The lease, it would seem, was a thought of Mr. Russell's to put beyond doubt any misunderstanding which might later arise in regard to his right of possession and enjoyment of the premises. It seemed to be a matter which he desired to have definitely established and not to depend upon an oral arrangement.

He was concerned with the retention of parental control over his children as is testified to by Mr. Marion Eppley, husband of Mrs. Eppley. It would seem that some time shortly after the passage of the income tax law he (Mr. Eppley) talked with Mr. Russell about the advantages of forming trusts thereby distributing some of his property to his children so as to materially reduce the surtax of which the decedent complained. Mr. Eppley, testifying as to the reply of the decedent to his suggestion, says: (S. C. 51)

“He said that there was no way that he could do this and still keep parental control. He said ‘The children are very young and if they have an independent income there is no way we can control them.’ ”

(D) The Facts Show that Donor Retained Possession and Enjoyment of the Property Until Death.

In addition to the oral agreement, the facts and circumstances surrounding the donor's treatment of this property subsequent to the date of transfer is further proof of the fact that he retained possession and control until the time of his death. Since the substance and not the form of the transaction determines the taxable status, we are always permitted to look at the facts as they actually are in order to determine the intentions of the parties.

While it has been suggested, as a motive for the transfer, that the property was too large and Mr. Russell wished to unburden himself of the cares and responsibilities attaching thereto, nevertheless

the testimony of Mrs. Eppley is clearly to the effect that Mr. Russell maintained the place, paid for the servants, expenses, etc. and continued to manage it and live there just the same after the transfer as he had always done before, so that it is actually a fact that notwithstanding what the effect of the lease may have been or whether there was any oral agreement in relation thereto the decedent did, right down to the time of his death continue in the same possession and control of this property as he had prior to the transfer. (S. C. 46)

The Vice-Ordinary did not overlook the obvious inconsistencies between the alleged motive for the transfer and the facts relating ~~to~~ the manner in which the decedent treated the property subsequent to the transfer, as is evidenced by the following excerpt from his conclusions: (S. C. 72, 73)

“The reason put forward as the motive for the gift is that Mr. Russell had lost interest in the place after his wife’s death a year or so before, and preferred the seashore as a residence, and wanted to relieve himself of the responsibility of keeping up the large establishment and turn that burden over to his children. Yet the evidence is uncontroverted and unexplained that after the deed he continued to live at the place and run it, maintain it, and pay the expenses just as he had before, although his son, aged 29, and his two unmarried daughters lived there, too, and had large means of their own.”

Where it has appeared from the facts that the donor was actually in possession and enjoyment of the property down to the time of his death, the courts have found the transfer taxable even though the retention of beneficial possession and enjoyment may not be evidenced in writing.

In re Honeyman, 98 N. J. Eq. 638, 639

Kelly v. Woolsey, 177 Cal. 325

People v. Moir, 207 Ill. 180

People v. Porter, 287 Ill. 401, 404

People v. Shaffer, 291 Ill. 142, 148

Reish Adm'r v. Commonwealth of Pa., 106 Pa. 521

In re Jones, 120 N. Y. Supp. 862

Matter of Miller, 236 N. Y. Rep. 290

In re Dobson's Estate, 132 N. Y. Supp. 472

The Prerogative Court in the *Matter of Honeyman*, supra, citing with approval the case of *Reish Adm'r v. Commonwealth of Pa.*, supra, says: (p. 639)

"And this is so whether the provision whereby the beneficial enjoyment is reserved to the donor, or rather is withheld from the donee until the death of the donor, is contained in the instrument of transfer, or is evidenced in some other way. The question is not of the form but of the substance of the transfer."

In *People v. Shaffer*, supra, the facts stated in the opinion show that Francis M. Shaffer, the decedent, made certain transfers of real property to his wife and daughters. It appeared from the evidence that Shaffer kept the same control over the property during all of the years when it stood in the names of the transferees as if it were his own. The Supreme Court of Illinois, in reaching the conclusion that the transfers were taxable, said: (p. 148)

"It was held in *People v. Estate of Moir*, supra, that if the actual possession and enjoyment are retained by the grantor until his death and the grantee exercises no right of ownership or does not take possession or come into the enjoyment of the land when the deeds are executed, their conduct should estop them from asserting that their intention was otherwise. *That case further held that though there was no express agreement, written or verbal,*

*to postpone the possession or enjoyment until after the death of the grantor, the intention to so postpone such possession and enjoyment may be inferred from the acts and conduct of the parties. * * **

(Italics Respondents'.)

Applying any one or all of the tests hereinbefore referred to, it is respectfully submitted that the inescapable conclusion must be that the transfer in the instant case was intended to and did, in fact, take effect in beneficial possession and enjoyment only upon the death of the donor, and is, therefore, taxable; and that the judgment of the Supreme Court sustaining the decree of the Prerogative Court which affirmed the assessment of the Comptroller in that respect is in no way erroneous or illegal as claimed by appellant.

Respondents respectfully call attention to the fact that any findings of fact by the courts below should be affirmed here unless reversible error clearly appears. It seems well settled that this court, on appeal will not weigh the evidence below for the purpose of reaching an independent conclusion on the facts, but will inquire only as to whether there is any legal evidence upon which the findings may be based, and if so its duty is at an end.

Sexton v. Newark Dist. Tel. Co., 86 Atl. 451

Ryer v. Turkel, 75 N. J. L. 677

Israelow v. Kreitzer, 2 N. J. M. R. 154

Zober v. Turner, 7 N. J. M. R. 171

Martin v. Smith, 125 Atl. 142

REPLY TO ARGUMENT OF APPELLANT

There are only two cases relied upon by appellant which, in respondents' opinion, require a reply, viz.:

Shukert v. Allen, 273 U. S. 545

Nichols v. Coolidge, 274 U. S. 531

The facts in the case of *Shukert v. Allen* have hereinbefore been set forth in considerable detail. (Brief p. 15)

The United States District Court (300 Fed. 754,) affirmed by the United States Circuit Court of Appeals (6 Fed. (2d) 551) held that the trust there under review was taxable as intended to take effect in beneficial possession and enjoyment at or after the death of the creator, since it was not to terminate until the expiration of a period of thirty years, which would be after his death, since he had an expectancy of only 17 years at the outside. While it is true that the lower courts were reversed by the United States Supreme Court, nevertheless, there is not the slightest intimation to be found in the opinion of the Supreme Court to the effect that the reasoning upon which the lower courts based their findings was erroneous. The real basis for the adverse decision of the United States Supreme Court was that the donor retained no beneficial interest whatever to himself in the property transferred. The following excerpt from the opinion of the Supreme Court conclusively substantiates this view. (p. 547)

"The transfer was immediate and out and out, leaving no interest remaining in the testator. * * * But it seems to us tolerably plain, that when the grantor parts with all his interest in the property to others 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."

It will be remembered that the creator of the trust in the *Shukert case* reserved no income to himself and it is therefore apparent that there was no reservation in the grantor of any beneficial possession or enjoyment of the property until the time of his death.

The foregoing view of the effect of the reversal by the Supreme Court in *Shukert v. Allen* was shared by Vice Ordinary Buchanan as evidenced by the following excerpt from his opinion in the instant case: (S. C. 75)

"* * * In *Shukert v. Allen*, 273 U. S. 545, a grantor had created a trust whereof the income was to be accumulated, and neither income nor principal paid over to the beneficiaries until 30 years from the date of the trust. The grantor expected to live not more than 15 or 20 years. The District Court (300 Fed. 754) upheld the tax on the ground that 30 years was a time intended to be at or after the grantor's death. The Supreme Court in no wise controverted *that* reasoning but set aside the tax, because nothing whatever had been reserved to the donor's own use or enjoyment."

(Italics by Vice Ordinary)

The fact is that respondents cite the decisions of the United States District Court and the United States Circuit Court of Appeals in *Shukert v. Allen* as supporting the assessment under review. The principle underlying the findings of both the lower courts which was not reversed on appeal by

the United States Supreme Court is applicable to the present matter. District Judge Woodrough, in writing the opinion for the United States District Court in that case, said:

“* * * Now, this trust was one in which the possession and enjoyment of it was to come to these beneficiaries long in the future, and, according to the undisputed evidence here, and the clear evidence, beyond any time that he expected to live himself. There is offered in evidence a table of expectancy that would show his average expectancy, if he was a well man at the time, to be some fifteen or sixteen years, seventeen at the outside. He said himself to Mr. Cutler that he might expect to live fifteen or twenty years, according to the testimony of the plaintiffs; but the time when these beneficiaries were to come into the enjoyment and possession of this particular trust was beyond that time, and beyond the time of his death.

* * * * *

* * * It is not the purpose of the court in interpreting these statutes to stretch a point, so as to make taxes payable, except when they come within the clear and specific letter and spirit of the law. It seems to me that that is where this trust comes. It is a trust created by Mr. Shukert, which he intended to take effect in possession and enjoyment long after he should have passed away; after it might be that the large fortune which he had accumulated had been lost through misfortune or extravagance, or waste, or things that might happen after that. His care went clear to the time when thirty years should have gone by. His care for his children reached clear to that point, and he intended that at that time it should take effect * * *”

Briefly, the conclusion of the lower courts in that case was to the effect that if the trust was not to take effect in actual beneficial possession and enjoyment, and did not in fact so take effect, until at or after the death of the decedent, the transfer would be taxable even though the term of the trust was not limited to the life of the creator. Those are the circumstances of the present matter with the added important factor that in the present case the decedent did reserve the beneficial possession and enjoyment of the property to himself, whereas in the *Shukert* case it was accumulated for the benefit of the ultimate beneficiaries—the distinction upon which the United States Supreme Court based its reversal. There is not the slightest basis for the supposition that the Supreme Court would have reversed the findings of the lower courts in that case had the income from the trust property been reserved to the donor instead of being accumulated for the benefit of the beneficiaries.

Great stress is laid by appellant on the decision of the U. S. Supreme Court in the case of *Nichols v. Coolidge*, 274 U. S. 531. This case, at first glance, would seem to be entitled to much consideration in the disposition of the problem presented, but when carefully considered in the light of the facts and the law there involved it leaves the issue here unaffected.

In the first place, the facts show that Mrs. Julia Coolidge, the decedent, died January 6, 1921; that the transfer of the real property there in question was perfected on May 18, 1917 and that the lease was to run for one year. It was, therefore, apparent that as the facts actually shaped that case, the lease having by its terms expired, long before the date of death of the donor, that she was in possession, not as a matter of right, but as a matter of sufferance on the part of the donees.

While there was a right of renewal of the lease from year to year, this right was terminable at any time at the option of the lessees, so that the donor's possession and enjoyment of the property at the time of her decease was by sufferance and not as a matter of strict legal right. While in the instant case the facts clearly are to the effect that the decedent right up until the time of death was actually in full beneficial possession and enjoyment of the property pursuant to an agreement entered into at the time of the transfer, and that his right of beneficial possession and enjoyment was a legal one and in no way at the mercy of the transferees.

Further, there is some doubt as to whether, in any event, the transfer of the real property in *Nichols v. Coolidge* could have been taxed for the same reasons as urged by the Supreme Court for the nontaxability of the other transfers there involved, viz.: because they were made before the effective date of the statute under which they were attempted to be taxed, and the statute was held unconstitutional in so far as it attempted to operate retroactively.

The Vice Ordinary in his opinion expresses the same views of the *Nichols v. Coolidge* case in the following language: (S. C. 75)

"* * * In *Nichols v. Coolidge*, 274 U. S. 531, the facts were much like the case at bar, but with two very important differences: (1) The deed had been made in 1917, two years *before* the enactment of the Federal statutes in 1919; and (2) the lease back by the children was for one year, with provisions for renewal, but 'always subject to the right in the lessors' (the children) 'to terminate the term in any year.' Although 'the parties contemplated that the premises would be enjoyed by decedent and her husband as long as they might desire,' * * * 'the decedent had no valid agreement to

that effect.' In the case at bar the deceased did have a valid agreement giving him the possession and enjoyment for a time expected and intended to continue until after his death."

It must be remembered that in the case of *Nichols v. Coolidge*, the lease, which was for a term of only *one* year had expired before Mrs. Coolidge's death, and with it went all of her legal rights to possession and enjoyment of the property. While in the case *sub judice* the lease was for ten years and still had several years to run at the time of Mr. Russell's death, so that his legal right to complete beneficial possession and enjoyment of the property remained in him until his decease. It would seem clear that the children, at the time of the execution of the deed and lease, had not succeeded to all of the rights of ownership in the property, since their right to possession as well as enjoyment was deferred. Therefore, so long as the privilege of succession had not been fully exercised by them prior to the donor's death it could be reached by an excise tax attaching at that time. (*Saltonstall v. Saltonstall*)

Aside from these distinctions it is respondents' contention that *Nichols v. Coolidge* does not have the slightest effect upon the case *sub judice*, since the Court was there construing the effect of a transfer in respect to its taxable status under the Federal Estate Tax Act, while here we are concerned with a state inheritance tax. The two forms of taxation are so entirely distinct as to make it apparent that a decision under the one cannot be taken as dispositive of a similar issue under the other.

The U. S. Supreme Court has itself recognized the total lack of similarity between the two statutes. The Federal tax, it has been held, is one upon the transfer of the estate of the decedent,

that is, a tax on the right to *transmit* property at death, or an interest in property which ceases at the death of the decedent;

Saltonstall v. Saltonstall, 276 U. S. 260

Nichols v. Coolidge, *supra*

N. Y. Trust Co. v. Eisner, 256 U. S. 345

while the state inheritance tax is a legacy or succession tax; that is, a tax on the right of the legatee, devisee, donee, transferee, heir, etc. to *succeed* to property or an interest therein on death.

In fact, the U. S. Supreme Court has specifically limited the case of *Nichols v. Coolidge* to matters arising under the Federal Estate Tax Act as the following excerpt from *Saltonstall v. Saltonstall*, *supra*, will clearly show: (p. 270)

"In *Nichols v. Coolidge* it was held that under the estate tax sections of the Revenue Act of 1919—which tax the privilege of transmission, *Nichols v. Coolidge*, *supra*; *New York Trust Co. v. Eisner*, 256 U. S. 345—property of which a donor had made an outright conveyance several years before the enactment of the statute could not, on his death after its enactment, be included as a part of his taxable gross estate at its value at the time of his death. *But we are here concerned, not with a tax on the privilege of transmission, not with an attempt to tax a donor's estate for an absolute gift made when no tax was thought of, and and to do so at the probably appreciated value which the gift now bears, but with a tax on the privilege of succession, which also may constitutionally be subjected to a tax by the state whether occasioned by death (Stebbins v. Riley, supra), or effected by deed (Keeney v. Comptroller, 222 U. S. 525.) * * ** The present tax is not laid on the donor but on the beneficiary; * * *

(Italics Respondents')

To the same effect see *Hill v. Nichols*, (18 F. (2d) 139, 140):

"That there is a marked difference between the attributes of an estate tax and a tax on succession goes without saying. Although each is said to be an excise laid upon the exercise of a privilege, the former is regarded as an excise upon the privilege of transmitting property by will or intestacy, *Y. M. C. A. v. Davis*, 264 U. S. 47, 44 S. Ct. 291, 68 L. Ed. 558; *Greiner v. Lewellyn*, 258 U. S. 384, 42 S. Ct. 324, 66 L. Ed. 676; *N. Y. Trust Co. v. Eisner*, 256 U. S. 345, 41 S. Ct. 506, 65 L. Ed. 963, 16 A. L. R. 660, while the latter is laid upon the privilege of receiving or succeeding to property upon the death of a decedent, *Crocker v. Shaw*, 174 Mass. 266, 54 N. E. 549; *Burnham v. Treas. and Rec. Gen.*, 212 Mass. 165, 98 N. E. 603."

Because of this marked distinction in the nature of the two taxes, it is not at all surprising to find that a deed of trust might be construed one way (exempt) for the purposes of the Federal estate tax and an entirely different way (taxable) for the purposes of a state inheritance tax. A specific illustration of this point is to be found in the case of Peter C. Brooks who died a resident of Massachusetts, January 27, 1920. Mr. Brooks created several trusts between 1905 and 1907. The trust instruments provided that the trusts might be terminated in whole or in part by Mr. Brooks with the concurrence of one of the trustees. The State of Massachusetts levied an inheritance tax upon the transfer of the corpus of these trusts as having been intended to pass in beneficial possession and enjoyment at the death of the creator. The Internal Revenue Department took the same action under the Federal estate tax act. The right of the

State of Massachusetts to tax these transfers was the subject of litigation through the Massachusetts Courts and finally reached the U. S. Supreme Court on writ of error. (*Saltonstall v. Saltonstall*, *supra*) The right of the government to an estate tax under the Federal Revenue Act was also tested by an action instituted in the U. S. District Court (*Hill v. Nichols*, 18 F. (2d) 139). Strange as it may seem, the United States Supreme Court reached the conclusion that the deeds of trust for the purposes of the inheritance tax were subject to the provisions of the Massachusetts act, while the United States District Court in *Hill v. Nichols* determined that the transfer by the same deeds of trust were not taxable under the Federal Estate Tax Act on the authority of *Nichols v. Coolidge*. Of course, as the excerpts above, taken from *Saltonstall v. Saltonstall*, and *Hill v. Nichols* will clearly show, the distinction was founded solely on the difference in the nature of the two taxes. Attention of the Court is also respectfully directed to the very recent decision of the Supreme Court of Massachusetts in the case of *Coolidge v. Commissioner*, 167 N. E. 757, which in very certain terms declares the inapplicability of Federal Estate Tax decisions to matters arising under state inheritance tax acts. The following excerpt from the opinion of the Court in that case is directly in point: (pp. 761, 762)

“The case at bar is distinguishable from *Shwab v. Doyle*, 258 U. S. 529 (3 Am. Fed. Tax Rep. 3145), *Shukert v. Allen*, 273 U. S. 545 (6 Am. Fed. Tax Rep. 6550), *Nichols v. Coolidge*, 274 U. S. 531 (6 Am. Fed. Tax Rep. 6758), *Reinecke v. Northern Trust Co.*, 278 U. S. 339, 345, 347, and *Chase National Bank v. United States*, 278 U. S. 327. In each of those cases the tax under consideration was

the Federal estate tax levied upon the property of the deceased transmitted at his death. That is a tax levied upon a subject quite different from the succession to property by a beneficiary, which is the subject of the present excise."

It might also be noted that *Coolidge v. Commissioner, supra*, involves the same estates (Randolph and Julia Coolidge) and the identical deeds of trust which were the subject of the controversy in the case of *Nichols v. Coolidge*. And because of the difference in the two forms of taxes it is not at all strange to find that the Supreme Court of Massachusetts held the trust taxable under their State inheritance tax act notwithstanding that the U. S. Supreme Court had *theretofore* determined that the same trusts were nontaxable under the Federal Estate Tax statutes.

There is just one more phase of the *Nichols v. Coolidge* case which respondents would like to touch on. As hereinbefore pointed out, the state courts, in matters involving inheritance taxation have recognized and upheld the following principles of law:

(a) It is the substance, essential character and practical result of a transaction and not its mere legal form which must control its taxable status.

(b) Extraneous evidence, even though oral, is admissible to establish the real agreement of the parties notwithstanding that the deed may be absolute on its face.

(c) The policy of the law will not permit anyone to evade the statute by any device which secures to him the possession and enjoyment of property until his death.

All of these principles are firmly established as is evidenced by the many authorities hereinbefore

cited in support thereof. But the United States Supreme Court by its decision in *Nichols v. Coolidge* has brushed aside every one of these principles. There, legal form held sway over substance and practical result which is contrary to the rule which has prevailed in this state and most of the other jurisdictions for years. That court considered the transfer solely in the light of the property rights of the respective parties under the deed and lease, thereby disregarding entirely the oral agreement, which the Court admits existed, to the effect that the possession and enjoyment of the property was to remain in the grantors so long as they might desire; and also the fact that the grantors were actually in full possession and enjoyment of the property right down to the time of their deaths when the grantees for the first time came into the possession and enjoyment thereof. Can it be possible that the United States Supreme Court, in a matter involving exclusively a Federal Estate Tax question, has proceeded to lay down a hard and fast rule which is applicable to state inheritance taxes, contrary to the overwhelming weight of authority as established by State Courts in the construction of their own statutes, and this, without even so much as a mention of the long line of authority upon the subject? It is not at all logical to believe that that Court had any such thought in mind or that it intended to do anything more than establish a rule applicable in matters arising under the Federal Estate Tax statutes. The fact is that the Supreme Court has said in *Saltonstall v. Saltonstall* that that is the limit to which it intended to go in *Nichols v. Coolidge*, and it is therefore respectfully submitted that the findings of that Court in *Nichols v. Coolidge* should be so confined.

If there is any conflict between the state and federal court decisions on the issue of what constitutes a transfer intended to take effect in beneficial possession and enjoyment at or after death, then it is respectfully submitted that the rule of the former must control since it is well settled that the question as to whether a transfer of property is intended to take effect in beneficial possession and enjoyment at or after death when that question arises under a state inheritance tax statute is solely a state issue and one for the state courts alone to decide;

Saltonstall v. Saltonstall, *supra*

Nickel v. Cole, 256 U. S. 222, 225

Moffitt v. Kelly, 218 U. S. 400, 405

and being a state issue the U. S. Supreme Court accepts the decision whether right or wrong;

Nickel v. Cole, *supra*, (p. 225)

its only inquiry being as to whether the transfer so construed, or the act as applied thereto, deprives the taxpayer of his property without due process of law or impairs the obligations of a contract contrary to the Federal Constitution and the Fourteenth Amendment thereof. This rule is easily understood when it is remembered that the only basis of appeal from a decision of the state courts to the U. S. Supreme Court is that a Federal issue is raised, and, of course, the mere determination that a transfer is to take effect at or after death based on the facts, does not, of itself, present a constitutional problem, or raise a federal question. Although, of course, whether the act taxing such transfers or that any particular transfer as so taxed does infringe constitutional guarantees, properly presents a Federal issue. It is perhaps pertinent to note at this point, however, that appellant does not object to the assessment on constitutional grounds either state or Federal. It

merely complains that the assessment is erroneous and illegal, i. e.; that the comptroller, from the facts, wrongly concluded that the transfer was one intended to take effect at or after death and, therefore, within the terms of the statute. It is certain that appellant cannot urge issues not raised in the petition of appeal before the Prerogative Court. The upper courts, on review, will consider only those issues presented to the trial court. On appeal from, or error to, the Supreme Court, sitting as a court of review, the only proper ground of appeal or assignment of error in this court is that the Supreme Court erred in giving judgment as it did.

Lecony v. Koch, 102 N. J. L. 716

State v. Belkota, 95 N. J. L. 416

Kleinert v. Hutchinson, 98 N. J. L. 831

And, of course, the United States Supreme Court will not review the findings of the state court since it is well settled that it is too late to raise a federal question either on the petition for the writ of error or in the assignment of errors.

Hiawassee Power Co. v. Carolina Tennessee Co., 252 U. S. 341, 344

Harding v. U. S., 196 U. S. 78, 84

Sayword v. Denny, 158 U. S. 180, 183

For these reasons it is too late now for appellant to object to the assessment on the ground that it violates the fourteenth amendment to the Federal Constitution. Appellant says that its *brief* before the Prerogative Court, as well as before the Supreme, urged the unconstitutionality of the tax, but it is respectfully submitted that an objection of such gravity cannot be raised in that fashion. It must be alleged as a ground for reversal in the petition of appeal to the Prerogative Court, or if the assessment be tested by an original certiorari, then the objection must be specified in the Reasons.

It is respondents' view that this Court, as well as the Supreme Court has so many times held that a transfer is taxable, notwithstanding that the legal title to the property may have vested in the transferee at the time of the transfer, if the beneficial possession and enjoyment was reserved to the donor, as to make the matter *stare decisis*.

In re Honeyman, 98 N. J. Eq. 638

Aff'd 103 N. J. Law, 173

American Board of Commissioners v. Bugbee, 98 N. J. Law, 84

Affirmed sub. nom.

Congregational Home Missionary Society v. Bugbee, 101 N. J. Law, 214

In re Harvey, 2 N. J. Misc. Rep. 247

Aff'd 102 N. J. Law, 720

Farmers' Loan and Trust Co. ex'rs of Muller v. Bugbee, 6 N. J. Misc. Rep. 415

The following test applied by the Prerogative Court in *In re Honeyman* (98 N. J. Eq. 638) is applicable here with all of the force and effect given to it in that case: (p. 643)

"The distinction, I think, rests on whether or not the donor retains, or, rather, whether the donee is deprived of an interest of some kind, whether as to principal or income or both, *in the very property transferred, until the donor's death*. Even though immediate possession pass to the donee, if the donor (or some third party) is to receive interest on the sum transferred, or the income, or part of the income, arising from the property transferred or from other property which the donee might substitute in place thereof * * * the intent is clear that the enjoyment (in whole or in part) of the thing transferred is intended not to take effect until the donor's death." (Italics Respondents')

Surely, the facts in the instant case clearly show that the beneficial possession and enjoyment of the identical property transferred was reserved to the donor until his death. That the legal title may have vested in the transferees long prior to the death of the decedent, does not affect the taxability of the transfer if, in fact, he was still in possession and enjoyment thereof until death. It is the transfer of this latter property right which is the subject of the tax, as held by this Court in the several cases just cited and also by the U. S. Supreme Court in *Moffitt v. Kelly*, 218 U. S. 400.

As stated by the U. S. Supreme Court in *Saltonstall v. Saltonstall*, *supra*, (at p. 271):

"So long as the privilege of succession has not been fully exercised it may be reached by the tax. See *Cahen v. Brewster*, 203 U. S. 543; *Orr v. Gilman*, 183 U. S. 278; *Chanler v. Kelsey*, *supra*; *Moffitt v. Kelly*, *supra*; *Nickel v. Cole*, *supra*. And in determining whether it has been so exercised technical distinctions between vested remainders and other interests are of little avail, for the shifting of the economic benefits and burdens of property, which is the subject of a succession tax, may even in the case of a vested remainder be restricted or suspended by other legal devices."

While it may be true that the children of Mr. Russell took a vested estate in the real property upon the execution of the deed, it is equally true that their privilege of succession in actual beneficial possession and enjoyment was suspended until the death of the donor and the passing of this valuable property right may be the subject of an inheritance tax as held by the U. S. Supreme Court in *Saltonstall v. Saltonstall*, *supra*.

Appellant says that there is no justification for the conclusion of the Comptroller, the Prerogative

Court and the Supreme Court that the 10-year period was one which the donor expected would exceed his expectancy of life. Appellant says that because the Comptroller found that the transfer was not made in contemplation of death he must necessarily conclude that the decedent's physical condition cannot be taken into consideration at all. It is patent that there is a marked difference between determining that the facts are not sufficient to support a tax on the theory that the transfer was one made in contemplation of the death of the grantor and in determining that under the facts relating to the donor's physical condition he did not expect to live more than 10 years. Evidence sufficient to support a tax on the ground of a transfer in contemplation of death must establish that the donor expected death within the reasonably near future. That is an entirely different thing from expecting that he will not survive a 10-year term. It is obvious that the facts required to base a reasonable inference on the second proposition need not be nearly so strong. The Comptroller concluded that the period (10 years), considering all of the evidence, was one which reasonably might be determined to be beyond donor's expectancy of life and that the transfer was, therefore, one intended to take effect at or after death. In this the Prerogative Court and the Supreme Court acquiesced and it is respectfully submitted, being a question of fact, should not be reversed by this Court unless it be determined that it lacks any legal evidence to support it. Whether the donor "intended" the transfer to take effect at or after his death is a practical problem and, of course, the question of the effect of his diabetic condition upon his mind must be looked at from the practical or layman's viewpoint rather than from a technical and scientific consideration of the ailment. It must

also be remembered that the decedent's normal expectancy of life (assuming him to be in normal health) was only 11.1 years, according to the American Experience Table of Mortality. The inference seems justifiable, therefore, that the selection of the 10-year term, in view of his diabetic condition, was in the belief that his expectancy of life would not exceed that period.

Appellant says that this is the first case which has come to its attention wherein the question of health was considered significant in arriving at the grantor's intention as to whether a transfer was to take effect at or after death. That *Conway v. State, supra*, is a case of this character is quite clear. As hereinbefore pointed out the Appellate Court of Indiana, in sustaining the tax there assessed, said: (p. 719)

"If the facts and circumstances shown by the evidence, in connection with the conveyances and the reservation of full possession by the grantor to the date named in the deeds, reasonably authorize the inference that in fixing such date the grantor contemplated that his death would occur on or before the date so named in such reservation, it would follow that the transfers were made to take effect at or after the death of the grantor within the meaning of the statute."

It might also be noted that,

Shukert v. Allen, supra

Stark v. U. S., supra

Matter of Schmidlapp, supra

are not wholly unlike the instant case. The reservation in each of those cases was for a fixed period rather than the life of the donor but that did not prevent the courts from sustaining the tax in each case, excepting *Shukert v. Allen*, which was reversed on another point.

Appellant further claims that the personal property contained in the homestead was not included in the lease and therefore cannot be held, in any event, to have been intended to pass in possession and enjoyment at or after the donor's death. This is another illustration of the indifference with which the whole transaction was treated. There appears to be absolutely no reason why the lease did not cover the personalty as well as the realty except for the fact that the lease, to use the words of Mrs. Eppley, "was not a very important thing." It is wholly immaterial whether or not the lease covered the personal property, so far as taxation is concerned. In fact, as hereinbefore pointed out, it would not matter even if the lease of the realty was never executed since the verbal agreement as well as the fact of actual possession and enjoyment of the property until death is sufficient to support the assessment. There is no question but that the furnishings of the homestead remained there and that the decedent treated them and used them just the same after the execution of the deed as before. The beneficial possession and enjoyment of both the real and personal property passed only at the death of the donor.

Appellant further contends that it is only where the donor reserves the use or income of the property for the *period of his life* that a taxable transfer results. *Matter of Schmidlapp, supra, Stark v. U. S., supra*, and *Conway v. State*, are directly opposed to this contention.

Appellant also claims that if the property is transferred, and by an independent act, even though simultaneous with the act of transferring, the transferee deeded or leased back to the grantor the use or right to the income from the property for the grantor's life, the transfer is not taxable. This claim heads right into the teeth of two or

three general principles of the law of inheritance taxation which seem to make its success impossible, viz.; (a) that the substance and practical result of the entire transaction and not its mere legal form must control; (b) that separate instruments executed at or about the same time must be considered as a single transaction in order to ascertain the intentions of the donor respecting the reservation of beneficial possession and enjoyment of the property transferred; (c) that the broad policy of the law will not permit the owner of an estate to defeat the payment of a tax by any device which secures to him for life the income, profits or enjoyment thereof.

The best illustration of the application of all three of the foregoing rules will be found in the *Matter of Miller*, 236 N. Y. 290. In that case the decedent transferred certain property to his son in the form of an outright gift, and the son in turn created a deed of trust of the identical property to pay the income therefrom to the decedent for life with disposition over at death not here important. Notwithstanding that the deed was that of the son and not the decedent, the New York Court of Appeals sustained the state's right to a tax. It was determined from the evidence that the transfer from the father to the son and the creation of the deed by the son should be treated as a single transaction and that the practical result and substance of the entire transaction was a transfer of property by the father intended to take effect in possession and enjoyment at his death. The Court of Appeals pointed out that "Unless this be so a very easy way would be opened for donors to evade the tax law."

The aim of Mr. Russell appears quite clear. He desired the homestead to be for his use and under his control as long as he might desire. That was

the understanding between all concerned. His enjoyment and possession of the property remained exactly the same after the transfer as before and continued so until his death. As a practical proposition the transfer was clearly intended and did in fact take effect in beneficial possession and enjoyment only at his death. Of course, there are technical reasons to be urged against this claim but if the rules of the numerous cases hereinbefore set forth are to be accepted as well settled, which it seems they are, that the substance and not the form is to control and that the courts will not sanction the exemption of any transfer wherein the donor has in fact reserved beneficial possession and enjoyment until his death, then the findings of the courts below are well founded. If we are to depart from these broad principles and let form and legal entanglements over-ride substance and practical result, then, to paraphrase the language of the U. S. Supreme Court in *Chase National Bank v. U. S.*, *supra*, we will be grasping at the shadow while the substance escapes. Taxation is an eminently practical problem and should be and universally is treated in a commonsense manner. (*Tyler v. U. S.*, 281, U. S. 497; *Comm'r v. McCormick*, U. S. Cir. Court of Appeals, (7th Cir.) not as yet officially reported.)

Appellant refers to the recent decision of the U. S. Supreme Court in *May v. Heiner*, 281 U. S. 238, but it is clear that that case has no application to the instant matter. There has been some intimation that this case goes so far as to hold that even the reservation of income from the trust property to the donor is not sufficient to constitute a taxable transfer under the Federal Estate Tax Statutes. Several Federal courts have so interpreted the decision; *Comm'r v. Northern Trust Co.*, 41 Fed. (2d) 732; *Hodgkins v. Comm'r*, 44 Fed. (2d) 43;

McCaughn v. Carnill, 43 Fed. (2d) 69. Although the U. S. C. C. A. (8th Cir.) does not believe the decision goes that far. (*Morsman v. Comm'r*, decided Nov. 10, 1930, and not yet officially reported.) It is quite certain that this point will require further judicial consideration if any attempt is made to apply it to state inheritance tax cases since the rule on this point has been settled so long and by such an imposing array of state cases that it is not easy to believe that they have been overruled without even so much as a reference thereto. However all of this may be it is certain that *May v. Heiner* and those cases adopting its logic have no application here since it is beyond argument that Mr. Russell, the donor, did have complete beneficial possession and enjoyment of the property transferred down to the time of his death. The lease and verbal agreement made that so.

For all of the reasons herein urged, it is respectfully submitted that the judgment of the Supreme Court should be in all respects affirmed.

WILLIAM A. STEVENS,

Attorney General of New Jersey,
Attorney for Defendants-Respondents.

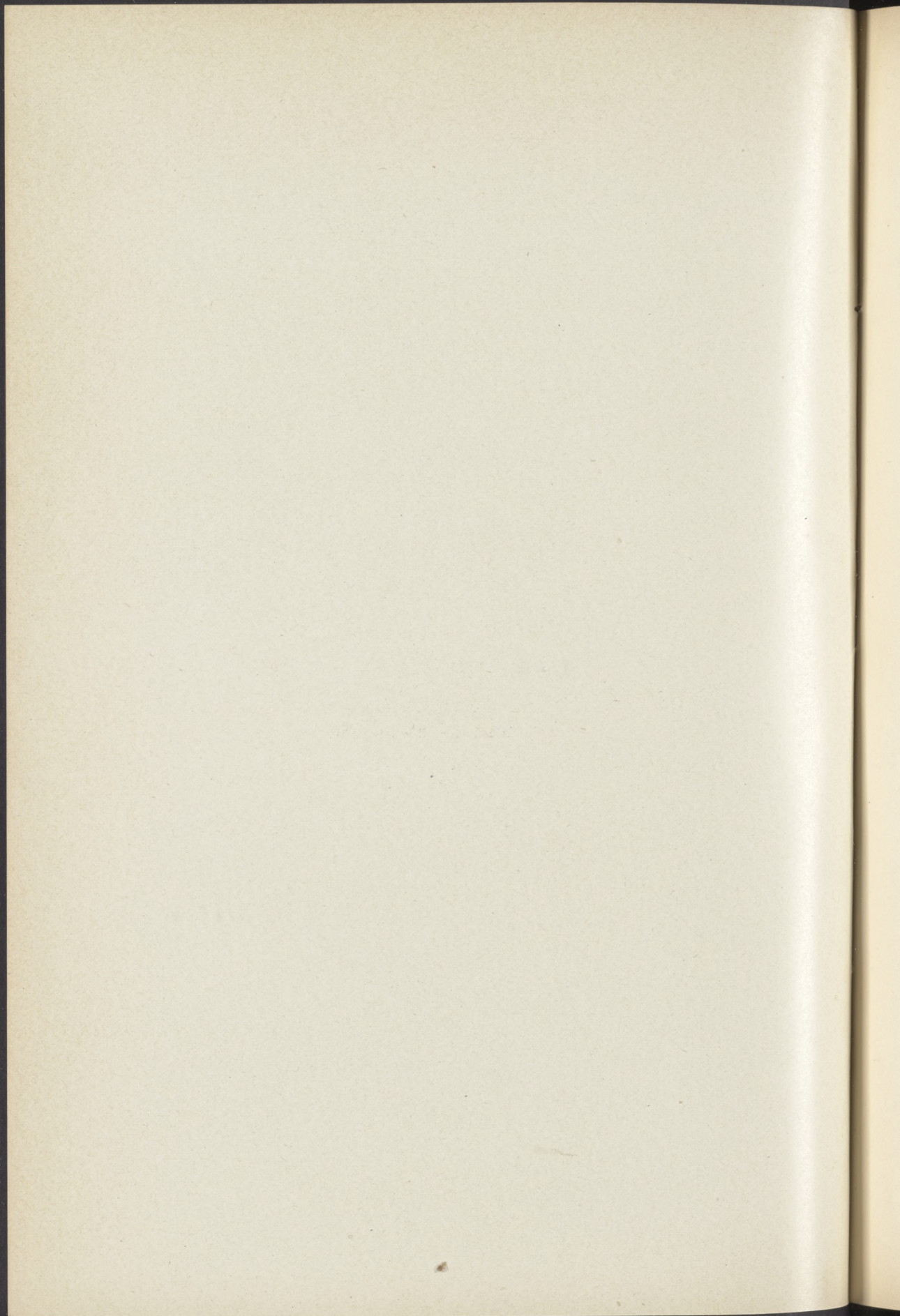


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New Jersey Court of Errors and Appeals.

CITY BANK FARMERS TRUST COMPANY (formerly known as The Farmers' Loan and Trust Company), as Executor of the Last Will and Testament of ARCHIBALD D. RUSSELL, Deceased,
Prosecutor-Appellant,

against

JOHN McCUTCHEON, as Comptroller of the Treasury of the State of New Jersey, ALBERT C. MIDDLETON, as Treasurer of the State of New Jersey, and JOSEPH F. S. FITZPATRICK, as Register of the Prerogative Court of the State of New Jersey,

Defendants-Respondents.

ON APPEAL

**POINTS OF
PROSECUTOR-
APPELLANT.**

POINTS ON BEHALF OF PROSECUTOR-APPELLANT.

This is an appeal from the order of affirmance of the Supreme Court, which order was entered in the above stated cause on July 10th, 1930. The said order affirmed a final decree of the Prerogative Court dated July 25, 1929, which final decree ratified and confirmed the action of the Comp-

troller of the Treasury in fixing and assessing a transfer inheritance tax in the estate of Archibald D. Russell, deceased, under the transfer inheritance tax law of New Jersey, as enacted by Chapter 228 of the laws of 1909 and the amendments and supplements thereto.

Statement of Facts.

Archibald D. Russell died a resident of Princeton, County of Mercer, on November 29, 1919, and thereafter The Farmers' Loan and Trust Company (now known as City Bank Farmers Trust Company), as the duly qualified executor of his will, instituted proceedings to have the New Jersey inheritance tax fixed and assessed. Thereafter, and on or about March 20, 1928, the said Comptroller issued an assessment in said estate in and by which he found that the decedent left a gross estate of \$8,602,656.94 (State of Case, pp. 22, 23), and a net estate subject to the said tax of \$7,152,325.59 (*ibid.*), upon which a tax was assessed and paid in the sum of \$162,481.14. The only dispute which exists at the present time between the said Comptroller and the executor with regard to said assessment, is the inclusion in the taxable estate of the value of the decedent's residence located at Princeton, New Jersey, known as "Edgerstoune", of a purported value of \$275,000, and personal property comprising the contents thereof having a purported value of \$17,800, in all \$292,800.

The said property, both real and personal, was conveyed by the decedent prior to his death by a duly executed warranty deed dated May 15, 1918, to his four children, namely, Ethelberta Pyne Eppley, Archibald D. Russell, Jr., Helen Rutherford Russell (now Benson), and Constance Rivington

Russell (now Winant), which deed was recorded in the office of the Clerk of the County of Mercer on June 25, 1918. The grantees on or about May 16, 1918 executed an indenture in and by which they leased the said real property (not the personal property) to the said decedent for a definite specified period of ten years, the consideration mentioned in said lease being "the yearly rent or sum of one dollar (\$1.00) and other valuable considerations to be paid in equal annual payments".

The action of the Comptroller in taxing said transfer was on the sole ground that the said transfer was one intended to take effect in possession or enjoyment at or after the death of the grantor. The parties are agreed that said transfer was not made in contemplation of death. (See paragraph "a", Stipulation, page 11, State of Case.)

Upon appeal to the Prerogative Court, the said action of the Comptroller was affirmed, and a final decree of the Prerogative Court affirming the said action of the Comptroller was entered on July 25, 1929. Thereafter the Supreme Court affirmed the said final decree by a final order dated July 10, 1930 (State of Case, pp. 67, 68).

It was found by the Prerogative Court (State of Case, p. 73) that the established and official tables of mortality indicate that on the date of the execution of the deed and lease, the decedent had a normal life expectancy of 11.1 years.

The Questions Involved.

Were the transfers of the real property at Princeton and the contents thereof subject to the transfer inheritance tax of New Jersey as transfers intended to take effect in possession or enjoyment at or after death within the purview and meaning of the statute. The parties have stipu-

lated that the transfers were not made in contemplation of death. The issue therefore is single. This major inquiry may appropriately be developed by the consideration of the following points:

1. There is no evidence of any kind that the decedent a year and a half before his death and at the time of the transfer was in ill health or suffered from diabetes. The findings of the Prerogative Court, and the affirmance of this finding by the Supreme Court, is without authority in that there is no evidence directly or inferentially to support the finding.

2. The personal property transferred by the deed of May 15th, 1918, was not let or leased to the grantor, and if he used the same he did no more than did the donees thereof.

3. The transfer of the real property and the contents thereof of May 15, 1918, was irrevocable. No further or greater property rights passed to the grantees at or by reason of the death of the grantor. A transfer is not one intended to take effect in possession or enjoyment at or after death where there are no rights reserved in the property for the life of the donor.

4. The value of the real property, the transfer of which was complete and irrevocable on May 15th, 1918, at the time of the delivery of the deed, may not be subjected to a transfer inheritance tax and such a tax thereon is in violation of the Fourteenth Amendment of the Constitution of the United States.

Statute Involved.

The statute involved is Chapter 228 of the Laws of 1909 and the Amendments and Supplements thereto, the same being the Transfer Inheritance Tax Law of New Jersey existing at the time of the death of Archibald D. Russell on November 29th, 1919. The pertinent section of the statute reads as follows:

“Third. When the transfer is of property made by a resident, or is of real property within this State, or of goods, wares and merchandise within this State, * * * made by a non-resident, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death. * * *”

POINT I.

There is no evidence to support the finding of fact that the grantor was suffering from diabetes on the date of the execution of the deed and lease. The health of the grantor is not a proper subject of inquiry in this class of case.

The theory upon which the tax was assessed on the gift by the decedent of his residence and of its contents is that it was the intention of the grantor that the use and possession and enjoyment thereof should not vest in the grantees until at or after his death. The Comptroller arrived at this conclusion by considering the deed from the grantor and the lease back to him by the grantees as one transaction. (It should be noted at this point, however, that there was no lease back

of the personal property comprising the contents of the residence and this theory is not applicable to the contents). Having arrived at this conclusion he at once concluded that the deed to the real property and the lease constituted in effect a reservation of the uses or enjoyment of the property during the life of the grantor, and that thus the transfer was one intended to take effect in possession or enjoyment at or after the death of the grantor. But this reasoning lacked one essential factor to sustain it and make it plausible, assuming so odd a bit of reasoning a proper basis for a tax. The life expectancy of the grantor was longer than the period of the lease, and this being so the normal and natural inference was, assuming the soundness of the premise, that the use and enjoyment were not reserved for the whole of the period of the life of the grantor, but that the transfer was intended to and would vest both in possession and enjoyment in the grantees prior to the death of the grantor. This weakness in the Comptroller's conclusion was supported indirectly (but without evidential basis as hereinafter will be pointed out) by assuming cumulatively (1) that the grantor had diabetes at the time of the transfer, and (2) knew that he was so afflicted, and (3) believed because thereof that he would not live out his life expectancy which was more than ten years. (State of Case, p. 73, Conclusions of Vice Ordinary).

The reasoning of the Comptroller was adopted and expanded by the Prerogative Court and found "justified upon the proofs before him" by the Supreme Court.

Let us test the conclusions and findings by the evidence. Let us search minutely the record to find, if possible, the slightest suggestion or hint either that Mr. Russell had diabetes at the time

of the transfer or that he knew that he had, or that the disease was malignant.

The evidence in respect of the health of the grantor was taken by the Comptroller for the purpose of proving if possible that the transfers in trust by Mr. Russell on May 15, 1918, for the benefit of his children of a large part of the property he had inherited from his wife, (State of Case, p. 50, testimony of Marion Eppley), as well as the transfer of the Princeton residence and its contents were made by him in contemplation of death. The evidence showed so clearly and so conclusively that at the time of the transfer the grantor was in good health that the State abandoned this claim, and determined that the large amount of securities transferred in trust on the same day the deed to the real property was dated was not taxable at all. The Comptroller then determined that because of the lease the transfer was or ought to be held a transfer to take effect in possession or enjoyment at or after death. But so free from doubt was the health of the grantor the Comptroller stipulated that the transfer of the real property and its contents was not taxable as a gift in contemplation of death. (State of Case, p. 11).

But what was the testimony, if any, that the grantor *had diabetes at the time of the transfer*? It is not in the record. The finding may be arrived at, if at all, only by strained inference. And it is only by inference that the Vice Ordinary undertook to arrive at the conclusion. (State of Case, p. 73). The death certificate is not a part of the record upon which the Court may predicate a finding of fact. The sole and only basis for the assumption or inference that the grantor had diabetes at the time of his death is the following testimony. The record is barren throughout of any

other evidence in respect thereof. State of Case, p. 44, examination by Mr. Rurode, counsel for the Comptroller:—

“Q. To your knowledge was he suffering from any disease or ailment which was progressive? A. Not that I knew of.

Q. Did he ever complain to you of anything? A. No, I do not think he seemed very ill.

Q. The cause of your father's death given in the certificate of death is diabetes, did you know that? A. Yes.

Q. How long did he suffer, to your knowledge? A. Well, I do not know.

Q. Did he keep on a diet for a time prior to his death? A. He was not on a strict diet, no.

Q. He was on some diet? A. I don't think so. Before he died he had been up on this trip to the mountains and he had eaten enough breakfast to kill most people. I don't think he was on a diet.”

The only evidence here is that the Attorney for the State Comptroller gratuitously states that the death certificate showed that Mr. Russell died of diabetes. What else does the death certificate show assuming that it showed that he did die of diabetes? Certainly this statement by the Comptroller's counsel and the daughter's acquiescence that the death certificate stated Mr. Russell died of diabetes is no basis for assuming he had diabetes a year and a half earlier, or that he knew it, or that he believed it affected his health and would shorten his life. The replies of the daughter seem to indicate exactly the contrary.

Again, State of Case, p. 48, counsel for the Comptroller assuming, without proving, that Mr. Russell had diabetes, asked:—

“Q. Did he talk about his diabetic condition? A. No.

Q. You say he saw a doctor two or three times a Winter? A. I do not know it, but I think so. He did not talk about going to the doctor. We all used to go to the doctor."

The question "Did he talk about his diabetic condition" is much in the nature of a catch question, though we do not believe counsel intended it to be. The daughter's reply "No" in view of her previous answers carries the normal natural inference that he did not talk about his diabetic condition because he never had any that she knew of. She had previously stated (State of Case, p. 44) that he was not on a diet, certainly not on a strict diet. That the finding by the Prerogative Court was gratuitous and was without basis in fact is clearly indicated in the only other instance in the record where the grantor's health, because of the assumed condition of diabetes, was even remotely a matter of testimony.

In the cross examination of Mr. Marion Eppley, a son-in-law of the grantor, the following colloquy is interesting (State of Case, p. 52). Question by Mr. Rurode:—

"Q. Did Mr. Russell ever speak to you about his condition? A. No. I knew Mr. Russell very intimately. I was the oldest one in contact with him of the second generation and he used to talk very frankly with me on all sorts of subjects. He seldom, if indeed ever, spoke about his health. The only time he spoke about his health was once when he had eezema on his arm, and he asked me whether I knew of a certain medicine and I told him I did not. I afterward found out it was a 'patent' medicine. When he was dying and the doctor told me that he was in a diabetic coma it was a great surprise to me to hear that he had a thing of that sort which I had always regarded as chronic. I asked

the doctor and he said his condition was probably due to his having caught cold or something of that sort. That is my recollection of the doctor's statement at Mr. Russell's death bed."

There is no definite testimony here except the bare statement that the doctor stated that Mr. Russell was in a diabetic coma. Even then Mr. Eppley was greatly surprised "to hear that he had a thing of that sort", which disease Mr. Eppley had always regarded as a chronic disease and not an acute one. The doctor, so Mr. Eppley testified, attributed the diabetic coma to Mr. Russell's "having caught cold or something of that sort."

There is patently nothing to indicate, and moreover nothing from which an inference may be drawn, that Mr. Russell had diabetes a year and a half before he died, or if he did that it affected him. Certainly medical science and knowledge would assume the contrary.

But the Vice Ordinary upon the assumption that the death certificate showed that he died from diabetes or from the statement of Mr. Marion Eppley that the doctor told him that he was in a diabetic coma probably due to his having caught cold, concludes that if a man died in a diabetic coma, he must have had diabetes for more than a year and a half. The Court said (State of Case, p. 73):—

"The grantor was within a few days of 65 years of age at the time. If in average health his expectancy of life would have been admittedly, a trifle over 11 years. But he died in a year and a half,—of diabetes. It is a matter of common knowledge that diabetes is a progressive disease,—at that time (which was prior to the development of the insulin treatment) usually fatal eventually. The

daughter testifying as to the year 1918 said she did not think he seemed very ill; that she did not know how long he suffered before his death; that he was not on a strict diet, &c. There is contrary evidence it is true, but bearing in mind that the daughter's interest was adverse to that of the State, the inference is justifiable, from these admissions, and from the nature of the disease which caused his death so soon afterwards, that the grantor was ill in 1918 with diabetes; and that some kind of a diet had been prescribed, even if not strict, or even if he did not adhere to it."

We submit that there is not a line nor a syllable to justify the inference or the finding. Diabetes in an older person is rarely fatal and is seldom serious. This may be illustrated, if it need illustration, in the decision of the United States Board of Tax Appeals in *White, Executor, etc. v. Commissioner*, 21 B. T. A. 500. In this case the Board found as a fact the following (p. 509):—

"About the year 1917, decedent developed a mild case of diabetes. In March, 1920, decedent underwent a thorough medical examination, which disclosed a chronic condition of diabetes and arteriosclerosis. His blood sugar was relatively low, around 160 milligrams. Normal is 120. *Diabetes varies in severity according to the age at which it is acquired.* In the case of children, before the introduction of the drug insulin, diabetes was very serious, usually fatal. It becomes less serious as one grows older. Beyond 60, diabetes is not recognized as a serious disease, and rarely if ever requires the active treatment necessitated in the more serious forms."

Again in the case of *Vaughan v. Riordan*, 280 Fed. 742, the decedent had suffered with diabetes for a period of twenty years. In that case he had made a transfer nine days before his death and

the issue was whether the transfer had been made in contemplation of death. The Court held the transfers were not made in contemplation of death.

We submit that not only is it not a matter of common knowledge that diabetes is a progressive disease, but in older people the contrary is true. It is rarely a serious disease. A diabetic coma could come, as the doctor indicated, from a severe cold. But a diabetic coma may occur without any prior history of diabetes. It could follow, as is also common knowledge, from a severe shock or fall or, as, possibly in this case, from a severe cold. There need never have been any prior traces of diabetes.

But whether the testimony and the record are sufficiently definite for the Court to find as a fact that the decedent died of diabetes is not a matter of moment here and should not have been in the lower court, because assuming diabetes to have occasioned death there can be no just and reasonable inference that the decedent had diabetes at the time of the transfer or was in any other way ill, and that such a disease if existing prompted the gift, or suggested the lease.

This is a tax law. The State must bring the transaction within the ambit of the statute or the subject of taxation goes free. This thought is expressed by the United States Supreme Court in *United States v. Merriam*, 263 U. S. 179, where Mr. Justice Sutherland quoted the rule with approval as laid down by Lord Cairns in *Partington v. Attorney-General*, L. R. 4 H. L. 100, 122:—

“I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter

of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. * * *

As we understand the rule it is that while a question of fact is not disputable in the appellate court it is always arguable in the appellate court whether or not there were any or sufficient facts upon which to sustain the findings of the lower court. The converse of this is indicated in the opinion of the Vice Ordinary in *In re Hall's Estate*, 94 N. J. Eq. 398, at p. 406, where the Court said:

“So the Comptroller’s finding in this behalf is not to be reversed *if there was before him sufficient evidence to support that finding.*” (Italics ours.)

If there be facts sufficient to justify the Court’s finding the question presented is a question of fact and not reviewable in the appellate courts. If the facts be not sufficient to justify the finding and, *a fortiori*, if there be no facts from which an inference appropriately may be drawn, the question presented to the Court is one of law, and like all other law questions is reviewable by the appellate courts. The rule is stated in 4 *Corpus Juris* at pp. 647-648 as follows:—

“A question of law is presented, * * * where there is no evidence to support the verdict or findings; * * *.”

This is true under Section 11 of the Certiorari Act. See *The Yellow Pine Co. v. State Board of*

Assessors, 72 N. J. Law 182, wherein this Court said at p. 184:—

“Under the Certiorari Act this Court has uniformly held that an adjudication of the Supreme Court on questions of fact, is a finality, and not open to review here, *if there were before that court, any facts upon which their adjudication could rest.*” (Italics ours.)

Again the Court of Errors and Appeals in *Voorhis v. Terhune*, 50 N. J. Law 147, held as follows:—

“Was there legal ground for the judgment of the court below? This depends upon its finding of fact upon evidence. This is a writ of error, and its sole office is to present legal questions for decision. Under it the court will not decide questions of fact, *and will look into the evidence only to discover whether it affords, on any permissible interpretation of it, a rational support for such finding.*” (Italics ours.)

It is the contention of the appellant that there is no evidence to support the finding of fact of the Comptroller and of the reviewing courts that the decedent was suffering from any disease on the date of the transfer of the real property involved herein, and that he was influenced by a knowledge of this purported ailment, and of necessity it follows that this Court may pass upon whether there was any evidence that in May of 1918 Archibald D. Russell had diabetes.

But suppose he did? His health has nothing to do with whether a transfer was intended to take effect in possession or enjoyment at or after his death. Such an inquiry appropriately may be directed solely to whether the transfer was made in contemplation of his death, and, when introduced

here, brings into play an altogether alien element of the law. This case is unique in this particular. It is the first case which has come to the notice of the appellant wherein the question of health was considered of any significance in arriving at a grantor's intention as to whether his grant was to take effect at or after his death. It may, and probably does, have a bearing upon whether a transfer was made in contemplation of death. But the State Comptroller after taking evidence for the purpose of discovering the health of this decedent at the time of the transfers came to the conclusion that the transfers were not in contemplation of death, and naturally inferable therefrom, because he was in good health at the time of the transfers. (See State of Case, p. 11, Stipulation.) We do not believe that, and cannot see how, the lower court as a matter of law had any right to inject the health of the grantor into the consideration of whether the transfer was one intended to take effect in possession or enjoyment at or after death. Certainly the health of the grantor could not affect the legal effect of the transaction. Mr. Russell transferred on May 15th, 1918, a large portion of the property he had inherited from his wife to trustees for the benefit of his children. The children had inherited nothing from their mother. On the same day he transferred to his children by warranty deed his former residence in Princeton, New Jersey, together with its contents. The grantees then leased the said property to their father for a period of ten years at a nominal rental of one dollar a year. Can his health affect the fact of the deed or of the lease? Assuming the two transactions of the warranty deed and the lease were one transaction, nevertheless his health, good or bad as the case may be, could not affect the legal

rights obtaining upon the completion of the two transactions. At that moment the children owned in fee simple the property. The father only owned a leasehold of ten years duration.

The Burden of Proof is on the State.

As laid down by the New York courts in respect of the New York transfer inheritance tax, the rule is as indicated in *Matter of Cochrane*, 117 Misc. 18, aff'd 202 App. Div. 751, at p. 23:—

“The law imposing the tax must be strictly construed against the Government and favorable to the taxpayer. *Matter of Vassar*, 127 N. Y. 1, 12; *Matter of Bronson*, 150 ib. 1. If a doubt exists whether a tax is to be levied, or not, it should be resolved against the State. *Matter of Weimann*, 179 N. Y. Supp. 190. *The state has the burden of proving the tax. Matter of Miller*, 77 App. Div. 473.” (Italics ours.)

We refer again to the observation of Lord Cairns quoted with approval by Mr. Justice Sutherland in the case of *Merriam v. United States*, 263 U. S. 179, where the rule was laid down that if the taxing authority seek to subject the transaction to tax it must bring the transaction within the statute. This rule of law has been announced over and over again in New York. See *Matter of Enston*, 113 N. Y. 174, 177; *Smith v. Browning*, 225 N. Y. 358; *Matter of Masury*, 28 App. Div. 580, p. 583; see also *In re Ullman's Estate*, 263 Ill. 528, 105 N. E. 292, 293; *Matter of Wadsworth*, 100 Misc. [N. Y.] 439, 446. The rule is equally definite that where there is doubt as to the meaning of the statute and to its application, that doubt is “construed most strongly against the government and in favor of the citi-

zen". *Gould v. Gould*, 245 U. S. 151, 153. See also *United States v. Wigglesworth*, 2 Story 3 B. G. 369; *Blair v. Herold*, 150 Fed. 199, 201.

It is submitted that the inferences drawn by the lower courts in this case have all been in favour of the state and against the taxpayer, and every possible doubt has been resolved in favour of the state, contrary to these very definite and fundamental rules of law.

The statute provides a transfer inheritance tax and in its provisions imposes a tax upon such *inter vivos* transfers as have been made as were intended to take effect in possession or enjoyment at or after death, or as were made in contemplation of death. The provisions of the law indicate that the burden is on the state to prove that the transfers were the kind of transfers made subject to tax by the statute. The estate is not called upon to prove a negative. This was recognized by the state in undertaking to take testimony in the attempt to prove these transfers, as well as other transfers made by Mr. Russell, were in contemplation of his death. As heretofore stated this claim was abandoned and stipulated out of the case. It then undertook by the same evidence to prove that the transfers involved in the case in suit were intended to take effect in possession or enjoyment at or after death. Did the state prove this? True, the findings of the lower court will not be reviewed by the higher court if the lower court had any basis upon which to find the facts. If resort must be had to inference, or there be any reasonable doubt, that reasonable doubt must be construed in favour of the taxpayer. This rule is cardinal in our law, and lies at the root of the interpretation of all fiscal legislation.

We submit that there is not a syllable nor scintilla of evidence to show that Archibald D. Russell

was suffering from diabetes at the time he made the transfer, on May 15th, 1918. We submit further, that even if it may be inferred that he was suffering from diabetes at that time (which possibility we challenge and deny) is there any fact which may be seized upon for the purpose of drawing the inference that the diabetes, assuming he was so afflicted, was of such an acute and malignant sort that it was gradually undermining his health and gave reason for him to believe that he would not live out his life expectancy of 11.1 years? This question is a matter properly before this Court, and it is the contention of the appellant that there was no basic fact justifying the findings of the lower court.

POINT II.

There was no lease of the personal property back to the grantor.

On May 15th, 1918, at the time Mr. Russell transferred the real property, he by the same deed (State of Case, p. 36, fol. 10) irrevocably transferred the contents of the residence. The personal property comprising the contents had a value as determined by the Comptroller of \$17,800.00. The theory of the Comptroller in respect of the real property is not applicable to the personal property. The theory of the state is that by reason of the lease to Mr. Russell of the real property, the transfer in effect constituted one to take effect in possession or enjoyment at or after death on the ground that in substance, if not in form, the transactions constituted a reservation of the uses of the real property. This is not true of the personal property.

From the time the personal property was transferred on May 15th, 1918, the four children of Archibald D. Russell as tenants in common owned the same. It was subject to their debts. The furniture and fixtures could have been taken away or destroyed by them. They could have sold them. The fact that the father continued to live in the house and use some of these fixtures and furniture will not justify the state in saying that he also reserved the uses thereof in making the gift. There is no evidence to justify such an inference. While he may have used some of the furniture, so, likewise, did the actual owners thereof, for two unmarried daughters living in the house, rent free, used the personal property comprising its contents as much so, if not more so, than the father. The same was true in respect of the son.

We submit therefore that irrespective of the taxability upon any theory whatsoever of the real property transferred there is no basis in law or in fact for the Comptroller including the personal property as a part of the taxable estate of Archibald D. Russell.

POINT III.

The transfer and conveyance of the property by the decedent under deed bearing date May 15, 1918, was not a transfer intended to take effect in possession or enjoyment at or after the death of the grantor within the purview of the New Jersey transfer inheritance tax law.

Under the decisions of the State courts a transfer is one intended to take effect in possession or enjoyment at or after death where the transfer is made subject to the reservation of the use or the

income of the property transferred for a stated period of the life of the grantor. *Carter v. Bugbee*, 91 N. J. L. 438; *Matter of Keeney*, 194 N. Y. 281, affirmed by the United States Supreme Court *sub nom Keeney v. New York*, 222 U. S. 25; *Matter of Green*, 153 N. Y. 223; *Matter of Webber*, 151 App. Div. 539; *People v. Moir*, 207 Ill. 180; *People v. Kelly*, 281 Ill. 509; *Reish, Admr. v. Commonwealth*, 106 Pa. St. 521. It has been held by the highest court of one state (Massachusetts) that if the transfer be by trust measured by the life of the grantor and even though at the time of death there was no right in the grantor to the enjoyment of the income (the same having been surrendered and released prior to death) the transfer is within the statute. This obviously was held upon the assumption that there could not be a manucaption of the property by the ultimate remaindermen until the termination of the trust. *Coolidge v. Commissioner*, 167 N. E. 757 (which case is now pending in the United States Supreme Court and was argued in December, 1930). Also there is a decision by one of the lower courts of New York to the same effect. *Matter of Dunlap*, 205 App. Div. (N. Y.) 128, 188 N. Y. Supp. 762. But this decision is of doubtful effect, see, contra, in effect, *Matter of Barstow*, 230 App. Div. (N. Y.) 371 (October, 1930); *Matter of Kirby*, 133 Misc. (N. Y.) 152, affirmed 228 App. Div. 640, affirmed without opinion by the Court of Appeals 254 N. Y. 122. The rule in the Federal courts in respect of similar language in the Federal estate tax law appears to be that a transfer, if irrevocable, is not one intended to take effect in possession or enjoyment at or after death, notwithstanding the reservation of income. *May v. Heiner*, 281 U. S. 238, *Commissioner v. Northern Trust Company*, 41 Fed. [2d] 732, 7th C. C. A.; *Hodgkins v. Commis-*

sioner, 44 Fed. [2d] 43, 7th C. C. A.; *McCaughn v. Carnill*, 43 Fed. [2d] 69, 3rd C. C. A.; see contra *Morsman v. Commissioner*, decided November, 1930, as yet unreported C. C. A. 8th Circuit. (These last four cases are now pending in the United States Supreme Court on certiorari.)

A transfer of the property with a subsequent independent transfer back of an interest therein constitutes an entirely different legal status from a transfer of property with a reservation of the uses thereof. If the transfer be subject to the reservation of the right to use the property transferred or to enjoy the income therefrom for the life of the grantor, the transfer under the state decisions including those of this state is one to take effect in possession or enjoyment at or after death provided the reservation of the uses thereof, or the income therefrom, be for the stated period of the life of the grantor. (*Carter v. Bugbee*, supra; *Matter of Keeney*, supra.)

If the property be transferred, and by an independent act, even though concomitant and simultaneous with the act of transferring, the transferee deeded or leased back to the grantor a use or right in the property, even though that re-granting be for the life of the grantor, a different legal status is presented. *Wolf v. Comptroller*, 90 N. J. Eq. 221; *In re Honeyman's Estate*, 98 N. J. Eq. 638; *Nichols v. Coolidge*, 274 U. S. 531; *Ely and Dinwiddie, Executors Est. Harriet S. Daniels v. United States* (decided by the United States District Court for the Northern District of Iowa on December 18th, 1930, reported in Prentice Hall Federal Tax Service 1918-1931 at p. 497), *People of the State of Illinois v. United Christian Missionary Society* (decided by the Illinois Supreme Court on October 31, 1930, 173 N. E. 132).

If an irrevocable transfer be made in trust but the instrument of transfer reserve to the grantor only a portion of the income or use of the property during life, and the enjoyment of the other portion thereof commences at once, only a pro rata portion of the property transferred is subject to tax as a transfer intended to take effect in possession or enjoyment even though the principal may not be transferred over by the trustees to the ultimate remaindermen until at or after the death of the grantor. (*Matter of Keeney*, 184 N. Y. 281 [*sub nom Keeney v. New York*, 222 U. S. 25, where the reservation was of one-quarter of the income and only a quarter of the property was made subject to the tax]; *People v. Welch*, 235 Mich. 555, 209 N. W. 930. See also United States Treasury Department Regulations 70, 1929 Edition, Article 18).

The appellant has been unable to find any case that would be authority for subjecting to tax the value of property irrevocably transferred where there was no reservation at the time of the transfer of income or property rights to the grantor. That this is so is because such a transfer is conceded not to be within the purview of the statute. Likewise this would be so even though there was an estate for years by leasehold or otherwise, by act of the grantee, independently, or even by the act of the grantor. True, the value of the estate for years or leasehold might be an appropriate subject of tax if the facts indicated that there was a property value being transferred at the date of death. But the State may not tax the value of the property transferred *inter vivos*, if there be nothing of the property so transferred left to be transferred at death (*May v. Heiner*, 281 U. S. 238; *Shukert v. Allen*, 273 U. S. 545; *Reinecke v. Northern Trust Co.*, 278

U. S. 339. *Matter of Kirby*, 133 Misc. 152, aff'd. 228 App. Div. 640, aff'd. without opinion 254 N. Y. 122).

The decision of the United States Supreme Court in *Nichols v. Coolidge* should be dispositive of the issue here presented.

Such cases as have gone to the courts upon facts similar to those herein, so far as the appellants have been able to discover, have definitely and fully decided the issue. The leading case, of course, and one in most respects on all fours with the case in suit, is *Nichols v. Coolidge*, 274 U. S. 531. This case we believe should dispose of the issue in suit. In this case Julia Coolidge, J. Randolph Coolidge, her husband, joining, on May 18th, 1917, by deeds conveyed the fee of two parcels of real property long used by her for residences to her five children as a gift. "Contemporaneously the grantees leased these parcels to the conveyors for one year at nominal rental, with provision for annual renewals until notice to the contrary. All parties understood that renewals would be made if either lessee wished to occupy the premises." (From statement of case by Mr. Justice McReynolds, at p. 533.) The Federal estate tax authorities contended that the above transfer was intended to take effect in possession or enjoyment at or after Mrs. Coolidge's death, within the meaning of the Federal law and that the value, at the time of her death of the property held by the conveyees constituted a part of her gross estate for tax purposes.

The Supreme Court of the United States said, commencing at p. 533:—

"The Court below held the transfer of the residences (1917) was absolute; the right to

possess or enjoy them did not depend upon death; and their value constituted no part of the gross estate."

The Supreme Court then in undertaking to treat and decide in respect of the taxability of the transfer of the residences subject to the lease as aforesaid, said, commencing at p. 538:—

"Concerning transfer of the residences in 1917, the trial court charged—

'I do not have much difficulty in reaching a conclusion respecting the deeds of the Boston and Brookline real estate, and I will first consider the claims of the parties respecting those transfers.

'The deeds conveyed, with warranty covenants, absolute and indefeasible title to the real estate without any valid reservations, conditions or restrictions whatsoever.

'The leases, executed the same day, were for one year or any renewal thereof but were always subject to the right in the lessors to terminate the term during any year by giving the notice as therein provided. It is conceded that the parties contemplated that the premises would be enjoyed by the decedent and her husband so long as they might desire to use them for residential purposes, but the decedent had no valid agreement to that effect. Her rights must be held to be governed by the term of the lease. If it could be said that the grantees did not come into full possession and enjoyment of the estate at the time of the conveyances—and I am inclined to the opinion that they did—their right to come into full possession did not depend in the slightest degree upon the death of the grantor. The effect of this transaction was to vest in the five sons named in the deed full and complete title to the property including the right of disposition. They had a right to sell the property subject to the lease and had all rights incident to ownership. There

was here a gift completed during the lifetime of the donor. The act of 1918 did not purport to tax such gifts.

'I have reached the conclusion, therefore, that respecting the property conveyed by the deed, the facts of this case do not bring the property within the reach of the statute and that the Commissioner of Internal Revenue was without authority to include the value of it as a part of the gross estate. I, therefore, give the following instructions, as requested by the plaintiffs: The real estate referred to in the second count of the declaration was not a part of the net estate of Julia Cooledge within the meaning of the Revenue Act of 1918.'

We agree with this conclusion and accept as adequate the reasons advanced to support it."

The similarity between the facts in the *Coolidge* case and those in the case at bar is so striking that we believe the decision of the Supreme Court in the *Coolidge* case should dispose of the issue in suit. The Prerogative Court attempted to differentiate the *Coolidge* case (State of Case, p. 75) in the following manner:

"The facts were much like the case at bar with two very important differences:—(1) The deed had been made in 1917 two years *before* the enactment of the Federal statute in 1919; and (2) the lease back to the children was for one year, with provision for renewal, but 'always subject to the rights in the lessors' (the children) 'to terminate the term in any year'. Although 'the parties contemplated that the premises would be enjoyed by the decedent and her husband as long as they might desire' * * * 'the decedent had no valid agreement to that effect.' In the case at bar the deceased did have a valid agreement giving him the possession and enjoyment for a time expected and intended to continue until after his death."

It is respectfully submitted that the United States Supreme Court in *Nichols v. Coolidge* did not decide that the transfer of the real estate was not subject to tax because the transfer was made under the Revenue Act existing in the year 1917 and the decedent died under the Federal Estate Tax Act of 1918. No such point was made to or by the Court or even considered by the Court. We submit, too, that the lease back to the children in the *Coolidge* case was under a more lasting understanding than the lease in the case in suit.

If the inappositeness of the attempted distinction of the *Nichols v. Coolidge* case by the Prerogative Court need illustration it can be found in the fact that the estate of Julia Coolidge involved in the case of *Nichols v. Coolidge* upon the death of J. Randolph Coolidge went to the courts of Massachusetts in respect of the taxability of the trust created by Julia Coolidge in 1907, and the Supreme Judicial Court of Massachusetts held in *Coolidge v. Commissioner*, 167 N. E. 757, that the trusts were subject to tax, notwithstanding the United States Supreme Court had held under the Federal law that the trusts were not subject to tax. But the taxing authorities of Massachusetts did not even pretend that the transfer of the real estate that was subject to occupation and to lease year by year was subject to the Massachusetts inheritance tax as a transfer intended to take effect in possession or enjoyment at or after death. Massachusetts did not even claim that the residences held not taxable in *Nichols v. Coolidge* were subject to tax under the Massachusetts law.

In other words, no question of retroactivity of the statute was involved in the decision of the United States Supreme Court in *Nichols v. Coolidge*, *supra*, in respect of the transfer of the

residences by Mrs. Julia Coolidge to her five children. Clearly, there was no question of retroactivity of the statute involved under the Massachusetts law, for the transfers of the residences were made in the year 1917, long after the enactment by Massachusetts of its transfer inheritance tax laws imposing a tax upon transfers to lineals. The Federal Court held that the transfer was not one intended to take effect in possession or enjoyment at or after death. The United States District Court sitting in Massachusetts held that the transfer was not one intended to take effect in possession or enjoyment at or after death. The Massachusetts taxing authorities, while undertaking to tax the other transfers of Julia Coolidge made prior thereto, made no claim that the property involved in this transfer was subject to tax. We respectfully submit that neither basis of attempted differentiation of this case from the case at bar by the Vice Ordinary is meritorious.

The New Jersey Supreme Court did not even refer to the *Coolidge* case. (See opinion, State of Case, p. 68 et seq.). The questions involved in *Nichols v. Coolidge*, supra, and as presented to the United States Supreme Court are quite clear and should not cause any confusion. There were two separate issues presented to the Court: One was in respect of whether a trust created in 1907 by Mrs. Coolidge for the benefit of herself and her husband with remainders over to the children upon the death of the survivor of herself and her husband was subject to the Federal estate tax. In this case she and her husband on April 6th, 1917, had assigned any interest that the settlors had in the trust and "especially any right to the income therefrom." This transfer was held by the United States Supreme Court not to be taxable upon two grounds: (1) That the transfer of the

property in trust by Mrs. Coolidge "was in no proper sense testamentary, and it bears no substantial relationship to the transfer by death" (p. 540); and (2) That as the transfer was irrevocable prior to the enactment of the first Federal Estate Tax Act, a tax upon the transfer would be a violation of the Fifth Amendment of the Constitution. The other issue, and the one here pertinent, was whether the two houses long used by Mrs. Coolidge for residences transferred by her on May 18th, 1917, was a transfer intended to take effect in possession or enjoyment at or after death.

In respect of the trusts that were created in 1907 the question of the retroactivity of the application of the statute, and its constitutionality if so applied, was the issue presented to the Court. In respect of the transfer of the residences (and it is only this transfer in which we are here interested and which is apposite to the case at bar) no question of the retroactivity of the law was present in the case. The lower Court, as well as the United States Supreme Court, held that the transfers were not transfers intended to take effect in possession or enjoyment at or after death, and hence not subject to tax.

The decision by the United States Supreme Court in the *Coolidge* case, and the action of the State Tax Commissioner of the State of Massachusetts in not imposing a tax upon the transfer of this real estate, is not an isolated instance in which the Courts have held under facts relatively similar to the facts in the case at bar that the transfers were not intended to take effect in possession or enjoyment at or after death within the purview of the death duty laws. The United States District Court for the Northern District of Iowa, as late as December 18th, 1930, decided

a similar case. This was the case of *J. S. Ely and J. M. Dinwiddie, Executors of the Estate of Harriet S. Daniels v. United States* (unreported as yet, but see Prentice Hall Federal Tax Service 1918-1931 at p. 497, Par. 374). The facts in this case were briefly as follows:

Harriette Daniels in June, 1906, conveyed by a general warranty deed real property of which she was the owner to Elizabeth Shearer. Upon the same occasion, as found by the Court, but as an independent transaction between Harriette Daniels and Elizabeth Shearer, it was agreed orally between them that the grantor might continue to reside with the grantee in the said residence and home situated on such real estate as long as she, the grantor, might desire, and that the grantor in consideration thereof was to pay the taxes and upkeep upon said premises. The Court further found that the continuation of the said agreement and arrangement was at the will of the grantor and might be terminated by her at any time. The Court found as a matter of law that the transfer should not be subject to the Federal estate tax.

We have therefore the United States District Court for the District of Massachusetts holding that an irrevocable transfer of real estate wherein there was a contemporaneous lease by the grantees to the grantor of the use of the property at a nominal rental was not a transfer intended to take effect in possession or enjoyment at or after death and not subject to the tax. We find the United States Supreme Court affirming this decision, and adopting the reasons given by the District Court as adequate. *Nichols v. Coolidge*, 274 U. S. 531, 539. We have the fact that the taxing authorities of the State of Massachusetts under the same circumstances did not impose a tax upon

the transfer of the real estate under these conditions. We have the decision of the United States District Court in Iowa to the same effect. We know of no decision by any of the Courts anywhere else that has ever been contrary under facts similar to these.

The substance of the transactions must control. "Taxes are very real things and statutes imposing them are estimated by practical results." (*Nichols v. Coolidge*, at p. 541). The actual facts must be viewed as they are and not as the respondent would have them. If Archibald D. Russell had no property interests at the date of his death to transfer, then any tax upon property previously transferred would violate the Fourteenth Amendment of the Constitution of the United States. If he had property to transfer upon the date of his death then he would be subject to a tax. Unless the grantor reserved something to himself there may be no tax. If he did reserve something to himself and that property right or interest was transferable at his death, a tax is impossible to the extent of the property interest or right transferred at death. The facts in cases like *Matter of Brandreth*, 169 N. Y. 437, where a transfer of stock was made to the daughters and at the same time the daughters granted the dividends and right to vote the stock to their father *during the whole of his life*, should not be confused with the facts in the case at bar. Nor should the facts in cases like *In re Dobson's Estate* (Surrogate's Court, Oneida County, New York), 132 N. Y. Supp. 472, be confused with those in the case at bar. In the *Dobson* case the transfer was of property upon the condition that the same would be leased to the grantor *for the period of the life of the grantor*. In the *Dobson* case the

deed itself in effect reserved the life use to the grantor in that the conveyance was upon the express condition that the promise of the grantee to lease the property to the grantor for life would be carried out.

In addition to that such cases as have been held taxable have all been cases, so far as our researches go, where either the instrument of transfer, or a separate concomitant instrument, reserved or gave the use and enjoyment of the property to the grantor *for a period not less than his life*. In other words, such cases as have held the transfers subject to tax are all cases wherein there was no possibility of the enjoyment being in any one other than the grantor until the moment of his death.

That circumstance is not true in the case in suit. The lease here was for a specific time. Also it may be pointed out as not altogether unworthy of note that in such cases as have been held taxable the property transferred consisted of a considerable part of the property of the grantor. This was not so in this case. The record shows Mr. Russell's gross estate, as determined by the Comptroller, was approximately \$8,602,000, including the value of the real property of \$275,000.00. Even this large figure excluded real estate owned by the decedant located outside of the State of New Jersey and which was not subject to tax by the State of New Jersey in the sum of \$4,300,000.00. In other words his gross estate when he died amounted to very nearly \$12,000,000.00. It would be idle to assume, certainly gratuitous, that the deed of this real property to the children and the lease by them to him could have been prompted in any way by the attempt to avoid inheritance taxes of the State of New Jersey

or of any other State. The real property transferred had a value of less than \$300,000.00 which at the time of his death would have constituted approximately 1/40th of his estate.

The tax is in violation of the Fourteenth Amendment of the Federal Constitution if it is applied to anything other than the value of the leasehold at the time of the death of the grantor—assuming the lease had a monetary value.

In the Prerogative Court it was stated in the brief of the appellant that there was "no basis for the imposition of the New Jersey death duties upon this transaction", and further "that the tax as imposed * * * is a violation of the Fourteenth Amendment to the Constitution of the United States." In the brief of the appellant in the New Jersey Supreme Court it was set out (p. 55) that any exaction of a tax upon the transfer of any property other than the value of the leasehold, assuming it had one, "would be a taking of * * * property without due process of law, contrary to the Constitution of the State of New Jersey and of the Fourteenth Amendment to the Constitution of the United States."

We repeat this contention.

In the Prerogative Court it was argued that no portion of the real or personal property transferred on May 15th, 1918, was subject to the New Jersey transfer inheritance tax. In the Supreme Court that argument was repeated, and in support thereof it was argued that assuming there was a property that could have been subjected to tax, the Comptroller had selected the wrong property. He had undertaken to tax the transfer of the real estate not as a transfer made in contemplation of death, but as a transfer intended to

take effect in possession or enjoyment at or after death, which it obviously and patently was not. Archibald D. Russell did possess, and there was transferred to his executors, a leasehold having approximately eight and one-half years to run, in the real property located at Princeton. This property was a part of the assets of the estate. If it had a value it was subject to tax. If it had no value then there could be no tax computed upon it.

The will of Archibald D. Russell did not leave his estate to his four children. The property composing the estate of Archibald D. Russell was left in trust during the lives of his children with the remainders over to his grandchildren and others. A part of the assets susceptible of being taken over by the trustees provided for under the will of Archibald D. Russell was the leasehold owned by him at the time of his death. The leasehold was an inventoriable asset of the executor. If the trustees had retained the leasehold and had sublet the property under the lease the children still would have received during the remaining term of the leasehold only such income as the trustee earned and was able to distribute under the terms of the testamentary trust. Property of this class was not susceptible of leasing. The executors in their judgment surrendered the leasehold to the landlords—the owners of the property in order to be free from the upkeep of an unproductive asset in the hands of the executor.

The children had no right in law to enter upon the property until May 16, 1928, the expiration of the term of the lease they had granted to another. The death of the father did not add to their property interest one iota. It did not affect their ownership of the real property (and *a fortiori* of the personal property comprising the contents

thereof) nor did the death of the father hasten their right to enter and lease or otherwise deal with the property. This is because there was an outstanding lease that had eight and one-half years more to run, and which leasehold had not been willed to them.

It was submitted by the appellants in argument in the New Jersey Supreme Court that if the State of New Jersey could tax anything constitutionally it could tax only the value of the leasehold. The Supreme Court, we say with deference, misapprehended the argument submitted by the appellant, and stated (State of Case, p. 70):—

“The prosecutor now seems to contend, and devotes a large portion of its brief thereto, that, if there should be a tax against this property, the present assessment is made upon an improper and illegal basis, as it is made upon the actual market value of the lands and chattels, and should have been made only upon the value of the leasehold thereof in the estate of Russell.

“We think this is without legal or factual merit, and, furthermore, this question does not appear to have been raised or argued in the Prerogative Court, and therefore may not be raised here.”

We argued in the Supreme Court that the real estate transferred could not be taxed constitutionally, nor under a reasonable and an appropriate interpretation of the New Jersey statute. That is what the Comptroller had taxed, and it was a tax on the transfer of the real estate which had been sustained by the Prerogative Court. It was from a tax upon the transfer of the value of the real estate that the appeal had been taken. In support of the argument that the statute did not provide for the taxation of the

transfer of this real estate, and that it was not taxable within the purview of the New Jersey inheritance tax Act, it was pointed out and argued that the Comptroller had undertaken to tax the wrong property assuming there was any kind of property subject to the tax. This is not raising a new point. It is an argument advanced to show that the transfer of the thing taxed by the Comptroller should not have been taxed under the New Jersey law. The suggestion was there made and is here made *arguendo* that the transfer of the real property is free from the New Jersey inheritance tax as a transfer intended to take effect in possession or enjoyment at or after death, and that if there is anything that may be taxed it is not the thing that was taxed, but is the value of a leasehold. It may be that the leasehold has no value. If this be so there can be no tax. It may be that the leasehold had a value. If so the Commissioner should have taxed the transfer of the leasehold, which was in fact transferred by death and went to others than the four children who are sought to be taxed in this instance upon receipt of the real estate, and as of their father's death, when they had received the real estate prior thereto.

Conclusion.

It is respectfully submitted that there is no basis in law or in fact for the tax as asserted by the Comptroller of the Treasury. There is no fact in evidence that justified the lower courts in finding that the transfer of the real property on May 15th, 1918, was subject to tax because Mr. Russell was suffering with diabetes. There was no fact introduced in evidence to indicate that he was

suffering with any ailment of any sort whatsoever at the time of the transfer, and it may not be inferred that he was, merely from a statement that the death certificate, which is not in evidence, indicated that he died of diabetes. If there be no evidence to support the findings of fact of the lower court, or if the findings of the lower court may not upon a "rational" inference be sustained, this Court may consider the evidence as a matter of law for the purpose of determining whether or not there was any basis for the inferences drawn by the courts below.

It is further respectfully submitted that the transfer of the real property, which transfer is the subject of this appeal and was the subject of the tax, was, within the purview of the decision of the United States Supreme Court, not a transfer intended to take effect in possession or enjoyment at or after death within the meaning of this language. It is submitted that there is no theory advanced either by the lower courts or by the Comptroller which would justify the taxation of the personal property transferred on May 15th, 1918, without reservation or restriction of any sort whatsoever, and which from that date belonged exclusively to the donees thereof and which ownership was antagonistic to the claim of everyone else in the world.

It is respectfully submitted that whether the value of the leasehold that was an asset of the decedent at the time of his death was a proper subject of tax is not of moment in this case, because the Comptroller has not undertaken to tax the value of the leasehold, but, it is respectfully submitted, a tax on the transfer of anything other than the said leasehold—if it have a value—would be an unconstitutional act on the part of the

Comptroller, and would be a taking of the property of this petitioner and of the grantees of the said property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, which is hereby invoked.

POINT IV.

The order of affirmance of the Supreme Court affirming the judgment of the Prerogative Court should be reversed.

Respectfully submitted,

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