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AFFIDAVITS.

EXHIBITS.

New Jersey Supreme Court

Notice and Grounds of Appeal.

(Filed March 6, 1930.)

In the Matter *of the* Inheritance Tax upon the Estate of Samuel Grabfelder, deceased.	On Certiorari.

To the Honorable William A. Stevens, Attorney General of New Jersey, Attorney for the defendant—Sir:

Take notice that the prosecutor appeals to the Court of Errors and Appeals, the last resort in all causes, from the judgment entered in the above entitled case, and each and every part thereof, upon the following grounds:

1. Because the Supreme Court erred in determining that the gift by decedent to his wife was made in contemplation of death, or that there was any legal evidence to support such a finding.

2. That the Supreme Court erred in failing to set aside the decree of the Prerogative Court, and in failing to vacate and set aside the assessment of the comptroller.

3. Because the Supreme Court should have set aside the assessment on the said gift for one or

more of the reasons assigned by the prosecutor upon the writ of certiorari allowed in this cause. Dated, February 28th, 1930.

Respectfully,

HENRY SWARTZ,
Attorney of Prosecutor-Appellant.

Service of a copy of the within Notice and Grounds of Appeal is hereby acnowledged this 3rd day of March, 1930.

W. A. STEVENS,
Attorney General of New Jersey,
Attorney for Defendant-Appellee.

Rule of Affirmance.

(Filed January 22, 1930.)

NEW JERSEY SUPREME COURT,

In the Matter *of the* Inheritance Tax upon the Estate of Samuel Grabfelder, deceased.	Writ of Certiorari.

This cause coming on to be heard during the May Term, 1929, and the Court having considered the return to the writ of certiorari and the reasons assigned for reversing the decree of the Prerogative Court entered in this cause February 11, 1929, and being of the opinion that said decree should be affirmed.

It is, on this 22nd day of January, 1930, ordered that said decree of the Prerogative Court be and the same is hereby in all respects affirmed.

Entered January 22d, 1930 on Motion of

William A. Stevens (signed),
Attorney General of New Jersey,
Attorney for Defendant.

Opinion.

NEW JERSEY SUPREME COURT.

No. 221, May T., 1929.

In the Matter *of the* Inheritance Tax upon the Estate of Samuel Grabfelder, deceased.	On Certiorari.

Argued before Gummere, Chief Justice, and Justices Kalisch and Campbell.

For the prosecutor, Henry Swartz.

For the State, William A. Stevens, Attorney General.

Per Curiam.

The present writ brings up for review a decree of the prerogative Court affirming an assessment of a transfer inheritance tax made by the Comptroller of the Treasury, pursuant to the provisions of the Transfer Inheritance Tax Act of this state. The tax was imposed upon a gift made by Grabfelder, a man seventy-three years old, to his wife in August, 1918, the gift being of certain securities valued at some $280,000. Grabfelder died in April, 1920, less than two years after the making of the gift, and the question involved was whether this gift was made by the donor in contemplation of death. In making an investigation of this question, a considerable number of witnesses were ex-

amined by the representative of the Comptroller, and, after considering the testimony given by them, he reached the conclusion that this transfer, in fact, was made in contemplation of death, and consequently assessed the statutory tax thereon. The executors of Grabfelder's estate, being dissatisfied with this finding of the Comptroller, appealed to the Prerogative Court for a review of his decision, and that Court, after a consideration of the testimony taken under the direction of the Comptroller, reached the conclusion that under the evidence, the gift in question was made in contemplation of death in the not distant future, and consequently affirmed the imposition of the tax. The certiorari having been sued out to review the action of the Prerogative Court, we are now asked to reverse the decree of that tribunal upon the ground that the testimony does not support the conclusion reached by the Comptroller and affirmed by the Ordinary.

Our examination of the testimony, which was sent up on the return of the writ, leads us to the conclusion that, although the question of whether or not this gift was made in contemplation of death is of doubtful solution, still it is not so plain that the adjudication of the Ordinary was erroneous as to justify us in setting aside the decree now before us for review, and consequently the decree should be affirmed.

Reasons.

(Filed March 27, 1929.)

NEW JERSEY SUPREME COURT.

In the Matter *of the* Inheritance Tax upon the Estate of Samuel Grabfelder, deceased.	On Certiorari.

The prosecutors present the following reasons why the decree of the Prerogative Court brought up by the writ in this matter should be set aside and the assessment made by the Comptroller set aside and vacated.

1. The assessment made by the Comptroller should have been set aside for the reasons assigned in the petition of appeal to the Prerogative Court.

2. The Prerogative Court erred as a matter of law in holding that the burden on the appeal was on the prosecutors.

3. The Comptroller and the Prerogative Court erred in adjudging the transfer in question to be a gift made in contemplation of death.

4. There is no proof in the record to sustain the finding of the Comptroller and the Prerogative Court that the transfer in question was made in contemplation of death.

Henry Swartz,
Attorney of Plaintiff.

Writ of Certiorari.

(Filed March 20, 1929)

NEW JERSEY, ss.:

[SEAL] The State of New Jersey to the Register of the Prerogative Court of the State of New Jersey and to the Comptroller of the Treasury of the State of New Jersey: GREETING:

We being willing for certain reasons to be certified of and concerning a certain Decree made in your Court affirming a certain transfer inheritance tax assessed by the Comptroller of the Treasury in the matter of the Estate of Samuel Grabfelder, deceased, said Decree being made on the 11th day of February, 1929.

DO COMMAND you that the said Decree together with all proceedings for the making of the same and all matters connected therewith, together with all things touching and concerning the same as fully and entirely as before you they remain or in your custody and control, you do certify and send together with this Writ to our justices of our Supreme Court of Judicature at Trenton, on the 22d day of March, 1929, that therein may be caused to be done what of right and according to law ought to be done.

Writ of Certiorari

WITNESS, the Honorable William S. Gummere, Chief Justice of our said Supreme Court at Trenton, this 2d day of March, 1929.

HENRY SWARTZ,
Attorney.

FRED L. BLOODGOOD,
Clerk.

A true copy.

FRED L. BLOODGOOD,
Clerk.

I allow this Writ. Let it be sealed.

WM. S. GUMMERE,
C. J.

Return.

In obedience to the command of this writ to me directed, I, Joseph F. S. Fitzpatrick, Register of the Prerogative Court of the State of New Jersey, DO HEREBY CERTIFY and send to the Honorable Justices of the Supreme Court within mentioned, the order or decree made by the Ordinary or Surrogate General and Judge of the Prerogative Court on the eleventh day of February, nineteen hundred twenty-nine, by virtue of the powers conferred upon the Ordinary or Surrogate General and Judge of the Prerogative Court by an Act entitled

Return

"An Act to tax the transfer 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 the Ordinary or Surrogate General and Judge of the Prerogative Court 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 inheritance tax of the Estate of SAMUEL GRABFELDER, Deceased," together also with the petition of appeal theretofore presented to *me* by Horace Stern, Moses Grabfelder and Land Title & Trust Co., of Philadelphia, Executors of the Estate of Samuel Grabfelder, deceased, and the answer of Honorable Newton A. K. Bugbee, Comptroller of the Treasury of the State of New Jersey 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 anexed more fully appears.

JOSEPH F. S. FITZPATRICK,
Register of the Prerogative Court.

Final Decree.

(Filed February 11, 1929)

NEW JERSEY PREROGATIVE COURT.

In the Matter
of the
Inheritance Tax upon the Estate of Samuel Grabfelder, Deceased.

This matter coming on to be heard in the presence of Henry Swartz, Proctor for Appellants, Horace Stern, Moses Grabfelder, and Land Title and Trust Company of Philadelphia, Executors of the last will and testament of Samuel Grabfelder, deceased; and Edward L. Katzenbach, Attorney General of the State of New Jersey, Proctor for Respondent, Newton A. K. Bugbee, as Comptroller of the Treasury of the State of New Jersey, and the record in the case having been examined and the arguments of respective counsel having been heard and considered and it appearing to the court that a certain transfer of property by Samuel Grabfelder, on or about August 22, 1918, to Delia Grabfelder, his wife, of an estimated fair market value of $280,382.57 was made by said decedent in contemplation of death, and that said transfer having been so made, was properly included by the Comptroller of the Treasury as a part of the taxable estate of said decedent and the assessment of transfer inheritance taxes in this respect was in no way erroneous.

Final Decree

It is on this eleventh day of February, 1929, by his Honor, Edwin R. Walker, Ordinary of the State of New Jersey, ORDERED, ADJUDGED AND DECREED that the determination of the Comptroller of the Treasury that the transfer of property by Samuel Grabfelder, deceased, on August 22, 1918, of the estimated fair market value of $280,382.57 was made by said decedent in contemplation of death and therefore taxable pursuant to the provisions of Chapter 228, Laws of 1909, section 1, sub-section 3, as amended by Chapter 151, Laws of 1914, be and the same is hereby in all respects affirmed.

And it is further ORDERED, ADJUDGED AND DECREED that the transfer inheritance tax assessment in the matter of the estate of Samuel Grabfelder, deceased, made by the Comptroller of the Treasury, under date of June 1, 1927, be and the same is hereby in all respects affirmed.

Respectfully advised,

E. R. WALKER,
Ordinary.

MALCOLM G. BUCHANAN,
Vice-Ordinary.

Conclusions.

(Not for Print)

NEW JERSEY PREROGATIVE COURT.

In re
Estate of
SAMUEL GRABFELDER,
deceased.

TRANSFER INHERITANCE TAX APPEAL.

Mr. HENRY SWARTZ, for Appellant;
Mr. EDWARD L. KATZENBACH, Attorney General, for Respondent.

BUCHANAN, V. O.

Samuel Grabfelder, died in April, 1920, a resident of New Jersey. In determining the transfer inheritance tax payable by his estate, the Comptroller assessed as taxable under the statute a gift or transfer of securities of the value of some $280,000.00, made by decedent to his wife in August, 1918. The issue on this appeal by the executors is as to whether or not the Comptroller erred in his determination that that transfer was taxable.

The burden on the appeal is on appellants. It is the conclusion of this court that they have failed to sustain such burden; that they have failed to show that the Comptroller erred in adjudging the transfer in question to be a gift made in contemplation of death.

It appears from the record that the transfer was a gift; that it was of a material portion of his estate (about 19%); that he was 73 years old at

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the time; that he died about a year and a half after the transfer, of heart disease.

There is also evidence in the record to show that he had heart disease, and knew it, for some time before the transfer. There is evidence in contradiction of this also, but when it is weighed, with the consideration of the interest and lack of interest of the respective witnesses, it assuredly cannot be said that an affirmative finding on this point would be unjustified.

The evidence further shows that the transfer was made in the place and stead of a testamentary gift. Decedent had made a will about two years before; he had made another will about two months before this gift, in which he provided for his wife by giving her $100,000.00 and a life interest in a fund of $500,000.00. On the day he made the gift, he executed a codicil reducing the fund to $200,000.00, and expressly recites as the reason therefor the making of the $300,000.00 gift.

There is another bit of evidence which is not without considerable significance and weight.

One of the decedent's lawyers testified that for four or five years before the gift, decedent had been talking about making a gift to his wife so as to make her independent. Another lawyer says that at the time of the gift decedent came to him and said he wanted to make the gift, that he had "always" intended to make her such a gift, and he had now concluded to make the gift instead of giving it by will, because he could thereby reduce the high sur-taxes on his income taxes. At the time he made the gift he wrote a letter to his wife saying "Carrying out an intention of long standing I have decided to make you an outright gift of the following bonds, my purpose being to render you financially independent of me during your life."

Conclusions

Now it appears that the wife was a chronic invalid; that decedent had been wealthy for many years; had retired from business 18 years before; that he had always taken care of her bills, gifts and business affairs; that he did so after the gift except that she signed some checks on the account opened in her name.

The fact that he had been considering the making of a gift to his wife all those years, and that he had been perfectly able to do so all the while, and had not done so, is indicative that the desire to make her financially independent was not the thing which actually caused him to make the gift, when he finally made it. The fact that he unnecessarily wrote the letter, expressing that as the only reason for the gift, (omitting even the reference to saving sur-tax on income tax), justifies an inference that the letter was "camouflage". There was no need for him to write such a letter or any letter: he was living with his wife at the time—he expected to go right back to her the same day, as he in fact did, and tell her about it.

It cannot be said under all the evidence that the Comptroller erred in finding that the gift so long withheld and finally made in substitution for a testamentary gift, was made in the contemplation of the real possibility of death in the not distant future, and in lieu of a testamentary bequest.

It is scarcely necessary to say that even if the saving of sur-taxes was a factor considered by decedent in concluding to make the gift, that does not prevent the gift from being a transfer made in contemplation of death.

The tax will be affirmed.

Endorsed:

"Filed Feb. 5, 1929

JOSEPH F. S. FITZPATRICK, Register."

Prerogative Court

OF THE STATE OF NEW JERSEY

IN THE MATTER

of the

Inheritance Tax upon the Estate of SAMUEL GRABFELDER, deceased.

Notice of Appeal.

(Filed August 1, 1927)

To the Comptroller of the Treasury of the State of New Jersey.

Sir:

PLEASE TAKE NOTICE that Horace Stern, Moses Grabfelder and Land Title & Trust Co. of Philadelphia, Executors of the above Estate hereby appeal to the Ordinary of the State of New Jersey, from so much of the assessment made in the above matter and dated June 1, 1927, as holds that a certain gift made by the testator prior to his death, namely: A gift of bonds and other securities of the value of $280,382.50 to Delia Grabfelder, the wife of the testator, is an asset of said Estate and subject to an inheritance tax under the "Transfer Tax Act as amended".

Dated, July 25, 1927.

HENRY SWARTZ,
Attorney for and of Counsel with Horace Stern, Moses Grabfelder and Land Title & Trust Co. of Philadelphia, Executors of the Estate of Samuel Grabfelder, deceased.

Petition of Appeal.

(Filed July 30, 1927)

NEW JERSEY PREROGATIVE COURT.

In the Matter

of the

Inheritance Tax upon the Estate of Samuel Grabfelder, deceased.

To the Ordinary of the State of New Jersey:

The petition of Horace Stern, Moses Grabfelder and Land & Title Trust Co. of Philadelphia, shows upon information and belief:

(1) On or about the 1st day of May, 1920, petitioners were appointed executors of the above estate and duly qualified as such. That thereafter proceedings were had before the Comptroller of the State of New Jersey with reference to the fixing of the inheritance tax upon said estate.

(2) That thereafter and on or about the 1st day of June, 1927, said comptroller made an assessment fixing said inheritance tax.

(3) Your petitioners hereby appeal from so much of said assessment as holds that a certain gift made by the testator prior to his death, namely a gift of bonds and other securities of the value of $280,352.50 to Delia Grabfelder, wife of the testator, is an asset of said estate, and subject to inheritance tax under the "Transfer Tax Act" as amended.

(4) Your petitioners complain and allege that said assessment is erroneous, improper and illegal, and your petitioners are aggrieved thereby.

Your petitioners therefore pray that said assessment be vacated insofar as it holds that said gift is an asset of the estate and subject to inheritance tax.

Dated, July 29th, 1927.

HORACE STERN,
MOSES GRABFELDER,
LAND TITLE & TRUST
CO. OF PHILADELPHIA,
Executors.

By HENRY SWARTZ.
HENRY SWARTZ,
Attorney for and of Counsel with said executors, 17 Academy Street, Newark, New Jersey.

STATE OF NEW JERSEY }
COUNTY OF ESSEX } ss.:

HENRY SWARTZ, being duly sworn deposes and says:

That he is the attorney for the executors in this proceeding;

That he has read the foregoing petition and the same is true to his own knowledge, except as to those matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Deponent makes this verification for the reason that he has examined the original documents in

this case and from them has learned the facts therein stated, and for the further reason that none of the executors are in the County where deponent has his office.

HENRY SWARTZ.

Subscribed and sworn to before me this 29th day of July, 1927.

A. A. BURGER,
A Master in Chancery of New Jersey.

Answer on Appeal.

(Filed August 23, 1927)

NEW JERSEY PREROGATIVE COURT.

IN THE MATTER

of the

Inheritance Tax upon the Estate of SAMUEL GRABFELDER, deceased.

ANSWER OF DEFENDANT, N. A. K. BUGBEE, AS COMPTROLLER OF THE TREASURY OF THE STATE OF NEW JERSEY, TO THE PETITION OF APPEAL OF HORACE STERN, MOSES GRABFELDER AND LAND TITLE & TRUST COMPANY OF PHILADELPHIA, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF SAMUEL GRABFELDER.

Defendant, answering the Petition, says:

1. The allegations contained in paragraphs 1 and 2 of the Petition are admitted.

2. Defendant answering paragraph 3 admits that there was included as a part of the taxable estate of the said Samuel Grabfelder a certain gift made by the decedent prior to his death consisting of bonds and other securities of the value of $280,382.50 (and not $280,352.50) to Delia Grabfelder, his wife. Defendant further answering the allegations of this paragraph denies that the transfer of said property was taxed by reason of the fact that it constituted an asset of the estate of said decedent. On the contrary, Defendant declares that the transfer by the decedent of said stocks and bonds prior to death was included as a part of the taxable estate of the decedent by reason of the fact that said transfer was made by him in contemplation of death and is therefore within the provisions of the Transfer Inheritance Tax Act of this State, Chapter 228, Laws of 1909, as amended Chapter 151, Laws of 1914, and the further amendments thereof and supplements thereto.

3. Defendant denies that the assessment is in any way erroneous, improper or illegal.

Defendant prays that the assessment heretofore levied be in all respects affirmed.

EDWARD L. KATZENBACH,
Attorney General of New Jersey
Solicitor of Defendant.

By THEODORE RURODE,
of Special Counsel.

NEW JERSEY PREROGATIVE COURT

In the Matter of the Inheritance Tax upon the Estate of Samuel Grabfelder, *Deceased*, Late of Atlantic County.	On Appeal. Authentication of Record.

I, Newton A. K. Bugbee, as Comptroller of the Treasury of the State of New Jersey (being an officer without seal), being duly sworn, according to law, depose and say:

1. That as Comptroller of the Treasury of the State of New Jersey I am the officer chargeable by Statute with the assessment and collection of Transfer Inheritance Taxes and have custody of all records pertaining thereto.

2. That the testimony, affidavits, bills, assessments, etc., hereto attached, are true copies of such documents as appear of record in the matter of the Transfer Inheritance Tax proceeding in the estate of Samuel Grabfelder, deceased, late of Atlantic County, New Jersey.

(Signed) N. A. K. Bugbee,
Comptroller of the Treasury
of the State of New Jersey.

Sworn and subscribed to before me this 24th day of Apr., 1928.

(Signed) Owen W. Kite,
[seal] N. P. of N. J.

Minutes of Hearing.

NEW JERSEY PREROGATIVE COURT.

In the Matter
of the
Estate of Samuel A. Grabfelder,
late of Atlantic County.

Examination of Dr. Roy A. Woolbert at his residence in Atlantic City, April 20th, 1923, in the presence of Emanuel Celler, Esquire, attorney for the estate.

Dr. Roy A. Woolbert, being duly sworn, testifies:

I first became acquainted with the Grabfelders in February or March, 1919, at which time I was called in to treat Mrs. Grabfelder for an injury to her eye. I also called again to see Mrs. Grabfelder and attended her for a broken arm in February, 1920. I had never met Mr. Grabfelder until February 20, 1920, at which time I examined him at his wife's request. I should say that he submitted to the examination under protest, and it was only apparently at his wife's request that he consented. I gave him a thorough examination and took a specimen of his urine for examination. His urine upon examination showed negative.

Mr. Grabfelder was a man who from appearance seemed to be in good physical condition for one of his age. He was about six foot one, and was alert and active. Like many successful business men he was self-willed and assertive, and

therefore it was difficult at times for me to deal with him. When I made my first examination, he said he didn't see any need for it at all. I didn't find any more heart trouble than I would expect in a man of his age, nor did I tell him he had heart trouble, and I reported to him that he was in very good condition for a man of his years, but that he ought to keep in touch with me out of a matter of precaution. He didn't come to see me until March 10th when he came at my request. I think I said to him, "Why don't you come over and let me look you over?" I found no change in him. He came again on the 20th and the 24th, and on April 1st at my request. The reason I persuaded him to come was that he was a man of means and he could afford to pay me for services, and I would advise any man at that age to submit to constant medical supervision. Mr. Grabfelder's attitude was one of indifference, and I should assume from his attitude that his demise was farther from his thoughts than his age from a medical standpoint would probably warrant.

He came again on the 9th and on the 16th and I found no change in him. The last time he was to my office, which was on the 16th, I had him stand on one foot and then on the other and pick up pins. I had him make these physical efforts so that I might detect any heart trouble. At that time I hold him that so far as his heart was concerned, he was in good condition. I had told him previously that cold baths were not good for him; that they were not good for any man of his age, but he said he had been taking them all his life and he did not propose to stop now. His blood pressure was normal for a man of his age. He

weighed about one hundred and eighty pounds, and appeared to be well preserved.

I am asked whether I made a statement to Mr. Lanning that Mr. Grabfelder had had a warning. I remember making no such statement. If I used the word "warning" at all, it was merely the expression of my thought from a medical standpoint that every man when he arrives at a certain age has what might be termed a warning.

(Signed) THEODORE RURODE,
Special Investigator.

IN THE MATTER
of the
Estate of SAMUEL GRABFELDER,
late of Atlantic County.

Hearing in the matter of the above estate held before me as Special Investigator this 1st day of May, 1923, at the New York apartment of Mrs. Grabfelder.

Mrs. Grabfelder, being duly sworn.

Q. Your first name, Mrs. Grabfelder?

A. Delia Grabfelder.

Q. How old are you?

A. Going on seventy-three. I was seventy-two in March.

Q. And you are the wife of Samuel Grabfelder?

A. Yes, sir.

Q. Mr. Grabfelder was how old when he died?

A. Seventy-five.

Q. And he died suddenly?

A. Yes, sir.

Q. In the bath?

A. No, he did not. He got up and opened the door for his valet to come in and give him his bath, said good morning to me, walked in the bathroom and a few minutes afterwards he was found on the floor by the valet dead. He hadn't got into the bath.

Q. Had he complained about not feeling well?

A. No. I had been having him see a doctor once and a while. He went over to the doctor's and he said, "Grabfelder, you're all right. Don't come around bothering me. Let me attend to people who need me."

Q. Who told you that?

A. Dr. Wolbert. He was attending me. Mr. Grabfelder came home and said to me, "Well, let me tell you you are obsessed. There is nothing ails me, nothing the matter with me. The doctor said he didn't want to see me any more." He wasn't restless in bed and got up as usual the next morning. He pulled down the shades so I could sleep, and went into the bathroom. His valet was a few minutes later than usual, and when he went in he found Mr. Grabfelder with one leg bent under him and the other stretched out, dead.

Q. Now, Mrs. Grabfelder, you made an affidavit in this proceeding relating to a gift of bonds approximating $300,000, did you not?

A. Yes, sir.

Q. That was a gift from Mr. Grabfelder to you?

A. Yes, that was a long time ago.

Q. Do you remember the occasion of that gift to you?

A. Well, it was no special occasion. Mr. Grabfelder was a man of very few words.

Q. Do you remember the time that the gift was made to you?

A. Why, certainly.

Q. When did you first hear about this gift of $300,000?

A. Mr. Grabfelder came home from his office. I was sitting on the front porch. We lived in Atlantic City. He said, "Well, Colonel, I made you absolutely independent". I didn't understand what he meant and said, "What do you mean, dear?" "Well, I made you a present today of such and such a sum of money. Now you are your own boss to do with it as you please."

Q. Did he tell you how much it was?

A. Yes, $329,000.

Q. Did he say anything about what that amount consisted of?

A. No, he did not say anything special about it. He said simply what I have told you. He simply said those few words. We had company, some of his relations and mine were sitting on the porch. He said that and walked away.

Q. How long was that before he died?

A. I judge between two and three years before he died.

Q. Was there anything ever said afterwards by him about this gift?

A. No, he was a man who never spoke of things twice.

Q. Did you speak to him about it?

A. Well, yes. I said, "I will have to pay all my own debts?" "Yes, whatever your automobiles, your charities, etc., whatever you spend you can pay for yourself". And he gave me my check book.

Q. Had you had your own check account? Did you pay for these things out of it?

A. No, I never had before, but I did after this.

Q. How did you come to open the account?

A. Well, because Mr. Grabfelder told me to. He said, "You are your own boss. You can pay for your own things. You make your own checks out and whatever you buy, you settle for it."

Q. Did you go to the bank yourself?

A. No, because I never had. Mr. Grabfelder did all of that for me.

Q. Did you go to the bank at all?

A. Yes, I have been to the Philadelphia bank.

Q. Where was this account that you opened?

A. Down at Atlantic City.

Q. Did you open more than one account?

A. I can't remember that.

Q. Did you ever have a bank account before?

A. No.

Q. How much was put in that bank account?

A. I suppose all that he has given me.

Q. What do you mean he had given you? The $300,000?

A. Well, he would have been able to do so if he had felt like it. I left those things to him. I don't remember just what it was started with. When I wanted to draw my check, he would have it filled out and I would sign it.

Q. Did you go down to the bank to open this account yourself. To sign your name?

A. I did that at home. I signed them at home.

Q. Did you ever make any deposits yourself in that bank?

A. No, he made them for me. In fact I was a woman who was sheltered in every way that could be done.

Q. After he had come home that night and told you he had made you independent, you say he never spoke to you about it again?

A. I wish you had known the man and you wouldn't ask me that. He never spoke of things twice. When he came home he said, "I have made you independent today". I said, "I don't know what you are talking about". "I want you to know that you are your own boss, to do just as you please with what I have given you. I have made you a present of so much and you settle for everything you get yourself. I will have the checks made out and will bring them home and you can sign them."

Q. And afterwards he brought home the checks for you to sign?

A. Yes.

Q. Did he afterwards bring you a card for you to sign at the bank?

A. I think he did. There are some days I cannot call to mind, just exactly what was what.

Q. Did he bring home a check book to you?

A. Yes.

Q. Did you make out the checks yourself?

A. No, I have two broken arms. I can only write my name now. He would have the checks made out for me and I would sign them as best I could. I couldn't write very much.

Q. Did you keep the checkbook home?

A. No, he kept it at the office.

Q. He had a secretary, Mr. Vollmer, did he not?

A. Yes, sir.

Q. When he said he made you independent and had given you $329,000, did he say what that $329,000 consisted of—whether it was cash or what?

A. He didn't say a word about that. He simply told me what he had done. "You are your own master, you sign your own checks". He knew I couldn't write. "I'll have Vollmer make them out and I will bring them home". And he was a man who never spoke of things twice.

Q. Did you ever go to Philadelphia to the safe deposit vaults there?

A. I certainly did.

Q. What did you go there for?

A. Just to go with Mr. Grabfelder to cut off coupons and I had friends there. Most of the day I spent with my friends.

Q. Did you ever go to Philadelphia after he made you this gift of $329,000?

A. That I can't answer. I can't remember. I think it is very likely I went there afterwards but I won't make a positive statement to that effect because I am not so sure whether it was before or after.

Q. And when you did go to Philadelphia with your husband when he was cutting off coupons, where did you go—what bank?

A. I don't remember just where it was. I can't recall. I have no recollection. We drove down in an automobile and I do not remember the street.

Q. While you were in Philadelphia with Mr.

Grabfelder, did you go to any safe deposit box of your own down there?

A. No.

Q. Did Mr. Grabfelder after he spoke about this gift of $329,000, give you any writing showing that he had made you this gift?

A. No, not to my knowledge. He may have put it in his papers. He was a man who gave you something, told you once and that was all.

Q. So far as this gift is concerned the only thing that transpired between you and him was that Mr. Grabfelder came home on this occasion, probably about two years before his death, said to you, "Colonel, I have made you independent and have given you $329,000, have made you your own mistress." That is all?

A. Yes.

Q. Mr. Grabfelder had retired from business, had he not?

A. Yes, for a number of years. We wanted to move East and did not care to be worried about the business. He took in younger people and made a stock company out of it.

Q. What time did he get up?

A. He was a very early riser, about quarter past six in the Winter and in the Summer, and always took a cold shower. He was a splendid specimen of a man. He always took long walks.

Q. Then he went down to his business at Atlantic City?

A. Well, he didn't have any business. In the last twelve or fifteen years, or I may say eighteen years, he devoted his entire life to the Denver Consumptive Hospital. I have various tributes paid to him because of his work. Most of his time,

and his stenographer whom he brought with him from Louisville so told me was spent on this kind of work. He was in business in a way but he did not take care of it.

Q. Did you ever cut off any coupons from bonds that were given to you by your husband?

A. No. I couldn't use my right or left hand to do anything like that. They have been like that for a number of years, twelve or fifteen years. I had broken my arms and couldn't cut anything or do anything like that.

Q. After this occasion when your husband said that he had made this gift, did he ever deliver to you personally into your hands any coupons from any bonds?

A. No, because it wasn't necessary. Mr. Grabfelder always paid my bills and then he would come home and I would see my receipts and would be done with it. I signed the checks, however.

Q. So that you yourself up to the time of his death never saw these bonds?

A. I saw them but I never cut anything off of them. I saw them in his office—no, not in his office but down stairs in the bank.

Q. What happened then?

A. Nothing at all. Just simply showed me how to cut them off. He said, "This is what I do when I go to Philadelphia and spend the day up there with Vollmer." I would simply go down there with him, like you and your wife would go to the bank.

Q. What I am asking is whether you actually saw any of the bonds given you?

A. Well, these different papers which I suppose were bonds.

Q. You only saw those bonds after he died?

A. Yes. No—I saw them before when I was down in this place. One day he opened the box and showed them to me. He said, "These are bonds". I didn't go into it. I never expected him to pass away before I did and I never paid attention to these things.

Q. You were a little concerned about his health?

A. I wasn't concerned about him. I felt he was getting along in years and I didn't think it would hurt a man getting along in years to take care of himself. He did a great deal of walking. I objected to it. There was no reason why he shouldn't. I got the idea that he shouldn't do it, and once I did speak to him about it and he said, "Well, if I didn't have my long walks before breakfast I wouldn't want any."

Q. He consulted Dr. Wolbert?

A. That was just because I wanted Wolbert called in, not because he wanted him. He was a neighbor, within a few blocks of the house, and he was my doctor. He had been treating me for my broken arm.

Q. Mrs. Grabfelder, previous to this gift of $300,000 did you have any private income of your own?

A. No.

Q. And had Mr. Grabfelder ever spoken about this thing before he actually had this conversation with you about making you independent?

A. A friend of his had made a gift to his wife. This man and he were very close friends and he said, "Why don't you do that?" He said, "I will." And that is the way it happened.

Q. Did Mr. Grabfelder tell you that?

A. Yes, and the man did too.

Q. How long before?

A. I am not positive that it was before or after. It may have been before. I cannot remember enough dates to say whether it was before or after. I tell the nearest I know to the truth—what I can remember.

Q. Did he ever tell you about making any income tax return for you?

A. That I don't know. I didn't attend to those things. He attended to them at his office.

Q. Do you remember if he brought home a paper to be signed?

A. He may have.

Q. Did you sign any papers after this gift of $329,000.

A. Not that I can remember. I don't know whether I did or whether I didn't. I can't tell you that.

Q. After that time that he came home, and told you that he had made you independent, did you ever go to Philadelphia with him?

A. Yes, I think I did.

Q. When you were in Philadelphia on that occasion, did you sign any paper up there?

A. No, he simply introduced me to the president of the bank and to one or two other gentlemen.

Q. Did you ever go up to Philadelphia with Mr. Vollmer after this gift of $329,000.

A. Not that I know of. Not for any special reason. I know I was never up there with Mr. Vollmer. The only time I was up there with Mr. Vollmer was after Mr. Grabfelder's death. I had no occasion to go up with Mr. Vollmer.

Note: There is exhibited to the Special Investigator a check book stub issued by the Guarantee

Trust Company of Atlantic City, N. J., which is alleged to be the stub of a check book used by Mrs. Grabfelder. The handwriting is identified by a brother of Mrs. Grabfelder as the handwriting of Mr. Vollmer, the secretary of Mr. Grabfelder. It shows on October 1, 1919, a memo of a deposit of coupons of Philadelphia Elec., The Alkire, Am. Smelt. & Ref., Central Ill. Light, Chic. Rock Island & Pacific, Ind. Gas, Midland Valley, Parr Shoals, amounting to $3,152.50. It also shows at various times notations of deposit of coupons. It also shows check to the Internal Revenue Collector for $824 income tax. There is also produced a passbook issued by the Guarantee Trust Company showing the following deposits to the credit of Delia Grabfelder, beginning September, 1918,

925.00
150.00
3152.50
1890.00
300.00
1650.00
775.00
915.00
3152.50
101.00
1890.00
5887.00
60.00
102.25
1470.00
775.00
915.00
17.50
3152.50
2040.00

60.00
1174.10
116.24
1805.00
775.00
765.00
2877.50
873.33

THEO. RURODE,
Special Investigator.

IN THE MATTER
of the
Estate of SAMUEL GRABFELDER,
late of Atlantic County.

Continued hearing in the above matter held this ninth day of March, 1923, before THEODORE RURODE, Esq., Special Investigator, at the office of GORDON BLOCH, Esq., 1118 Real Estate Trust Building, Philadelphia, Pa., at two-thirty P. M. PRESENT:

THEODORE RURODE, Esq., Special Investigator;
EMANUEL CELLER, Esq.

HORACE STERN, sworn.

By Mr. Celler.

Q. Judge, you knew Mr. Grabfelder in his lifetime?

A. I did.

Q. You acted at one time as his attorney?

A. I did.

Q. Do you recall making this affidavit, verified the 23rd day of January, 1922?

A. I do.

Q. In that affidavit, Judge, you stated as follows: "The said Samuel Grabfelder prior to 1918 consulted me in connection with his personal matters, and on several occasions dating from as early as 1914, stated to me that he was formulating plans for making a gift of a portion of his estate to his wife, Delia Grabfelder." In connection with that do you recall at the present time any conversations or the substance of any conversations you had with reference to the making of a gift to his wife as far back as 1914?

A. You mean the substance of anything said at any definite time?

Q. Yes.

A. I don't think I could testify to that. I know that Mr. Grabfelder used to come into the office, possibly two, three or four times a year. I knew him personally and socially, as well as professionally, and I wrote one or two of his wills for him, and he talked to me about his affairs. He always said to me that he wanted to make a gift to his wife during his lifetime, that he thought it was the proper thing to do, and he always said "The next time I see you I want to attend to that", but he would see me again and not attend to it; and being in personal relations we were not as sharp and efficient in our professional connections with him as we otherwise would have been, and we just let the matter drift. But he did so express himself. I don't know that I

could say anything definite as to just what words he used, but he spoke to me several times about the subject.

Q. Did you explain to him the nature of the gift or how it would be made, whether it would be an absolute gift or anything of that sort?

A. No, he never wanted to talk on the subject. He simply said that the next time he saw me he wanted to prepare some legal paper by which he would set aside something for his wife, that he wanted to give her an independent estate in her lifetime, that is all. But he never got definite, and I didn't know that anything had been done until I came back from Washington after the war, and found it had been done in my absence, because it actually was effected through Mr. Wolf while I was away.

Q. Do you recall when you came back from the war, Judge?

A. In February, 1919.

Q. You spoke to your former partner, Mr. Wolf, and he told you the gift had been made?

A. Yes, I think I learned it through Mr. Wolf—in fact I am quite sure I did.

Q. Did you see Mr. Grabfelder after that?

A. Yes, he died in 1920.

Q. In April, 1920?

A. Yes, I saw him after that. I saw him three or four times after that. I remember once having lunch with him, probably in the fall of 1919, if I recollect.

Q. Did he talk to you about this gift fund to his wife?

A. I wouldn't want to say that I remember that he did. I don't know; he may have, but I wouldn't want to say as to that.

Q. You did know Mr. Grabfelder a great many years?

A. Yes.

Q. You always found him to be an honorable man?

A. Certainly, he was quite an intimate friend of our family.

Q. From your knowledge of him you wouldn't understand him to be a man who would want to do something which would be the prevention of payment of any taxes or a subterfuge to avoid paying taxes.

A. I should not think so. I think he would do what I suppose most men do, I imagine he would not seek to pay any taxes that were in his opinion legally not due, but I do think that he would misrepresent facts or conceal facts in order to avoid payment of taxes.

By Mr. Rurode.

Q. He had retired from business for some years prior to his death?

A. Yes; he still took some interest in the business out in Louisville—a sentimental interest, but he had personally retired from the business, yes.

Q. Did he ever tell you why he retired from active participation in the affairs of his business?

A. I don't know that he ever told me. I had a very strong thought that in the first place he moved east and didn't care to live any more in Louisville, and wanted to get into a larger field of social activity; and in the second place, presumably that he had made enough money to satisfy him and was approaching the age when he wanted to enjoy some of the fruits of his efforts.

Q. Did you know that he was consulting any doctor with regard to his health prior to 1918?

A. No, not prior to 1918. The only doctor I can recall that I think he told me he consulted was Doctor Riesman, and I think that was in the fall of 1919.

Q. In 1918 prior to the time of this gift of $300,000 to Mrs. Grabfelder, did Mr. Grabfelder ever discuss with you his own health?

A. Well, it is dreadfully hard to answer that question. If he did, and I presume he would from time to time, I am quite sure he didn't do it in what I might call an acute way. I mean to say, he may have grumbled from time to time and spoken about his general health and all that sort of thing, as people will do in personal relations, but I do not recall any subject that came up as to the acute state of his health. My general impression is, and I am only testifying to very vague impressions, I do believe he was what you would call a grumbley man about his health; I mean he was the kind of a man who enjoyed bad health, with quotation marks around enjoyed. I mean to say he never came to me with any desire to write his will or give him any legal aid or advice or anything of that kind with reference to an expected demise or anything of that nature.

Q. Did he ever tell you he was suffering from any particular ailment at all?

A. I can't answer that altogether definitely. He did tell me, just what time I cannot say, that he thought he had a bad blood circulation, I think he possibly may have gone so far as to say he thought he had a heart condition.

By Mr. Celler.

Q. Was that after you came back from the war?

A. I cannot fix any definite time in my mind, because I would not swear he said anything definite at any given time. I know I had the general impression from him that he had a bad circulation, because I thought it came about perhaps through my saying to him how well he looked or something like that, and he would say that his looks were illusory, that he was not so well, or something of that sort, and I believe he did mention about the high color that he had as perhaps bearing on a heart condition, but he never said anything alarming that would in any way attract particular attention. If I am not mistaken I think I bantered him by implying I myself had a similar condition, that I had been turned down twenty years before for life insurance for what was said then to be an acute heart condition, and was still living, and I think it was the ordinary conversation that would take place normally under the circumstances.

Q. Did you observe his condition when you saw him and find it always to be, as you said, that he looked well?

A. Oh, he always looked well; he had a high color.

Q. You knew him when he was at Atlantic City?

A. Yes.

Q. And saw him frequently?

A. Yes.

Q. Did you observe his daily habits of taking walks?

A. Well, I wouldn't say I observed his daily habits, but I have taken long walks with him. He always struck me, if you want my opinion—he

always struck me as a man in perfectly good health, but who may have been told, or may have had the thought, and possibly and probably was the fact, that he had some heart condition, and that he was conscious of it, and that it may have bothered him in the sense it has bothered me for a great many years. But I do not think that it was very acute with him, in the sense he thought he was going to die the next day or next year; it certainly never consciously or expressly entered into any legal relations that I had with him, and without attempting to influence this case one way or the other, because it is nothing to me, he never in any talk he had with me in regard to his contemplated gift to his wife for example, he never coupled it with any intimation or desire to do it with the view of premature death or anything of that sort. Of course, the extent to which a man has at any time or at all times the thought of the possibility of death, and especially if he has or thinks he has some chronic or organic ailment, is a matter of speculation. I do not think Mr. Grabfelder was ever acutely morbid on the subject.

Q. Your relations were very close?

A. Very, most friendly. He professed to have and I sincerely believe did have a great fondness for me. I certainly admired him, he was a very charitable and public spirited man.

Q. Is it your opinion if he wanted or desired to couple this gift with the fact that he anticipated an early death he would have told you?

A. Well, I think he would. I certainly can say this that he never said anything to me about this contemplated gift that coupled it in any sense with impending death, and that he never had me write a will. As I say, I did revise his will from time

to time, and as I recall he never, while doing that, made me feel or said anything to me to suggest that he thought the will was to become quickly operative or he was doing it in any sense of acting in an emergency. The health conversations were something which might be said to have been social and personal, and disassociated from any legal relations I had with him; the two never came into conflict or into combination, that I am absolutely positive about. Just to what extent he talked to me about his health when he did, I am hazy, but it was the ordinary conversation that men will have.

Q. Did he ever speak to you about taking a trip to Europe?

A. I don't remember anything like that.

Q. Did he ever speak to you about death?

A. I don't recall that he ever did.

MORRIS WOLF, sworn.

By Mr. Celler.

Q. You are an attorney licensed to practice law in the State of Pennsylvania?

A. Yes, sir.

Q. A member of the firm of Wolf, Patterson, Block & Schoor?

A. Yes, sir.

Q. You knew Mr. Grabfelder in his lifetime?

A. Yes, sir.

Q. Did he consult you sometime in the month of August 1918?

A. He did.

Q. What did he consult you about?

A. He consulted me about making a gift of

some securities to his wife during his life instead of giving her the securities in his will.

Q. Prior thereto Judge Stern had been his personal attorney, isn't that true?

A. Yes, Judge Stern and I. However, when he came into the office he usually saw Judge Stern.

Q. And Judge Stern at that time was in Washington?

A. Yes, sir, in the Government Service.

Q. Do you remember the substance of any conversations or talks you had with him about that time, about this gift or what sort of a gift it would have to be?

A. I do. Mr. Grabfelder came to me and told me that as he had intended to give a certain amount of property to his wife in his will, he had concluded that it would be better to give that to her during his life, because by so doing he would be able to reduce his own taxes, and at the same time carry out the intention that he always had had that she should receive a certain amount of his property. He had with him a list of the securities that he wanted to give to his wife, and I told him that there was no objection that I could think of to his making the gift, and that the effect of it would be to reduce the Income Taxes that he would have to pay, but that in order for the intention which he had to be carried out, it was necessary that he really give her the securities. I told him that merely pretending to give them, or seeming to give them, would accomplish nothing, but he had actually to give them to her and withdraw any expectation he might have that he would benefit by those securities afterwards.

Q. Did he say anything in reference to that?

A. He said he understood that. I told him by that I meant that the income from these securities would have to be Mrs. Grabfelder's own money, and would have to go into her bank, and be used as she wanted to, and I think I told him it would be prudent to engage a separate box for her, and I am inclined to think he said that she did have a box and that these securities should be placed in that box.

Q. Was there anything said about Inheritance Taxes at that time?

A. I couldn't say specifically. I don't remember. We were considering whether the making of this gift would reduce the taxes.

Q. You mean the Income Taxes?

A. Income Taxes was in my mind at the time. If anything was said about Inheritance Taxes I have no recollection of it.

Q. But you are certain what was in your mind and what you supposed was in his mind was Income Taxes which would be reduced by that action?

A. Yes.

Q. You also, at the same time, prepared a letter, didn't you—at the same time you prepared the codicil?

A. I prepared the codicil at the same time I prepared the letter. I prepared a letter giving Mrs. Grabfelder these securities, and then prepared the codicil reducing the amount she was to receive under the will by the sum equal to the value of the bonds which Mr. Grabfelder was giving to her at that time.

Q. Did Mr. Grabfelder live in Atlantic City at that time?

A. Yes.

Q. And he came to Philadelphia to make that change and that gift?

A. I don't know whether that is why he came to Philadelphia.

Q. He did journey to Philadelphia?

A. Yes, he came to Philadelphia.

Q. And that was done in the office?

A. Yes.

Q. Did you observe the condition of Mr. Grabfelder's health at that time?

A. I cannot say that I observed it. There was nothing about his condition that specifically called it to my attention. By that I mean he was in ordinary condition or I would have noticed it.

Q. In the affidavit which you have submitted, which is verified on the 11th day of January 1922, you stated "It is not my personal opinion that Mr. Grabfelder had in mind at all the probability of his early death." What made you come to that conclusion?

A. Probably nothing except the fact that he did not appear to be any different state of health from that in which I had seen him before. I mean he seemed to be in ordinary good health and he didn't discuss any fear of approaching death.

By Mr. Rurode.

Q. When he came to your office on the occasion this paper was drawn transferring to his wife $300,000 in stocks or bonds, did he have a previous appointment with you?

A. I am sorry I don't remember.

Q. Did you on that same day prepare his codicil?

A. Yes, the two were done at the same time.

Q. The paper making the transfer to his wife and the codicil to his will reducing her legacy by a like amount of $300,000, were both drawn the same time?

A. Of course, that isn't strictly accurate, I would say the gift was drawn first and then the codicil, but it was at the same interview.

Q. At the same sitting?

A. Yes.

Q. Who was here with him?

A. I don't remember that any one was here with him.

Q. He was alone?

A. Yes.

Q. When you drew this paper which was to evidence the gift to his wife inter vivos, you simply handed the paper to Mr. Grabfelder, did you?

A. I drew it and handed it to him. I think he signed it in my presence.

Q. Then he took it away with him?

A. Yes.

Q. That is all you know about the paper?

A. That is all I know.

By Mr. Celler.

Q. That paper contained a list of the bonds, did it not?

A. I don't remember. I know Mr. Grabfelder had a list of bonds when he came in. Whether I rewrote the list of bonds or attached to the paper the list which he had brought I don't remember any more.

Q. In any event Mr. Grabfelder furnished a list of the bonds he wanted to have transferred to his wife?

A. Yes. That paper which I have not seen for a long time refreshes my memory about the box. That was put in because I told him it was necessary for these securities to be really Mrs. Grabfelder's, and under her control.

By Mr. Rurode.

Q. You are now referring to the paper dated August 22nd 1918 and signed "S. G.," and addressed to Mrs. Samuel Grabfelder, and which is marked with a file number received October 24th, 1921, controller's department?

A. Yes, sir.

MEETING ADJOURNED.

IN THE MATTER
of the
Estate of SAMUEL GRABFELDER,
late of Atlantic County.

Hearing in the matter of the above estate held before me as Special Investigator, this 28th day of February, 1923, in the presence of Emanuel Celler, as one of the residuary legatees and as counsel, and Leo F. Hughes.

JOSEPH KERN, being duly sworn.

Examination by Mr. Celler.

Q. Where do you reside?

A. My present residence is at Hotel Hamilton, West 73rd St., New York City. My legal residence

is as yet in Kentucky. My income tax return though I file in New York.

Q. You were acquainted with Mr. Grabfelder during his lifetime, were you not?

A. I have known Mr. Grabfelder—well—since about 1903 or 1904, the year in which we established relations together when I purchased in his corporation a large block of stock together with my brother.

Q. That is the corporation known as S. Grabfelder & Company of Louisville?

A. Yes. Our relationship was of the very closest, but no relation by blood, marriage or otherwise.

Q. You are not interested in this estate, are you? From a monetary standpoint?

A. From a monetary standpoint, no.

Q. Were you an officer of that corporation?

A. Since from the time I bought the stock.

Q. Your business relations with Mr. Grabfelder were close?

A. Very close.

Q. Where did Mr. Grabfelder live during the years 1917 and 1918?

A. To the best of my recollection at Atlantic City.

Q. Did you ever have a conversation with Mr. Grabfelder in the year 1917?

A. Yes. Mr. Grabfelder was on a visit to Louisville, possibly in 1917 and not later than January of 1918. The reason why I know to establish it so positive, we had our annual meeting of our corporation either the first or second Tuesday of January, and Mr. Grabfelder attended these meetings.

Q. Was this the meeting of the year 1917 you refer to?

A. Now, I might have called his attention to the fact of the income tax returns possibly in 1917. I am inclined to think I did.

Q. You had a conversation with him the early part of 1917?

A. Not later than January of 1918. It might have been previous to that time.

Q. What was that conversation?

A. The question of income taxes. I had given a great deal of consideration to it myself, and because of my friendly relations with Mr. Grabfelder I called his attention to the fact that it would be a considerable saving to himself if he would convert some of his securities over to his wife, which was the plan I had adopted with some of my securities, and which is better established by the fact that I converted some of the stock of S. Grabfelder & Company to my wife outright.

Q. Outright?

A. Outright.

Q. What did Mr. Grabfelder say?

A. He then said he would take the matter into consideration. After that conversation I recall reading in the question and answers in the Wall Street as to whether a person could convert some of his securities over to his wife and thus bring about a saving in his income taxes, and I cut this article out of the paper, I remember very distinctly, and forworded this article to him.

Q. By mail?

A. By mail.

Q. Was there any letter to him?

A. It is possible. I think at the same time I

wrote a personal letter to him about it. Whether Mr. Grabfelder kept those personal matters, I do not know.

Q. Did he ever speak to you afterwards about having received the clipping?

A. It is my impression that a few months afterwards I was in Atlantic City, and I mentioned the fact whether he had followed the suggestion about saving income taxes, and he said "Yes," he had.

Q. He had done so?

A. He had done so in transferring some of these securities to his wife. I said, "You will have to make a direct transfer of those stocks".

Q. Did you explain any further what you meant by a direct transfer?

A. By direct transfer I meant that he would have to give the stocks to his wife outright.

Q. Do you remember, if possible, the exact words in your conversation with him?

A. I don't remember exactly. It was in his office we had this conversation and then we walked up to the boardwalk and from there walked as far as the Breakers Hotel, and the matter was discussed rather thoroughly as I thought it would be quite a saving, and he led me to believe in that direction that he intended to give outright quite a lot of his securities.

Q. Did he tell you he had consulted or was going to consult a lawyer with reference to this transfer?

A. I do not recall his speaking of any lawyer. I thought the sanction of the Wall Street Journal in this connection was as good advice as a lawyer could give.

Q. Did he make known to you that he had received that clipping?

A. Well, we mentioned it in our conversation.

Q. Did you mention anything about the good faith in making that transfer?

A. Well, it was understood that he had to give those securities outright to Mrs. Grabfelder, or else it wouldn't stand.

Q. Did you or he have any conversation with reference to the income from those bonds?

A. Yes.

Q. Tell us about it.

A. Whatever was derived as income would go to Mrs. Grabfelder, and whatever was derived as income on his securities would go to him. They would be treated as separate incomes. We had rather a lengthy talk on that matter, and I had made inquries as to that particular article in the Louisville office, and while I am not positive, I think the gentleman I consulted there was a Mr. Cox who was an authority in that office, and he concurred on the opinion as it appeared in that article.

Q. You said the Louisville office. Of S. Grabfelder & Company?

A. No, I am speaking of the Revenue Department, Income Tax Department.

Q. Did you convey the substance of that talk with Mr. Cox to Mr. Grabfelder?

A. I might have because very frequently when matters of income taxes and federal taxes came up, I would go down to the office and talk with them and subsequently have a talk with him.

Q. Did Mr. Grabfelder frequently consult you on financial matters?

A. Always. Anything appertaining to our corporation and very frequently his personal affairs.

Q. Did you see him frequently during this period?

A. Sometimes it might be three or four times a year.

Q. What was the date of the annual meeting of S. Grabfelder & Company?

A. January of every year.

Q. Did you attend those meetings every year?

A. Always.

Q. Did Mr. Grabfelder attend those meetings?

A. I don't recall Mr. Grabfelder's having been absent but from one of those meetings, and that was possibly a few years prior to that time.

Q. Do you remember if he was present at the meetings of 1917, 1918 and 1919?

A. Going back to the beginning of the corporation with the exception of once, or I think possibly as much as twice, in the fifteen years of that corporate existence he was not present.

Q. That is not the question. Did he attend the annual meetings during the years 1917, 1918, 1919 and 1920?

A. To the best of my knowledge I think he was present at those meetings.

Q. During that period from 1917 on to which you have testified, you have observed Mr. Grabfelder's health, did you not?

A. Yes.

Q. What would you say his health to be?

A. I would regard Mr. Grabfelder, looking at him, and my impression of him as being in perfect health.

Q. Did you ever see him sick in bed from 1917 on?

A. No, I do not recall ever having seen him in bed. I think once when he was in Louisville he had a slight cold or indisposition. I might have called on him at the hotel, but the next day he was out again. Mr. Grabfelder was a man who paid particular attention to his health. I recall when my mother was operated on in Atlantic City, she was then about seventy years old and she is now eighty, which would make it about ten years ago, at that time he had regular attendance of a doctor, not that he needed any, but I think he just wanted to keep in good physical condition, and the doctor who he recommended to me was Dr. Riesman.

Q. When was this?

A. I would judge, from the age of my mother, it was about 1912 or 1913.

Q. Do you mean by that he consulted a doctor while he was in good health?

A. In good health.

Q. For the purpose of seeing that his body was kept in good condition to avoid illness?

A. I presume that would be his reason because he wasn't ill.

Q. In other words he consulted a doctor much after the fashion of the Chinese where the doctor—

A. I don't know the customs of the Chinese but I know he consulted the doctor while he was in good health. I think just as a man submits specimens of himself, not because he is ill, but wants to be sure of himself.

Q. Did Mr. Grabfelder ever tell you that was his reason for consulting a physician at any time.

A. He never discussed his health because he was, in my opinion, a man of extraordinary good health during those years.

Q. During the time that you knew him, did he take long walks daily?

A. Yes. Whenever I was in Atlantic City we walked together. I was a good walker but found it hard to keep up with him. Not only did he walk in Atlantic City but whenever he came to Louisville, he would never take a street car or conveyance but would walk. He would say, "Come, take a walk", and we walked to where his former home was, which I suppose would be perhaps a mile and a half.

Q. Did he take longer walks then on the Boardwalk in Atlantic City?

A. From his office up to the Boardwalk, up to the Breakers, back to his home, now I don't know what that distance would be but I would judge a couple of miles, and we walked briskly. He did that even in the year 1920 the time he died. As I recall the time we were talking about income taxes we walked together, you know how a man walks when he is holding a conversation, and at times very briskly. I never noticed anything nor was a complaint made about his health.

Q. Those walks were, so far as you know, from 1917 on to his death?

A. My recollection is that in Louisville and frequently when I would go to Atlantic City to discuss some important business matters whenever I was there he always liked to walk.

Q. Up to the year 1920?

A. Yes. In fact, I don't recall his ever having stopped from walking.

Q. Did he ever at any time talk to you about death?

A. The only time that he discussed death was at the time we were drawing contracts. I always brought up the question as certain provisions had to be made about his death, I being a minority stockholder.

Q. You were a minority stockholder?

A. I was. My brother and I were interested to about thirty-five percent of that corporation, and we afterwards bought in about ten percent more in that corporation, and we had to discuss with him whether our stock was sufficiently protected.

Q. Did he ever talk to you about his death?

A. No.

Q. Did he ever tell you the amount of the bonds he set aside for his wife in that gift?

A. He did not, but my impression was that it was several hundred thousand dollars worth.

Examination by Mr. Rurode.

Q. You say it was in 1903 you bought your holdings from Mr. Grabfelder?

A. I think it was in 1903 or 1904. I would have to look at my papers to establish the time. I think it was in November, 1903, but it may have been 1904.

Q. And was Mr. Grabfelder at the time of his death an officer in that corporation?

A. He remained as president of S. Grabfelder & Company up to the time of the liquidation.

Q. And when was the liquidation?

A. I think we liquidated in 1919. We also had another corporation in which I was president, the Claremont Company.

Q. In 1917 and 1918 was Mr. Grabfelder actively engaged in the conduct of the business of S. Grabfelder & Company?

A. He was just as active in the year 1917 and 1918 as he was in any other year after he left Louisville which was possibly in 1904.

Q. In 1904.

A. He left Louisville for Atlantic City in 1904 or 1905. While he didn't undertake the actual operation of the business, he really directed the policy of the business from Atlantic City, and the actual operation of that business was handled at the time of his leaving, by three of the officers, and afterwards one of them died and subsequent to that another one died, so that I was really the executive in the office although Mr. Grabfelder really directed.

Q. In 1905 Mr. Grabfelder changed his residence from Louisville to Atlanitc City, and that was coincident with his practical retirement from the active management of S. Grabfelder & Company?

A. Well, he was about as active a person to be away from business as we ever saw, because we furnished him with weekly statements, and he kept track of all the affairs of the business. He was virtually the same as if he was in Louisville, and the correspondence was very voluminous at all times, and he really directed it as much as those who were there at Louisville.

Q. Did he ever tell you why he moved to Atlantic City?

A. Well, I think more or less to relieve himself of petty matters in connection with the business.

Q. What style man was he physically? Was he heavy or light?

A. Well, I should judge Mr. Grabfelder to be a man about five foot ten or eleven, held himself erect, a man who weighed I should judge 175 pounds. I do not believe he varied much in his weight in the many years I knew him. I do not think there was much change. There might be five pounds difference from the time I knew him to the time of his death.

Q. So far as you know at the time you spoke to him about this transfer, he hadn't actually made the transfer at that time?

A. Well, I couldn't exactly recall. I don't recall that he had actually made the transfer at the time. I think he subsequently made it, while we were at Atlantic City and talking about the matter he said the transfer had been made. As to the exact date I can't say.

Examination by Mr. McGovern.

Q. How old was Mr. Grabfelder?

A. I think he was seventy-five.

Q. And he died when?

A. About Aprli, 1920. Mr. Grabfelder had been on a visit to Louisville in 1920 and remained there, possibly ten days.

Examination by Mr. Celler.

Q. Did you see him there then?

A. I was talking with him and in his company, and he attended the annual meeting of the board of directors. I think we had up the matter of our Claremont Company then and we discussed a great many matters as to the liquidation of all of our corporate existences, and we had virtually

shaped up everything so that the business had really suspended. That was in January, 1920.

Q. Prohibition was the reason for the liquidation?

A. Yes, of course.

Q. In other words, S. Grabfelder & Company was a distillery or wholesale liquor dealer?

A. We operated two different corporate existences. The distillery was operated as Murphy, Barber & Company, and S. Grabfelder & Company, Inc., of which Mr. Grabfelder was the president, was the distributing company. Murphy, Barber & Company was the distilling plant and S. Grabfelder & Company was the distributing corporation and wholesale liquor dealer, so that the liquidation was the result of prohibition.

Q. The Claremont Company was also a holding company, was it not?

A. The Claremont Company was a corporate existence separate and distinct, as we interpreted it, from the other corporations.

Examination by Mr. McGovern.

Q. Was there any business reason why he should have left Louisville for Atlantic City?

A. None that I know of.

Q. There wasn't any question of establishing agencies in the East or being here for the purpose of supervising things? Nothing like that so far as you know?

A. No. It was just to relieve himself more or less of responsibilities where a man has been in close touch with his business. He was a man who paid a great deal of attention to details, and I suppose that he couldn't rid himself of those details unless he moved away.

Examination by Mr. Celler.

Q. Mr. Grabfelder was interested in the Gynnbrook Distillery Company, was he not?

A. Yes.

Q. Did he come to Philadelphia to operate the Gynnbrook Plant?

A. He didn't go to Philadelphia to establish the Gynnbrook Plant. That was something that developed subsequent to his going. He took a very active interest in that.

Q. He didn't go to Atlantic City for his health?

A. No. In fact he first moved to Philadelphia and then he moved to Atlantic City, and then he came to New York, and then back to Atlantic City. I think that he had a desire to live in Atlantic City.

Q. Did he ever say he liked living in Atlantic City?

A. Yes, better than any place he had lived in.

Examination by Mr. McGovern.

Q. Had he always lived in Louisville?

A. He was born in Germany but he lived in Kentucky from a boy.

Examination by Mr. Celler.

Q. Do you know when he left Louisville?

A. 1905.

Q. Was he just as active in the Claremont Company as he was in S. Grabfelder & Company?

A. Yes. He supervised that company the same as anything else he was interested in, and was very active in its affairs. He was interested not only in S. Grabfelder & Company, but in Clare-

mont Company, Murphy, Barber & Company, and a hotel in Denver in which I am also a stockholder, and a Denver hospital, in all of which he took an active interest.

Examination by Mr. Rurode.

Q. Did he ever at any time speak to you about his health?

A. I don't recall his ever having been sick. He might have had a cold or something like that, but I don't recall any symptoms that would be classed as illness.

Q. And when you spoke to him about the illness of your mother, you said he told you he always consulted a physician?

A. I do not believe he consulted a physician because of any illness.

Q. He suggested Dr. Riesman?

A. Yes.

Q. Did he tell you what he was consulting Dr. Riesman for?

A. I don't recall his mentioning he had any trouble.

Q. This office that he had at Atlantic City, was that his own office?

A. Yes.

Q. Was his name on the door?

A. I think "S. Grabfelder" was on there. I am not certain about that.

Q. While you were in Atlantic City with him, how much time did he spend in the office during the day?

A. Well, he was a man who always went to the office very early, and I would say the times I was with him he would stay until eleven or half past

eleven. I think he would get down there about eight-thirty.

Q. Did he live at a hotel in Atlantic City, or did he have his own residence?

A. He lived at times in a residence, and then at times in the Breakers Hotel.

Examination by Mr. Celler.

Q. In your affidavit you said that the decedent appeared to be in perfect health, and all the plans you talked of and he talked to you about showed that he looked forward to living many years. Tell us what you meant by that?

A. Well, of course when a man gets to be seventy-five years old, he might not expect to live many years. However, I would judge from Mr. Grabfelder's health that he looked as if he could easily live another ten years, or perhaps longer.

Q. And were those plans and talks you had with him ones which would indicate to you that he looked forward to living that number of years?

A. Yes. We talked about new plans in reference to the Claremont Company and other enterprises. We were trying to shape up everything. We were forced out of business and we were just clearing up the slate.

Examination by Mr. Rurode.

Q. You and your brother, you say, bought your holdings in S. Grabfelder & Company in 1904 and 1911?

A. Yes.

Q. You first bought your holdings in 1904?

A. Yes.

Q. Whom did you buy your holdings from?

A. We dealt direct with Mr. Grabfelder.

Q. And it was at that time that Mr. Grabfelder left Louisville and went to Atlantic City or Philadelphia?

A. Yes.

Q. And then later in 1911 you purchased more of his holdings so as to become a larger stockholder?

A. We had a contract giving us that privilege.

Q. And you bought all your holdings, say 35 or 40% of the entire capital stock from Mr. Grabfelder in 1904 or 1905?

A. In 1904 and 1911.

Q. In 1904 what was the extent of your purchase from Mr. Grabfelder?

A. Well, I would say approximately 30%, something like that.

Q. You purchased 30% of the capital stock from Mr. Grabfelder?

A. Yes.

Q. Was that your first interest?

A. Yes.

Q. And then from then on you and your brother took an active interest in that business and Mr. Grabfelder left Louisville and went to Philadelphia or Atlantic City?

A. Yes.

Q. And then in 1911 you purchased more of his holdings in that concern?

A. Yes, in accordance with the original agreement.

Q. The original agreement made in 1904 gave you an option to purchase additional stock and you exercised that option in 1911?

A. Yes.

Q. What was the holdings of stock in S. Grabfelder & Company in 1904?

A. There were about fifteen stockholders. The principal stockholder was Mr. Grabfelder who held the largest interest, then my brother and I were the second largest stockholders.

Q. Prior to 1904 you had no stockholdings in S. Grabfelder & Company?

A. Yes, in 1903 I didn't even know Mr. Grabfelder.

Q. And when you and your brother made your purchase in 1904 of approximately 30% of the stock, you and your brother became officers of the corporation?

A. Well, I became an officer and my brother became a director.

Q. And you and your brother assumed the active management of the business in Louisville?

A. My brother did not. I was active as one of the executives because we had others also.

Q. Did Mr. Grabfelder ever tell you why he was selling you this 30% of the stock?

A. Well, I guess he figured he made a pretty good deal and we figured the same way.

ELSIE GOLDMAN, being duly sworn.

Examination by Mr. Celler.

Q. Where do you live?

A. In Flushing. 150 State Street, Flushing, Long Island.

Q. You knew the deceased in his lifetime?

A. All my life.

Q. He was your uncle?

A. Uncle by marriage.

Q. And you, however, have no financial interest in the estate, have you?

A. No.

Q. In that sense you are dis-interested?

A. I am disinterested.

Q. You always lived with Mr. Grabfelder and his wife, did you not?

A. Yes.

Q. Did you live with them in Atlantic City?

A. Yes.

Q. All the time since they moved East?

A. Ever since I was five I have lived with them.

Q. Around the years, 1916-17-18, do you recall the health of Mr. Grabfelder?

A. He was in perfect health.

Q. And you were with him every day?

A. Yes.

Q. Well, just tell Mr. Rurode what you observed to be the condition of Mr. Grabfelder's health during that period?

A. To me he appeared perfectly healthy, was up early and out, came regularly to his meals and was out again in the evenings.

Q. Do you know during all those years, 1916-17-18, what time he got up every morning?

A. Any time between seven and half past. It was probably seven, because at eight o'clock he always had his breakfast and was out.

Q. Do you know whether he took a cold shower?

A. Up to the very day of his death.

Q. Did he take long walks?

A. Yes, he took walks before his breakfast and then walked to his office.

Q. Did you ever walk with him?

A. Manys a time he tired me out.

Q. Did he outwalk you?

A. He always did.

Q. Do you know how many miles he would walk of a morning?

A. Anything from one to two, and he always did it as long as I can remember.

Q. Did he do this daily?

A. Every day.

Q. Do you know why Mr. and Mrs. Grabfelder came to live in Atlantic City?

A. They didn't come to Atlantic City direct from Louisville. They went to Philadelphia, and it was really my aunt who urged him to leave Louisville. She wanted to move to New York, but he preferred Philadelphia. It was her doing, not his.

Q. Do you know why he stayed in Atlantic City after 1913?

A. Well, he always went to Atlantic City every summer since I can remember. For about twenty years before that he would go there for the summer.

Q. In other words, he grew to like the place?

A. Yes. In 1900 he brought the whole family East and every summer after that he spent at Atlantic City until he finally moved East.

Q. Then he simply came to Atlantic City because he liked the place?

A. Yes, and he met friends he liked there, people he met there he knew, Philadelphia ones.

Q. Did you ever at any time, say from 1916 on, see Mr. Grabfelder sick in bed?

A. No.

Q. Did you ever know him to take any medicine?

A. No.

Q. Did you ever see him take medicine?

A. No.

Q. Did you know him to take any medicine from 1916 on?

A. No.

Q. Did he ever discuss his health in your presence?

A. No.

Q. Did he ever appear ill?

A. No, he seemed quite robust.

Q. Did you know whether he consulted any physician during that period?

A. Well, I know once in a great while he would go to see Dr. Riesman and come back and say, "I am physically fit".

Q. In other words, he would see the Doctor, not because he was ill, but in order to keep himself in good health?

A. Yes. He didn't do that more than a couple of times a year.

Q. Did you know about this gift to Mrs. Grabfelder of $300,000 in 1918?

A. I only heard it once and that was the day he came home and told her.

Q. Were you present?

A. We were sitting on the porch.

Q. Do you recall any of the conversation?

A. He said, "Well, Colonel, I have made you independent".

Q. What did he mean by "Colonel"?

A. That was a pet name he always called her.

Q. Did you hear anything else?

A. Then she wanted to know what he meant by

that. Then he told her that he did it so that she could do her own charity work, keep up her automobiles, everything except the household expenses. He said that she was to take care of her personal financial affairs, charities and the like, and he would take care of the household. She paid her own chauffeur, the other expenses he paid, and she paid for her clothes.

Q. Do you know whether or not Mr. Grabfelder, prior to 1918, made any gift of any consequence to Mrs. Grabfelder?

A. Well, he made a number of gifts in the way of presents.

Q. Tell us what they were.

A. Long before that he gave her two different houses.

Q. When was that?

A. One was back when I was seven years old, and then when I was about seventeen he gave her another.

Q. How old are you?

A. I am thirty-six. He bought a house in Flushing, too, and gave it to her.

Q. To Mrs. Grabfelder?

A. Yes. He had a house in Flushing, Long Island. He gave her that house.

Q. Do you know the value of that? Approximately?

A. About $25,000.

Q. When did he give her that house?

A. It must have been six or seven years ago. There was also a house in Douglaston, Long Island, which he also gave to Mrs. Grabfelder. That was her house.

Q. What was the value of that house?

A. About $40,000.

Q. When was that he gave it to Mrs. Grabfelder?

A. About ten years ago.

Q. Did Mr. Grabfelder ever talk to you about death?

A. No, never.

Q. Did he ever speak about death?

A. Never.

Q. Did he ever talk to you about his plans in the future?

A. No, he was a man who didn't discuss his future plans.

Q. Mr. Grabfelder went daily to his office in Atlantic City ever since he was there?

A. Yes.

Q. Did he ever get much mail at his home?

A. No, at his office.

Examination by Mr. Rurode.

Q. How old is your aunt?

A. She is seventy-one—will be, I think, this month.

Q. Mr. and Mrs. Grabfelder had no children?

A. They did but they died as infants.

Examination by Mr. Celler.

Q. From your observation and contract with Mr. Grabfelder, was it your opinion that he had an idea that he would outlive Mrs. Grabfelder?

A. Well, she was always sickly and he was never sick. He always worried and fretted about her being sickly all the time.

Examination by Mr. McGovern.

Q. This house in Douglaston, how long had Mr. Grabfelder owned it?

A. He built it and gave it to my aunt.

Q. Had he ever lived in Douglaston?

A. No. He just felt it was a good investment in building a house there. She wanted it and he gave it to her.

Q. Well, had she ever lived there?

A. Well, she had a niece she wanted to live there and she wanted him to build the house and let her have it.

Q. They never spent any time there?

A. They never lived there but visited there.

Examination by Mr. Rurode.

Q. During the last two years of his life, what medical attention did he ever have?

A. Nothing outside of these examinations now and then. That is by seeing Dr. Riesman as he had years and years before. He would go down and then come back and say he was physically fit. That is all as far as I can remember.

Q. Did he ever in 1917 or 1918 have any physician attend him at the hotel or at the house?

A. Not to my knowledge.

Q. Never at his home?

A. No. I can't remember his ever being ill and having a physician come in and see him. He might have had a cold or something like that but he was never in bed because he wasn't a man who would take to bed.

Examination by Mr. Celler.

Q. Do you know of any gift Mr. Grabfelder made to his wife of liberty bonds?

A. He did that some years before.

Q. Do you know the amount?

A. I do know he gave them to her. I think about $9,000 worth, but I paid no attention as I wasn't interested.

ALEXANDER VOLLMER, being duly sworn.

Examination by Mr. Celler.

Q. You reside where?
A. Atlantic City.
Q. What address?
A. 3507 Kingfisher Avenue.
Q. You knew the decedent in his lifetime?
A. I did.
Q. When did you first become acquainted with Mr. Grabfelder?
A. In the spring of 1906.
Q. You were employed by him?
A. Yes, I was.
Q. You were his confidential secretary?
A. Yes.
Q. Were you with him at Philadelphia?
A. I was.
Q. And at Atlantic City up to the time of his death?
A. Yes.
Q. You were with him in his office at Atlantic City?
A. Yes.
Q. And what kind of an office was that?
A. Just to take care of his business affairs.
Q. Was it a large office?
A. Well, yes. We had three rooms.
Q. Did you have any other employees in that office?
A. Well, just a stenographer. That was all.

Q. You were there all day attending to his business?

A. All morning was what we devoted to his work.

Q. You were familiar with all his affairs, with the details of his holdings of stocks and bonds?

A. Yes.

Q. And you kept his books?

A. Yes.

Q. And the other bookkeeping required in that office?

A. Yes.

Q. Were you in personal touch with him all the time from the time you were employed by him up to the time of his death?

A. Yes.

Q. Did he come down to his office every day?

A. Yes.

Q. Did he walk down to the office?

A. Yes.

Q. What time would he be there?

A. He was always there by eight-thirty. He always managed to be there. Most times he would be there ahead of me.

Q. Do you remember any conversation had with Mr. Grabfelder in 1918 concerning any gift to his wife?

A. Well, he said he was going to pick out a certain number of securities and give them to her outright.

Q. Was there any other conversation?

A. Well, that he wanted to make her so that she would not bother him with her personal charities, automobile bills, etc. She had a lot of personal charities, relatives of hers who were not so well off.

Q. Did you make any entry in your books of account in reference to that gift?

A. Yes.

Q. Have you the ledger with you?

A. Yes.

(There is produced a private ledger.)

Q. And that ledger was always kept in the office in the safe?

A. Yes.

Q. And after his death what happened to the ledger? Did you always have it?

A. Yes, until I brought it to your office.

Q. You put that ledger in a case and you opened that case last night at my office?

A. Yes.

Q. And it was in the same condition it was when you handed it to me?

A. Yes.

Q. Turn to that page in that ledger and show anything which would indicate items of stocks and bonds appertaining to this gift.

A. I kept an S. Grabfelder account and every month I would determine what his loss or gain was and the difference was deducted from or added to his capital account.

Q. What was it a month before August, 1918?

A. He had a net credit of $1,804,000 on August 22. I took out of his account and transferred to Mrs. Grabfelder's account $319,038.10. The expenses of that month above his income was $33,-091.80. He reduced his capital account to $1,481,-681.81.

Q. You also kept books for Mrs. Grabfelder?

A. At the time the $319,000 was given to her we went through the ledger, he picked out the items that made up this $319,000.

I offer in evidence a copy of this ledger account, marked Ex. 1, each item on this Exhibit is to be found in the ledger of Delia Grabfelder.

Examination by Mr. Rurode.

Q. From that date on, August 22nd, 1918, when you made this list out, did you keep a separate set of books for his wife?

A. Yes. When he completed this list I started a new ledger for Mrs. Grabfelder.

Q. Were all those bonds coupon bonds?

A. Yes.

Q. Prior to the transfer or the making out of this list, where were these bonds?

A. In Philadelphia in Samuel Grabfelder's box.

Q. Did you go to that box subsequent to the transfer of these bonds on the ledger?

A. I think we made the list up and then we went to Philadelphia to the Fidelity Trust Company. That was in 1918. Then we rented a box in the name of Delia Grabfelder and we took out all these securities from Mr. Grabfelder's box with the exception of the Alkire bonds, these were in a bundle about three and a half inches thick and we couldn't get them in Mrs. Grabfelder's box so we left them in the box and he wrote on them in his own handwriting "property of Delia Grabfelder."

Q. So that all these securities appearing on this list were transferred from his box to a box rented in her name with the exception of the Alkire bonds and they were marked to show they were her property?

A. Yes. They were too bulky to get in her box.

Examination by Mr. Celler.

Q. Thereafter did you cut the coupons on those bonds which had been transferred?

A. Well, yes. We generally went to the box and cut them off. We usually cut them off six months in advance.

Q. What was done with the coupons on those bonds?

A. I would make out the ownership certificate.

Q. In whose name?

A. Delia Grabfelder. The ownership certificates required by the Internal Revenue Department. Well, I made them out at the office and she signed them and I made deposits in her account.

Q. She signed all these certificates?

A. Yes, and the coupons were deposited in her personal bank account.

Q. You also made out checks to be signed by Mr. or Mrs. Grabfelder?

A. Yes.

Q. On this account that she had, did you make checks out for her?

A. Yes.

Q. Did she sign those checks?

A. Yes.

Q. Were those checks for distribution of moneys realized from those coupons?

A. Yes.

Q. Do you remember what those checks were for?

A. Well, she had several charities, some relatives she used to send a monthly check to. She

also used to pay her own automobile expenses. Then she would often draw cash. I don't know what she done with that, probably used it for personal expenses. She would sign the check and I would draw the money for her.

Q. Did Mr. Grabfelder use any part of the income from the bonds in question for himself?

A. No, he never did. They were hers and hers only.

Q. Were separate income tax returns made out?

A. Yes.

Q. You are now an accountant and you always were?

A. Yes.

Q. For how many years?

A. About thirteen.

Q. And you are familiar with income tax returns and regulations?

A. Yes.

Q. Did you observe that there was considerable moneys saved by this transfer in taxes?

A. Yes. It reduced the surtax.

Q. Did Mr. Grabfelder keep in constant touch with the Louisville corporation?

A. Yes.

Q. Was the correspondence voluminous?

A. Yes, very voluminous.

Q. Did he receive reports from the Louisville office concerning the S. Grabfelder Company?

A. Yes, during all those years.

Q. And did he receive reports from the Claremont Company?

A. That had practically the same officers.

Q. Did he receive reports from the Denver Hotel?

A. He was a majority stockholder. He had a controlling interest.

Q. Did he receive reports from the Denver Hotel?

A. Yes.

Q. Did he keep in constant touch with all these companies?

A. Yes. He examined the reports carefully.

Q. Just how often did he receive the reports?

A. Well, we had a monthly report, also considerable correspondence during the month.

Q. He was also interested in a Jewish Hospital for Consumptives?

A. Yes. He was president of it at the time of his death.

Q. And he was always active in the management of the hospital?

A. Yes.

Q. Did he have much correspondence from that hospital?

A. Yes.

Q. Daily?

A. Well, I shouldn't say daily.

Q. Did he exercise supervision of the hospital?

A. He directed a lot of the affairs from Atlantic City.

Q. Even up to the time of his death?

A. Yes, as far as I remember. He was interested in stock and bonds of a good many corporations, and he was in constant touch with all those he was active with. He was in constant touch with all of them and interviewed many people in his office in the morning.

Q. And that was during the years 1916 to 1918 and up to the time of his death?

A. Yes.

Q. During those fourteen years, you were with him daily?

A. Yes.

Q. Did you observe his health during those years?

A. Yes.

Q. What would you say his health was during that period?

A. It was very good. I never knew anything to be the matter with him.

Q. Did you ever see him in bed?

A. No.

Q. Did you ever know him to take any medicine?

A. No.

Q. Did he ever complain to you about his condition?

A. No, I can't say he ever mentioned anything at all.

Q. Do you know whether or not he went to a Doctor?

A. No. I do not know whether he went to a Doctor or not. He never spoke to me about that.

Q. Did you ever walk with him?

A. I don't think I ever had occasion to.

Q. Do you know what he did during his spare time?

A. I knew he came to the office about eight-thirty. I knew he took a walk before breakfast and then he would be at the office about eight-thirty, and he would attend to his correspondence, then he would wait until the letters were written, and then about eleven or eleven-thirty he would leave the office. Then he would take a walk up to his hotel and after he had lunch he had a pinochle

game every afternoon and then he went home to his dinner.

Q. What did you observe his general condition, his temperament?

A. He was always even tempered.

Q. Was he happy or sad?

A. He seemed to be in good spirits all the time so far as I knew.

Q. And did he ever have any tlak with you about death?

A. No. He never talked about death.

Q. And did he ever talk other than what he stated concerning that gift to Mrs. Grabfelder?

A. No.

Q. Were there any other charities in which he was interested besides the Denver Hospital, or to which he ever donated moneys, etc?

A. Well, he gave to charities out in Louisville and he donated moneys to a great many charities.

Examination by Mr. Rurode.

Q. Did he change his will after he made this gift of $300,000 to his wife?

A. Not that I know of.

Q. He didn't say anything to you about it?

A. No.

Q. Who was his lawyer?

A. At that time Wolf. Stern up to the time he went to the Bench, and then Morris Wolf took care of his affairs.

Q. This office at Atlantic City, was that your office or his?

A. His office.

Q. You carried on some other business?

A. Yes, I did accounting. I always did his work

up to about noon and in the afternoon I did accounting and used his office. Afterwards I took my own office.

Q. Did you ever send any checks to doctors during 1917 and 1918?

A. No, I don't think so. I do not remember.

Q. You never paid any of his doctor's bills?

A. I don't remember my making out any checks.

Q. You knew who his physician was in Atlantic City?

A. No, I really don't.

Miss Goldman recalled and sworn.

Q. Do you know during the last three or four years of his life-time at least, whether he was quite regular in consulting a physician?

A. He had done it ever since I remember. It was his habit, he would go to the doctor and see if he was all right.

Examination of Mr. Vollmer.

Q. Did you visit Mr. Samuel Grabfelder at his house at all?

A. Occasionally. Not very often.

Q. Did he ever ask you to go there?

A. If he had any matters to be attended to, I would go there.

Q. Was there any writing executed with regard to this gift of $300,000?

A. Outside of this list you mean?

Q. Yes?

A. Not that I know of.

Q. So far as you know there was no formal paper executed?

A. No, I think not.

Q. In renting the box in Philadelphia when you transferred the securities to that box, was Mrs. Grabfelder present?

A. No, he and I went there alone.

Q. Were you present when the securities were removed from that box?

A. I helped to remove them.

Q. Who were present?

A. Sam Grabfelder and I.

Q. You had access to the box?

A. No, I did not. He did and he simply took them out, carried them over to the little room and took them from one box and put them in the other.

Q. What did you do with the securities when you removed them?

A. We took them from Mr. Grabfelder's box and put them in a box which he hired in the name of his wife.

Remark: The rent of the box was paid out of her money.

Q. Did those securities remain in that particular box until he died?

A. Yes, so far as I know.

Q. They were never brought to Atlantic City?

A. He also rented a box in Atlantic City in her name. He may have brought some of them down, but I don't remember his doing so.

Q. These securities which were transferred, and which made up this gift of $300,000, were transferred from his box in the Fidelity Trust Company to a box which he hired in the name of his wife, and they were left there until his death?

A. Yes, so far as I know.

Q. And Mrs. Grabfelder was not present with

you and Mr. Grabfelder at the time the actual transfer was made from his strong box to the strong box which he had hired in her name?

A. Yes.

Q. Did you ever open that safe deposit box which was hired in the name of Mrs. Grabfelder after that? Personally?

A. Not unless he was along. I did not have access to it.

Q. Were you ever present when that box was opened after that?

A. Yes.

Q. Who was present?

A. Sam Grabfelder.

Q. Was Mrs. Grabfelder ever present?

A. No, I don't remember her going but I wouldn't like to say so positively.

Q. When the box was hired it was arranged that Mrs. Grabfelder should have access to that box?

A. Yes. She had to come up personally and sign before she could go in alone, and whether she has done it or not, I don't know. He took it in her name and she would have to come up and sign the card but whether she has done it or not, I don't know.

Q. And all of these bonds were unregistered bonds?

A. Yes. They were all coupon bonds. He never bought a registered bond.
bonds?

Examination by Mr. Celler.

Q. The income from these bonds was deposited in her account?

A. Yes.

Q. Now, did she buy any new bonds from that income?

A. Yes.

Q. Was it those bonds which were placed in the Guaranty Trust Company, Atlantic City?

A. Yes, that is how that was. I didn't remember before. We put all her money in the Guarantee Trust Company in Atlantic City, and as the amount would creep up she would buy a bond and we put it in that box until he or she would take it up to Philadelphia. He thought it was best to have a box there to put it in, and in that box were also put the six month coupons which had been cut off the bonds in Philadelphia, her bonds. He always cut the interest coupons off six months in advance.

Q. Did Mr. Grabfelder ever have any conversation with you concerning the increment from these bonds?

A. He would often ask me what his wife's bank balance was, and when I would tell him he would say, "Don't let it lay there, let us buy something for her out of the income".

Q. You have heard Mrs. Goldman's testimony concerning gifts of real estate by Mr. Grabfelder to Mrs. Grabfelder. Is that your recollection of it?

A. Yes, that is right and those liberty bonds were $9,000.

Testimony of Joseph E. Griff

JOSEPH E. GRIFF, being duly sworn.

Examination by Mr. Celler.

Q. What is your residence?

A. At the present 777 West End Avenue, New York City.

Q. You are a brother of Mrs. Grabfelder?

A. Yes, sir.

Q. Are you interested in this estate, financially or in any other way?

A. No, sir.

Q. You are not mentioned in the will?

A. No. I am not a beneficiary under the terms of it.

Q. You knew the decedent in his life-time?

A. I should say I did. I was his brother-in-law.

Q. Did you have a conversation with him in the autumn of 1918?

A. I think it was towards the coming on of the autumn. I was frequently a visitor at his home during their stay in Atlantic City, and would go back and forth from the city. On other occasions I would be invited to spend week ends there.

Q. You visited there frequently during 1917 and up to 1920?

A. Yes, up to about the 20th day of February, 1920.

Q. Did you have a conversation with him some time around the summer or autumn of 1918?

A. Yes, a general conversation. We were talking and he made a statement to me as he had repeatedly done during his life-time.

Q. What was said?

A. I think I read an article in the paper where a husband had made a large provision for his wife,

and in a general talk with him I spoke to him about it. In fact I think I read the article to him, and said "That is what every man ought to do, every solvent man". He said, "That is just what I have done. I made your sister a very pretty gift". He said he had made her independent and she could attend to all her own affairs.

Q. Was anything further said?

A. We didn't continue the conversation. It was just in a general talk.

Q. In your observation of Mr. Grabfelder, what would you say his health was during that period, 1917 to 1920?

A. That would be a conclusion. He looked like a man who would have a great many years before him. He was very robust, seemed to enjoy good health, had a splendid appetite, and indulged in exercise whenever I saw him. I mean by taking walks and generally as a man will go about. He seemed to be very active for a man of his years.

Q. Did you observe him taking walks at all?

A. I remember walking with him whenever I was in Atlantic City. We would walk along the Boardwalk. He could outwalk me.

Q. That was all during the period 1917 on?

A. Yes, to about six months before his death.

Q. Did you ever see him in bed for illness?

A. No, I can't recall ever seeing him sick.

Q. Did he take any medicine?

A. I never saw him.

Q. Did he ever tell you he did?

A. He did not.

Q. Did he ever speak to you about death?

A. No, on the contrary, he spoke about life.

Q. What did he say?

A. Well, we had one conversation and he said, "Now that the war is over and obstacles are removed, I am seriously thinking of going to Europe this summer". That was just about four weeks before he died. He said, "Now Delia can get away as your mother is dead, and she has no worry in that direction, and I intend to visit Germany. I have had that in mind a long time. Now I am determined she will go with me". Before he didn't care to go without her. He said, "she must go with me now".

Q. Did he ever express his desire to go to Europe before?

A. Yes, on different occasions. He said that the reason he didn't go to Europe before the war was that my mother was living and sister didn't want to go with him and he didn't want to go alone.

Q. In other words, your sister didn't want to leave your mother?

A. That is what he said to me. I knew she didn't want to leave my mother.

Q. Do you know anything about the box in the Guaranty Trust Company in the name of Mrs. Grabfelder?

A. Yes.

Q. Tell Mr. Rurode about that.

A. At the time the executors and trustees were inventorying Mr. Grabfelder's estate I was present at the time with my sister, and there were some coupon bonds that were contained in a box that, I think, they both had access to, but they were nothing as compared to the bonds in the Fidelity

Trust at Philadelphia. I noticed that these bonds had short periods to run and that there were some that had been recently bought and placed in this strong box at Atlantic City, but the majority of the bonds were in the strong box in her name independent of Mr. Grabfelder's in the Fidelity Trust Company, because at the time the executors attempted to investigate that box the Fidelity Trust Company refused to permit them to enter as they had no authority from Mrs. Grabfelder to do so.

Remark: It is suggested that I said when talking with Mr. Grabfelder when he spoke about going to Europe, that I said that this was about four weeks before he died. I didn't so intend to testify. It was in 1919 he told me. If my testimony reads the other way, then it is error.

Examination by Mr. McGovern.

Q. Did you ever go to the safe deposit box at Philadelphia with Mrs. Grabfelder prior to Mr. Grabfelder's death?

A. No.

Q. Do you know whether she went?

A. I would only know that from hearsay.

Examination by Mr. Celler.

Q. So far as you know, Mr. Grabfelder attended to Mrs. Grabfelder's business?

A. I was so led to believe.

Testimony of Henry Cassman

HENRY CASSMAN, being duly sworn.

Examination by Mr. Celler.

Q. Your address?

A. Office address, 820 Real Estate & Law Building, Atlantic City.

Q. What is your profession?

A. Attorney and counsellor at law.

Q. And you reside in Atlantic City?

A. Yes, I do.

Q. Were you acquainted with Mr. Grabfelder?

A. I was. He lived in Atlantic City.

Q. And when did you come to know Mr. Grabfelder?

A. About 1916.

Q. Did you see him daily?

A. In 1918 my father-in-law moved to Atlantic City, and Mr. Grabfelder and my father-in-law used to play cards a great deal, and I met them quite frequently in that way.

Q. During the year 1918, did you observe Mr. Grabfelder's health?

A. Yes.

Q. What did you think it to be?

A. His step was firm, his mind active, and his general bearing was that of a healthy man.

Q. He was interested in a great many civic and communal societies?

A. Yes, he was.

Q. Did you ever see him make any address at a public gathering?

A. There was a campaign in 1918 for the benefit of the Jewish War Relief and Mr. Grabfelder talked a little bit and was one of the largest contributors. He addressed a gathering at the

Q. Do you know about what month that was?

A. I do not. It was in the Fall, whether November or December, I do not know.

Q. Did you ever see him make any other address after that date?

A. I think in this particular cause this was the only time I recollect his making an address.

Q. During the time that you knew him, from 1916 on, did he ever appear ill to you?

A. He did not.

Examination by Mr. Rurode.

Q. Did you ever discuss his health with him?

A. Yes. In a general way I would ask, "How are you", and his answer was "Feeling fine". That is all. There was no discussion.

Q. Did he ever discuss any details with reference to his health?

A. Never discussed them.

Q. And all he would say was "Feeling fine"?

A. Yes. I remember particularly on the occasion of the address that I referred to, that he said he was feeling very well. He and I were active in that particular campaign.

STATE OF KENTUCKY, }
COUNTY OF JEFFERSON. } Set.

The affiant Joseph Kern says that his present address is the Hamilton Hotel, West Seventy-third Street, New York, New York;

That for many years he was an officer and stockholder of S. Grabfelder & Company, a corporation in Louisville, Kentucky;

That the last Samuel Grabfelder was the President of and a large stockholder in the said Com-

pany, and was in intimate business relations with the affiant; that the said Samuel Grabfelder on the occasion of a visit to Louisville in 1917 and 1918, affiant is uncertain which year, was discussing the question of income taxes with this affiant; affiant brought to the attention of the said Samuel Grabfelder that a tax payer had the right to make a bona fide transfer or gift of part of his property to his wife or some other member of his family, and that thereafter the income from such transferred portion of his estate (if the transaction was in good faith) would be taxable in the name of the new owner, and that the rates applicable thereto would be different than if the donor retained all the property and enjoyed all the income therefrom.

The said Samuel Grabfelder told the affiant that he would consider the matter, and if it was permissible, he would transfer some of his estate to his wife, Delia Grabfelder, so that the income on her portion of the estate would be taxable as income to her, and the income on the remaining portion of his estate in his hands would be taxable as income to him.

A few months after this first conversation had in Louisville, Kentucky, the affiant was in conversation with the said Samuel Grabfelder at Atlantic City, and inquired of the said Samuel Grabfelder whether or not he had ever followed the suggestion of transferring to his wife a substantial part of his estate for the purpose and reasons before given.

The affiant says that the said Samuel Grabfelder told him he had acted on the said suggestion and had transferred to his wife a substantial part

of his estate, so that the income therefrom thereafter would be taxable in her name.

The affiant says that at the time both the conversations herein referred to took place, the said Samuel Grabfelder was in apparent good health, and did not speak of his death and apparently did not contemplate death, nor did he indicate that the transfers of property were made to his wife in contemplation of death, but on the contrary at the said time the said Samuel Grabfelder appeared to be in robust health, and all the plans that he talked of, and the discussions with this affiant, showed that he looked forward to living many years.

The affiant says that he is not related by blood or marriage with to the said Samuel Grabfelder, or to Delia Grabfelder his widow, nor to any person interested in the estate of Samuel Grabfelder, deceased, nor is he a beneficiary under the said will, nor in any manner interested in the administration of the said estate.

Jos Kern (Signed)

Subscribed and sworn to before me by Joseph Kern this 10th day of February, 1922. My commission will expire January 8, 1924.

L. A. Fusting (Signed)
Notary Public, Jefferson County,
Kentucky.

Affidavit of Horace Stern

State of Pennsylvania }
County of Philadelphia } ss.:

Horace Stern being duly sworn according to law deposes and says:

I was formerly a member of the law firm of Stern & Wolf (now Wolf, Block & Schorr), and was the legal representative in some matters for Samuel Grabfelder, late a resident of Atlantic City, New Jersey. The said Samuel Grabfelder prior to 1918 consulted me in connection with his personal matters, and on several occasions dating from as early as 1914 stated to me that he was formulating plans for making a gift of a portion of his estate to his wife, Delia Grabfelder. I had nothing to do with the actual carrying of this into effect because at that time I was in the United States Army in Washington, D. C., but I am informed that my former partner, Morris Wolf, took charge of that.

Horace Stern

Sworn and subscribed before me }
this 23rd day of January. }
A. D. 1922

Murial E. Smith
Notary Public.

State of New York, }
City of New York, } ss.:
County of New York, }

Delia Grabfelder, being duly sworn, deposes and says:

I reside at No. 777 West End Avenue, in the Borough of Manhattan, City and State of New York.

Affidavit of Delia Grabfelder

I am the widow of the late Samuel Grabfelder, deceased.

That on the 22nd day of August, 1918, while we were living at the corner of Hartford and Pacific Avenues, in Atlantic City, State of New Jersey, towards evening of that day I was sitting on the front porch waiting for my husband to come home. Upon his return he said, "Well, Colonel, (a term of endearment that he often used) I have made you independent of me." I replied, "What do you mean" and he answered "I have just given you a little over $300,000." He went on to state that I would have to take care of my incidental expense myself; that there would be sufficient income to pay for the upkeep and expenses in connection with my two automobiles, the salary of my chauffeur and the various charities in which I was interested. He also informed me that I was to open a bank account in my own name and that Mr. Vollmer, who was his Secretary, would take care of the matters for me.

Soon thereafter, I opened up a separate bank account, in my own name, in a bank in Atlantic City and Mr. Vollmer took care of the books for me and collected coupons on the various securities and cashed the coupons for me on the various securities that had been turned over to me. I also had a separate Safe Deposit Box in the Guarantee Trust Company and at the office of the Fidelity Trust Company of Philadelphia. Mr. Vollmer also prepared my Income Tax Return, separate from that of my husband and income taxes were paid by me from my separate bank account, and I used the said check account to pay all expenses in connection with my two automobiles, my own

individual expenses, the salary of my chauffeur and the numerous charities in which I was interested.

At the time my husband made this gift to me, he was in good health. At that time and prior thereto he had never complained of any illness. He took daily walks along the boardwalk at Atlantic City, of at least three or four miles and very often the mileage was greater than that. Every day during 1918 and in fact even up to the day of his death, he played pinochle with his friends at a club which had been formed in Atlantic City. I do not know of any day that he missed his walk, except when it was stormy and the weather was inclement, nor do I know of any day that he missed his game of pinochle. He took a cold plunge every morning of his life and always had the glow of ruddy health upon him. At the time he made the gift to me of $300,000, it is my conviction that he was in no wise thinking of early death and that he simply wanted to make me independent of him.

My husband, to my knowledge, never consulted any doctor, for a long time before and for a long period after August 22, 1918.

DELIA GRABFELDER.

SWORN to before me this
14th day of January, 1922.

BERTHA BIENER.
Commissioner of Deeds, City of New York
Residing in the Borough of Brooklyn
Kings Co. Clerk's No. 21
Kings Co. Register's No. 3018
N. Y. County Clerk's No. 79
N. Y. County Register's No. 23031
Term expires Feb. 1, 1923

Affidavit of Myer Cravis

State of New Jersey }
County of Atlantic } ss.:

Myer Cravis of full age, being duly sworn according to law, upon his oath deposes and says, that he is a resident of the City of Atlantic City, County of Atlantic and State of New Jersey, and was a resident in said city during the year of 1918; that deponent knew the late Samuel Grabfelder about eighteen years, and during the year 1918 deponent frequently saw the said Samuel Grabfelder, and was accustomed to meet with him almost daily during that said time; that said Samuel Grabfelder at that time appeared to be in good health and clear mind, and never made any statement indicating that he thought of death at that time.

Myer Cravis (Signed)

Sworn and subscribed to before me this 14th day of January, A. D. 1922.

Hilda Smith
[seal] Notary Public of N. J.

State of Pennsylvania }
County of Philadelphia } ss.:

Morris Wolf, being duly sworn, deposes and says:

I am an attorney, a member of the firm of Wolf, Block and Schorr, with offices at 1118 Real Estate Trust Building, Philadelphia, and on August 22nd, 1918 Mr. Samuel Grabfelder called on me, who had been his attorney for sometime prior thereto and had at his direction prepared his will in June of 1918. Mr. Grabfelder told me that he wished

to give his wife, Mrs. Grebfelder, securities which would yield a sufficient income to enable her to be independent of him and that he was pleased to do this as he had been informed that by giving her the securities his own personal income taxes would be reduced. I told him that in order for his taxes to be reduced the gift must be an absolute one and that there could be no strings of any kind attached to it. He told me that his intention was to place the securities in a box which should belong to Mrs. Grabfelder and to have her deposit the income in her own account and use it for her own purposes. At that time Mr. Grabfelder seemed to be in perfect health and there was no discussion as far as I can remember concerning his physical condition.

After I had prepared the letter of August 22nd I prepared the codicil, making the will conform to Mr. Grabfelder's intention that Mrs. Grabfelder should receive the securities at that time rather than having to wait until after he died. It is not my personal opinion that Mr. Grabfelder had in mind at all the probability of his early death. I think he was more interested in the income tax situation than anything else.

MORRIS WOLF.

Sworn to and subscribed before me this
11th day of January A. D. 1922.

MURIAL E. SMITH
(SEAL—MURIEL E. SMITH
Notary Public
Philadelphia, Pa.)

Affidavit of Joseph E. Griff

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } SS.:

JOSEPH E. GRIFF, being duly sworn according to law, deposes and says that he is of full age, and resides at 777 West End Avenue, in the City of New York, State of New York; that he is the brother of Delia Grabfelder, the widow of the late Samuel Grabfelder; that some time in the Autumn of 1918 he was talking to Mr. Grabfelder on the porch of his (Mr. Grabfelder's) home in Atlantic City, New Jersey, which was located at the corner of Hartford and Pacific Avenues; that they were alone at the time; that he, the deponent, had read in the newspaper of a certain person, whose name he does not recall, who had turned over a portion of his estate to his wife, and the deponent then casually commenting upon this to Mr. Grabfelder that he thought this was a very wise thing to do because a man in his (the deponent's) judgment should make his wife independent where it was possible so to do. The deponent recalls that Mr. Grabfelder then stated to him, as near as he can recall the words, "That is exactly what I did. I recently made your sister a very fine present." He did not state the amount, nor the nature of it, but he stated that he wanted her to feel independent and that, therefore, he had given her a portion of his savings and that she had her own independent checking account. Subsequently after the death of Mr. Grabfelder the deponent, who was assisting his sister, the widow, learned that there had been some securities turned over by him to her, that they were in separate safe boxes in the Guarantee Trust Company, Atlantic City,

and the Fidelity Trust Company, of Philadelphia; that they were not included in any way in the accounts of Mr. Grabfelder, nor in his personal ledger and in fact the Fidelity Trust Company of Philadelphia would not allow the executors of the estate to have access to the box there without the widow being present.

Deponent further avers that at the time of the conversation above referred to between Mr. Grabfelder and himself Mr. Grabfelder was in good health, was not ailing in any way in so far as he, the deponent knows, and had no reason to anticipate death beyond the fact that he was an elderly man.

JOSEPH E. GRIFF.

Sworn to and subscribed before me this 9th day of January, A. D. 1922.

MURIEL E. SMITH,
Notary Public.
[SEAL] My Commission Expires March 7th, 1925.

STATE OF NEW JERSEY, }
COUNTY OF ATLANTIC, } ss.:

HARRY CASSMAN, of full age, being duly sworn according to law, upon his oath deposes and says, that he is an attorney engaged in the general practice of law in Atlantic City, New Jersey; deponent further says that during the year 1918, he frequently saw and spoke to Samuel Grabfelder, deceased; that during that time said decedent appeared to be in good health, was firm in his physical carriage and of clear and sound mind; deponent further says that said decedent regular-

ly attended to his business at his office in the Guarantee Trust Building, Atlantic City, New Jersey; and that deponent heard said decedent address a public gathering in the fall of 1918; and the decedent then told deponent he was in excellent health.

HARRY CASSMAN (Signed).

Sworn to and subscribed before me this 13th day of January, A. D. 1922.

HILDA SMITH,
Notary Public of N. J.

[SEAL]

STATE OF NEW JERSEY, }
COUNTY OF ATLANTIC, } ss.:

ALEXANDER VOLLMER, being duly sworn according to law, upon his oath, deposes and says: I am a resident of Atlantic City, County of Atlantic and State of New Jersey, and during the lifetime of the late Samuel Grabfelder I was his Secretary, and in sole charge of his books of account and correspondence, and was generally in close personal touch with him every day for a period of fourteen (14) years; deponent further says that in August, 1918, the late Samuel Grabfelder informed him that he desired to make an outright gift of certain securities, which he designated to the amount of about Three Hundred Thousand Dollars ($300,000), and requested him to charge them off from his ledger, and open up a new ledger for Delia Grabfelder, his wife. Following his instructions, the deponent opened the ledger for her, deposited coupons when they matured in her separate bank account and regularly handled said se-

curities in her name; deponent further says that during the year 1918 the late Samuel Grabfelder was in good health and in sound and clear mind, and regularly attended to his business affairs in his office in the Guarantee Trust Building, Atlantic City, N. J., that he saw the late Samuel Grabfelder daily during 1918 and up to the date of his death, and that he believes that in the year 1918 his condition of health and state of his mind was fully as good as it had been for the twelve (12) years previous to the time that he had known him; deponent further says that Delia Grabfelder regularly paid certain expenses in connection with the automobiles and chauffeur's salary and certain private charities of her own in which she was interested; deponent further says that the transfer of said securities by the decedent was absolute and non-conditional and decedent never claimed or used any part of the proceeds therefrom after said transfer; deponent further says that the decedent, the late Samuel Grabfelder, at the time he made said outright gift to his wife, Delia Grabfelder, never made any statement which indicated that said gift was made in contemplation of his death, or that he ever thought of death.

ALEXANDER VOLLMER (Signed)

Sworn and subscribed to before me
this 13th day of January, A. D. 1922.

HILDA SMITH,
Notary Public of N. J.

[SEAL]

Affidavit of Arnold S. Rukeyser

STATE OF NEW JERSEY, }
COUNTY OF ATLANTIC, } SS.:

ARNOLD S. RUKEYSER, being duly sworn according to law, on his oath deposes and says that he is Manager of the Breakers Hotel, of Atlantic City, New Jersey, and has been engaged in the hotel business in Atlantic City, New Jersey, for fifteen years. The deponent further says that he knew the decedent, Samuel Grabfelder, since 1907, that decedent lived at the Hotel Breakers for a period of five or six years at various times, that the deponent was very well acquainted with the decedent and say him almost daily in the year 1918, that said Samuel Grabfelder was in good health, walked about three or four miles every day, regularly attended to such business as he desired and was of clear and sound mind during the year 1918, that said Samuel Grabfelder was accustomed to arise, during 1918, at 6.30 A. M. and reported at his office in the Guarantee Trust Building at about 8.30 A. M.

Your deponent further says that in the year 1918 said Samuel Grabfelder at no time complained of being in ill health and to the knowledge of your deponent lived and transacted his business in the same manner in which he had done it for the fifteen years that your deponent was acquainted with him.

ARNOLD S. RUKEYSER (Signed)

Sworn and subscribed this 13th day of January, 1922. }

C. HENRY LANDOW (Signed)
Notary Public.
[SEAL] My Commission Expires Aug. 24, 1925.

Exhibit in re Safe Deposit Box

WICOFF & LANNING
COUNSELLORS AT LAW
TRENTON, NEW JERSEY
Broad Street Bank Building

JOHN V. B. WICOFF KENNETH H. LANNING

June 9, 1923

N. A. K. Bugbee, Esq.
Comptroller of the Treasury
Trenton, N. J.

In Re: Samuel Grabfelder-Atlantic Co.

Dear Sir:

As directed by your letter of May 15, I have visited the Fidelity Trust Company of Philadelphia and interviewed the custodian of their vault in reference to the box reported to have been rented by Mrs. Grabfelder.

In inspected their record. It shows that, on August 22, 1918, Delia Grabfelder signed a contract for box number 1058 and named her husband, Samuel Grabfelder, as deputy with power to enter the same. On June 16, 1920, the box was surrendered and Mrs. Grabfelder signed a release for the contents thereof.

This information was at first refused me, but I finally succeeded in getting it by interceding with the Land Title and Trust Company, the executor, and getting it to request the Fidelity Trust Company to disclose me the information.

Yours very truly,

KENNETH H. LANNING (Signed)
Special Investigator.

KHL/M

WICOFF & LANNING
COUNSELLORS AT LAW
TRENTON, NEW JERSEY
Broad Street Bank Building

JOHN V. B. WICOFF KENNETH H. LANNING

November 4th
1 9 2 1

N. A. K. Bugbee, Esq.
Comptroller of the Treasury
Trenton, New Jersey.

Re: Samuel Grabfelder, Dec'd.-Atlantic County.

GIFT TO WIFE.

Dear Sir:

I have interviewed numerous persons in Philadelphia and Atlantic City for the purpose of ascertaining the facts with regard to the gift made by decedent to his wife.

I return herewith a copy of the death certificate by which it is shown that decedent died April 17, 1920, aged 75 years, 7 months and 15 days, and that the cause of death was myocarditis. It is claimed that on August 22, 1918, about one year and eight months before his death, decedent gave his wife certain bonds, as shown by a memorandum of that date, a copy of which has already been submitted to the department. The statements submitted to the department as to the manner of delivery of the securities and the opening up of an account covering the same in the name of the wife by Mr. Vollmer were restated to me by Mr. Vollmer. I saw the original memorandum of August 22, 1918. It is in the possession of Mr. Claude A. Simpler, trust officer of the Land Title

and Trust Company. It is a typewritten sheet initialed at the bottom "S. G.", which initials are said to be in decedent's handwriting. I believe that the statements heretofore submitted with regard to this memorandum and the delivery of the bonds are true and that the taxable status of the gift depends upon whether it was made in contemplation of death. I interviewed numerous persons as to decedent's state of health and attach hereto a synopsis of their statements to me. The most of them disclose nothing, but some of them, in my opinion, warrant the conclusion that decedent had suffered from heart trouble and that he knew it for several years before death and before the gift in question was made.

FEDERAL TAX.

Mr. Simpler advises that the Federal Estate Tax has not been revised by the Federal authorities and he, therefore, can give no more definite information as to the amount thereof than is contained in the Federal return. That return showed the amount of tax due to be $49,581.44. The item was carried in Schedule D as estimated at $50,000.

NEW ALBANY HOTEL CO.

Mr. Simpler submits to me a letter (attached hereto) dated October 27, 1921, supplementing the data heretofore on file as to value of this stock upon the basis of which he requests a valuation of 65½¢ per share, instead of 50¢ as originally set out in Schedule B, or $1.54 as tentatively fixed by the department.

COMMERCIAL DISTILLING CO.

Mr. Simpler submits a copy of a letter from Mr. Vollmer (attached hereto) showing that during 1918 and 1919 decedent received a distribution of 60% on account of the dissolution of this concern. What more is to be received is uncertain on account of an unsettled claim of the government for taxes.

ARKANSAS VALLEY IRRIGATION CO.

The department's tentative appraisement of this stock is based upon information contained in a letter of Ernest Morris to Cassman & Gottlieb, dated May 14, 1921, and in the file. Mr. Simpler says that the information contained in that letter is entirely contrary to information received by him from Mr. Morris and he desires final action withheld until he has opportunity to obtain and submit additional data.

REAL ESTATE.

As previously reported orally to Mr. Lippincott, Mr. Simpler's assistant at one time stated to me that the decedent owned a cottage in Atlantic City. Investigation, however, proves that statement to have been an error. Decedent owned no real estate in New Jersey.

I return the file.

Yours very truly,

KENNETH H. LANNING (Signed)
Special Investigator.

KHL/M

Mr. Lord, Marine Trust Company, Atlantic City:

He had a small account with us. I knew nothing about him except that I saw him occasionally on the street. I did not know he was sick.

Judge Louis A. Repetto, District Court Judge, Atlantic City:

I didn't know him except by sight on the street. I know nothing about his health.

Alexander Vollmer, Guarantee Trust Bldg., Atlantic City. Public Accountant. Financial Agent of Decedent:

Decedent went to Dr. Riesman of Philadelphia about every six months for perhaps ten years prior to his death for a general looking-over. Dr. Riesman told him to go slow and that he should not have any excitement. Decedent was in good health and this advice was only what might be expected for a man of his years.

Dr. Woolbert, Pacific and Delaware Aves., Atlantic City:

I knew decedent for perhaps two years. He was sent to me by his brother-in-law with whom I was well acquainted. I was the "heart man" for the Atlantic City draft boards and in that work examined hundreds of hearts. The very night before decedent died he was in my office. I stripped him and examined his heart and found nothing to warrant expectation of death. He had had a warning or two "perhaps". I had remonstrated with him about taking cold baths and told him the shock was too great but he said he had always taken them and didn't propose to change his habits at his time

of life. He died in the bathroom the morning after I saw him, probably from shock of cold bath.

George A. Bourgeois, Counsellor at Law, Atlantic City:

I believe he was in poor health for a time before his death but not for long—certainly not as long as a year.

William N. Clevenger, Counsellor at Law, Atlantic City:

I walked from Railroad Station with him a day or two before he died. He seemed in good health. I was surprised at his death.

Mr. Joel Hiliman, Proprietor of Breakers Hotel:

He lived at the Hotel Winters for a time and seemed in fine health. I didn't know he had heart trouble until I heard of his death. He had a brother and a sister both older than he. His brother died shortly after he did. He was a good liver and a rather fast one. Had a big birthday party at the hotel when he was 75 with lots of champagne—always drank.

Mr. Sypherd, Trust Officer, Guaranty Trust Co., Atlantic City:

Did not know him except as I saw him in bank frequently. I did not know he was sick or had any trouble.

Mr. Louis E. Stern, Counsellor at Law, with Braunstein Blatt Co., Atlantic City:

I was at one time his attorney. I drew a will for him in fall of 1916, by which he left his wife $100,000 and a trust fund of $350,000. At one time

he invested largely in mortgages and I examined titles for him. Later he changed the nature of his investments and I didn't have anything to do. I didn't know so much about him at the last. But I know he was subject to some sort of trouble and had to take care of himself. I met him once on the Boardwalk and he told he would have to stop playing pinochle because the excitement affected his heart. I can't fix the time of this statement. The gift was probably in contemplation of death. I believe that's what he had in mind. Your suspicions are probably well founded, but you'll have a hard time to establish it. He had an older brother who survived him a few months and an older sister who is still living—was of a long-lived family.

Hon. Horace Stern, Judge of Court of Common Pleas, Philadelphia, Pa.:

I knew for perhaps 10 years that Grabfelder had a high blood pressure, though I have no reason to believe that he made the gift in contemplation of death. I know that, in making the gift, the decedent was "carrying out an intention of long standing", because upon one or more occasions two or three years before the gift, he told me that he was contemplating such a thing. He did not consult me at the time this gift was made, but the typewritten memorandum was prepared in my office at his request during my absence.

Mr. Claude A. Simpler, Trust Officer of Land Title and Trust Company, one of executors:

I did not know Grabfelder to amount to anything and know nothing about his health.

Death Certificate

DEPARTMENT OF HEALTH OF THE STATE OF NEW JERSEY

BUREAU OF VITAL STATISTICS.

CERTIFICATE AND RECORD OF DEATH.

1. PLACE OF DEATH

County....Atlantic.... State....NEW JERSEY.... Registered No.....

Township ..... or Village ..... or

City....Atlantic..... No..... St., ...Ward

(If death occurred in a hospital or institution, give its NAME instead of street and number.)

2. FULL NAME.....Samuel Grabfelder.....

(a) Residence. No..... 134 States ..... St. 1st Ward.....

(Usual place of abode) (If non-resident, give city or town and State.)

Length of Residence in city or town where death occurred yrs. mos. ds.

How long in U. S., if of foreign birth? yrs. mos. da.

MARGIN RESERVED FOR BINDING.

N. B.—WRITE PLAINLY, WITH UNFADING INK—THIS IS A PERMANENT RECORD. Every item of information should be carefully supplied. AGE should be stated EXACTLY. PHYSICIANS should state CAUSE OF DEATH in plain terms, so that it may be properly classified. Exact statement of OCCUPATION is very important. See instructions on back of certificate.

PERSONAL and STATISTICAL PARTICULARS

3 SEX	4 Color or Race	5 Single, Married, Widowed or Divorced (write the word.)
Male	White	Married

5a If married, widowed or divorced
HUSBAND of
(or) WIFE of.....

6 DATE OF BIRTH (month, day, and year)
9/2/1845

7 AGE	Years	Months	Days	IF LESS than 1 day, .. hrs. or ... min.
	75	7	15	

8 OCCUPATION OF DECEASED
(a) Trade, profession, or particular kind of work .....Retired.
(b) General nature of industry, business, or establishment in which employed or employer .....Distiller.
(c) Name of employer

9 BIRTHPLACE (city or town)
(State or Country.) Germany.

PARENTS 10 NAME OF FATHER Unknown

11 Birthplace of Father (city or town) Germany
(State or Country)

12 MAIDEN NAME OF MOTHER Unknown

13 Birthplace of Mother (city or town)
(State or Country.) Unknown

14 Informant Mrs. S. Grabfelder
(Address) Atlantic City, N. J.

15 Filed Apr. 19, 1920 A. T. Glenn
Registrar.

MEDICAL CERTIFICATE OF DEATH

16 DATE OF DEATH (month, day, and year) Apr. 17, 1920

I HEREBY CERTIFY, That I attended deceased from Feb. 20, 1920, to Apr. 16, 1920, that I last saw him alive on Apr. 16, 1920, and that death occurred on the date stated above at M.
THE CAUSE OF DEATH* was as follows:
..... Myocarditis .....

(duration) ...yrs. ...mos. ...ds.

CONTRIBUTORY - - -
(Secondary)
(duration) ...yrs. ...mos. ...ds.

18 Where was disease contracted if not at place of death?.....
Did an operation precede death?...
Date of .....
Was there an autopsy?.....
What test confirmed diagnosis?....

Signed... R. Woolbert...., M. D.

(address) 800 Pacific Ave.

*State the DISEASE CAUSING DEATH, or in deaths from Violent Causes, state (1) Means and Nature of Injury, and (2) whether Accidental, Suicidal, or Homicidal. (See reverse side for additional space.)

19 PLACE OF BURIAL, CREMATION or REMOVAL

Salem Fields Cem. Bklyn., N. Y.

Date of Burial Apr. 20, 1920

20 Undertaker

Dennis A. Gormley
Address Atlantic City, N. Y.

Exhibit—Dr. Riesman's Statement as to Physical Condition of Decedent

COPY

Dr. David Riesman
1715 Spruce Street
Philadelphia

January 22, 1921.

Gordon A. Block, Esq.,
Real Estate Trust Building,
Philadelphia.

Dear Sir:

Replying to your letter of January 18th, I would state that the late Samuel Grabfelder, prior to the time of his death, was always of clear mind. With regard to his physical condition, I would say that Mr. Grabfelder had slight trouble with his heart, not enough during the year 1918, to interfere materially with his daily routine. It was not until February, 1920, that his heart began to give definite subjective and objective signs of weakness.

Yours very truly,

(SD) David Riesman.

Exhibit—Request for Report of Physical Condition

Law Offices of

WOLF, BLOCK & SCHORR
118 Real Estate Trust Building
PHILADELPHIA

January 18, 1921.

Dr. R. Woolbert,
800 Pacific Ave.,
Atlantic City, N. J.

Dear Sir:

We represent the Estate of Samuel Grabfelder, Deceased, and in connection with a certain phase of his estate we have been asked to obtain from his physician a letter stating as well as possible the physician's recollection of the decedent's physical and mental condition in August of 1918. We are advised that practically until his death he was in good physical condition and of clear mind. If you can assist us by giving this information, we will appreciate it very much.

Truly yours,

(Signed) GORDON A. BLOCK
For Wolf, Block & Schorr

GAB:H

Answer:

Unknown to me in 1918.
First under my observation Feb. 1920.
Mentality normal, and physically active, until about Apr. 16, 1920 when he dropped dead from acute dilation of heart. Dr. Roy Woolbert 1/19/1921.

Exhibit—Memorandum of Gift to Wife

"August 22, 1918.

Mrs. Samuel Grabfelder:

My dear Wife:

Carrying out an intention of long standing, I have decided to make you an outright gift of the following bonds, my purpose being to render you financially independent of me during your life:

John D. Alkire Investment Co.	4	at	500
	49	"	1000
American Smelting & Refining	11	"	1000
Atlantic Water & Elec. Power	9	"	1000
Baltimore & Ohio R. R.	10	"	"
Bangor and Aroostock R. R.	10	"	"
Central Illinois Light Co.	5	"	"
Chicago, Rock Island & Pac.	5	"	"
Columbus Gas Co.	5	"	"
Commonwealth Power Co.	5	"	"
Consolidated Cities L. P. & T.	10	"	"
Denver Gas & Electric Co.	15	"	"
Empire Refining Co.	10	"	"
Galveston Terminal R. R.	6	"	"
Indiana, Columbus and Eastern	10	"	"
Indianapolis Gas Co.	10	"	"
Lehigh Valley R. R. Co.	10	"	"
Midland Valley R. R.	20	"	"
Missouri Metals Corp.	10	"	"
C. R. Myers Hotel Co.	25	"	"
Paducah Water Supply	28	"	"
Palmer Hotel Co.	10	"	"
Parr Shoals Power Co.	10	"	"
Philadelphia & Balto. Cen.	10	"	"
Philadelphia Electric	9	"	"
	10	"	100
Pittsburgh Cin. Ohio, & St. L.	10	"	1000
Seaboard Air Line Ry.	12	"	"

Affidavit of Alexander Vollmer

In accordance with your wish, I have rented a box for you at the Fidelity Trust Company of Philadelphia, in which these securities are deposited for you.

Affectionately yours,

S. G."

ESTATE OF SAMUEL GRABFELDER

STATE OF NEW JERSEY }
COUNTY OF ATLANTIC } SS.:

ALEXANDER VOLLMER of full age, being duly sworn according to law, on his oath deposes and says: I am a resident of the City of Atlantic City, County of Atlantic and State of New Jersey, and for fourteen years prior to the death of the late Samuel Grabfelder I was secretary for him, and was in sole charge of his books and papers, and was in close touch with all of his affairs, and except as otherwise stated I make this affidavit on my own knowledge.

I further say that the late Samuel Grabfelder on August 22, 1918, made an outright gift to his wife, DELIA GRABFELDER, of securities of the value of Three Hundred Thousand ($300,000) Dollars; that on that date I transferred said securities to the ledger of Delia Grabfelder, and that on or about that date a safe deposit box was secured in the name of Delia Grabfelder at the Fidelity Trust Company in Philadelphia, and latter at the Guarantee Trust Company in Atlantic City, New Jersey, in which said securities were kept.

I further say that since that date the income from said securities were deposited in the personal bank account of Delia Grabfelder, which she kept at the Guarantee Trust Company, Atlantic City, New Jersey, and credited to her account on her books.

At the time the late Samuel Grabfelder transferred these securities he was seventy-three (73) years of age, and was active in business and charitable affairs, and in a good state of health.

(Signed) ALEXANDER VOLLMER.

Sworn and subscribed to before me this 5th day of August, 1921.

(Signed) HILDA SMITH,
Notary Public of N. J.

Inheritance Tax Assessment

STATE OF NEW JERSEY

DEPARTMENT OF COMPTROLLER OF THE TREASURY
TRANSFER INHERITANCE TAX BUREAU
TRENTON

167976

Claude A. Simpler,
Trust Officer of The Land
Title and Trust Co., one of
the Executors,..... of the Estate of Samuel Grabfelder,
Emanuel Celler, Esq., Late of Atlantic County
51 Chambers St.,
New York City, N. Y.

June 1, 1927.

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 $.....

Taxes assessed		$40,469.96
Payment on Account Oct. 14, 1920.....	$30,000.00	
Discount	1,578.95	31,578.95
Balance due		$ 8,891.01
		3,295.76
		$12,186.77

Salem Rields Cemetery,	$ 250.00	Samuel Grabfelder, Jr.	$ 100.00
Carrie Levine,	1,606.06	Babette Lowenstein	4,549.99
Anna Merz,	1,606.06	Moses Grabfelder,	3,138.88
Emanuel Levy,	100.00	Abraham Grabfelder,	3,138.88
Max Levy,	100.00	Robert Grabfelder,	3,138.89
Minnie Weil,	100.00	Bertha Benjamin,	856.05
Leopold Levy,	100.00	Theresa Schwager,	856.05
Mollie Glauber,	100.00	Carrie Isaacs,	856.06
James Peters,	25.00	Annie Sobel,	856.06
Horace Milburn,	50.00	Lucy Heilbut,	856.06
National Jewish Hospital for Consumptives,	2,500.00	Emanuel Muller,	856.06
Cleveland Jewish Orphan Asylum,	500.00	Frank Muller,	856.06
Jewish Hospital Association, Louisville, Ky.	500.00	Alfred Muller,	856.06
Federation of Jewish Charities of Louisville, Ky.	500.00	Emanuel Celler,	214.01
Hochnosas Orphim of Philadelphia, Pa.	100.00	Mortimer Celler,	214.01
Delia Grabfelder,	9,836.68	Jessie Anixter,	214.02
Ricka Grabfelder,	125.00	Lillian Masch,	214.02
Hattie Blum,	100.00	Rfd. 527.37	
Ella Wertheimer,	100.00		
Regina Grabfelder,	100.00		
Morris Grabfelder,	100.00		
Emanuel Grabfelder,	100.00		
Viola Grabfelder,	100.00		

$12,714.14 Pd. acct. 6/22/27

JN. A. K. BURGHER
Comptroller.

PAID
June 22, 1927
M. W. R.

DECEDENT DIED April 17, 1920.

If paid subsequent to April 17, 1921 add interest at rate of 6% per annum from said date to date of payment.

EK

CORRECTED ASSESSMENT

Return this statement to this office with certified check for amount due. Make checks payable to TREASURER, STATE OF NEW JERSEY.

Basis of Assessment

STATE OF NEW JERSEY

DEPARTMENT OF COMPTROLLER OF THE TREASURY
TRANSFER INHERITANCE TAX BUREAU
ASSESSMENT

Estate of SAMUEL GRABFELDER of Atlantic County.
Late Resident of Atlantic City. Date of Death April 17, 1920.
Assessment Dated 5/31/27
Assessed by C. F. Duman
Re-Audited by .....

Amount of Estate	Personal	$1,201,370.01	"C" TOTAL	$1,481,752.51
	Real	280,382.50		
Debts, Expenses, &c.,				181,371.20
Net Estate for Distribution,				1,300,381.31
Exempt & Contingent				154,159.96
Taxable Interests,				1,146,221.35
Will			Tax 1%, 1½%, 2%, 3%, 5%	$ 40,469.96

	Beneficiaries and Bequests	Value of Devise or Bequest	Relationship	Age	Exempt	Taxable
	Salem Fields Cemetery		none			5,000.00
2	Care of Grave	5,000.00				250.00
	Carrie Levine		niece			32,121.18
3	Cash	15,000.00				1,606.06
3	1/33 of Residue	17,121.18				
		32,121.18				
	Anna Merz		niece			32,121.18
4	Cash	15,000.00				1,606.06
3	1/33 of Residue	17,121.18				
		32,121.18				
	Emanuel Levy		nephew			2,000.00
5	Cash	2,000.00				100.00
	Max Levy		nephew			2,000.00
5	Cash	2,000.00				100.00
	Minnie Weil		niece			2,000.00
5	Cash	2,000.00				100.00
	Leopold Levy		nephew			2,000.00
5	Cash	2,000.00				100.00
	Mollie Glauber		niece			2,000.00
5	Cash	2,000.00				100.00
	James Peters		none			500.00
6	Cash	500.00				25.00
	Horace Milburn		none			1,000.00
6	Cash	1,000.00				50.00
	National Jewish Hospital for Consumptives		none			50,000.00
7	Cash	50,000.00				2,500.00
	Cleveland Jewish Orphan Asylum		none			10,000.00
7	Cash	10,000.00				500.00
	Jewish Hospital Association, Louisville, Ky.		none			10,000.00
7	Cash	10,000.00				500.00
	Federation of Jewish Charities of Louisville, Ky.		none			10,000.00
7	Cash	10,000.00				500.00
	Hochnosas Orphim of Philadelphia, Pa.		none			2,000.00
7	Cash	2,000.00				100.00

Basis of Assessment

Chapter 228, Laws 1909.

As Amended and Supplemented by Chapter 57 and Chapter 151, Laws of 1914

TRANSFER INHERITANCE TAX

ASSESSMENT.

Estate of SAMUEL GRABFELDER of Atlantic County.
Late Resident of Atlantic City. Date of Death April 17, 1920.
Will or Intestate,

ANALYSIS OF ESTATE

Items of Will	Beneficiaries and Bequests	Relationship	Age	Value of Life Estate or Annuity $	Exempt $	Taxable $
	Delia Grabfelder	wife	69		5,000.00	441,222.54
8	Cash			100,000.00		9,836.68
	Property transferred as Gift in contemplation of death			280,382.50		
11	Life Estate in $210,000			65,840.04		
				446,222.54		
11	Remainder after above life estate is Contingent				144,159.96	
	Ricka Grabfelder	niece				2,500.00
9	Cash			2,500.00		125.00
	Hattie Blum	gr. niece				2,000.00
9	Cash			2,000.00		100.00
	Ella Wertheimer	gr. niece				2,000.00
9	Cash			2,000.00		100.00
	Regina Grabfelder	gr. niece				2,000.00
9	Cash			2,000.00		100.00
	Morris Grabfelder	gr. nephew				2,000.00
9	Cash			2,000.00		100.00
	Emanuel Grabfelder	gr. nephew				2,000.00
9	Cash			2,000.00		100.00
	Viola Grabfelder	gr. niece				2,000.00
9	Cash			2,000.00		100.00
	Samuel Grabfelder, Jr.	gr. nephew				2,000.00
9	Cash			2,000.00		100.00
	Babette Lowenstein	sister			5,000.00	183,332.94
13	1/3 of Residue			188,332.94		4,549.99
	Moses Grabfelder	nephew				62,777.64
13	1/9 of Residue			62,777.64		3,138.88
	Abraham Grabfelder	nephew				62,777.64
13	1/9 of Residue			62,777.64		3,138.88
	Robert Grabfelder	nephew				62,777.65
13	1/9 of Residue			62,777.65		3,138.89
	Bertha Benjamin	niece				17,121.17
13	1/33 of Residue			17,121.17		856.05
	Theresa Schwager	niece				17,121.17
13	1/33 of Residue			17,121.17		856.05
	Carrie Isaacs	niece				17,121.17
13	1/33 of Residue			17,121.17		856.06
	Annie Sobel	niece				17,121.17
13	1/33 of Residue			17,121.17		856.06
	Lucy Heilbut	niece				17,121.18

Basis of Assessment

Items of Will	Beneficiaries and Bequests	Relationship	Age	Value of Life Estate or Annuity	Exempt	Taxable
13 1/33 of Residue				17,121.18		856.06
	Emanuel Muller	nephew				17,121.18
13 1/33 of Residue				17,121.18		856.06
	Frank Muller	nephew				17,121.18
13 1/33 of Residue				17,121.18		856.06
	Alfred Muller	nephew				17,121.18
13 1/33 of Residue				17,121.18		856.06
	Emanuel Celler	gr. nephew				4,280.20
13 1/132 of Residue				4,280.29		214.01
	Mortimer Celler	gr. nephew				4,280.29
13 1/132 of Residue				4,280.29		214.01
	Jessie Anixter	gr. neice				4,280.30
13 1/132 of Residue				4,280.30		214.02
	Lillian Masch	gr. neice				4,280.30
13 1/132 of Residue				4,280.30		214.02
					$154,159.96	$1,146,221.35
						40,469.96

Computation of Taxes

Exempt	5,000.00	(Widow)
1%	45,000.00	450.00
1½%	100,000.00	1,500.00
2%	100,000.00	2,000.00
3%	196,222.54	5,886.68
	446,222.54	9,836.68
Exempt	5,000.00	(Sister)
2%	45,000.00	900.00
2½%	100,000.00	2,500.00
3%	38,332.94	1,149.99
	188,332.94	4,549.99

NOTE. Re-appraisement of several securities in "B" and "C" as well as change in executors' commissions, counsel fees and federal estate tax allowance as well as inclusion of taxes paid States other than New Jersey makes this assessment necessary.

Estate of SAMUEL GRABFELDER of Atlantic County.

Late Resident of Atlantic City. Date of Death April 17, 1920.

Will

I, Samuel Grabfelder, being a citizen and resident of the City of Philadelphia, State of Pennsylvania, do hereby make, publish and declare this my last will and testament, hereby revoking all former wills by me at any time heretofore made.

First: I direct that all my just debts and funeral expenses shall be paid by my executors hereinafter named as soon as conveniently may be after my decease.

Second: I direct my executors to pay to the Corporation which conducts the Salem Fields Cemetery at Brooklyn, New York, such sum of money, not exceeding Five Thousand Dollars ($5,000.00) as may be necessary under the rules and regulations of that Corporation to insure the perpetual care and maintenance of my burial lot in said Cemetery.

Third: I give and bequeath to my niece, Carrie Levine, of New York, the sum of Fifteen Thousand Dollars ($15,000.00).

Fourth: I give and bequeath to my niece, Anna Merz, of New York, the sum of Fifteen Thousand Dollars ($15,000.00).

Fifth: I give and bequeath to each of the five (5) children of my deceased sister, Jeanette Levy, the sum of Two Thousand Dollars ($2,000.00), making this bequest no larger for the reason that I know that these children all have ample means.

Sixth: I give and bequeath to my faithful servants, James Peters, the sum of Five Hundred Dollars ($500.00) and to Horace Milburn the sum of One Thousand Dollars ($1,000.00).

Seventh: I give and bequeath to the National Jewish Hospital for Consumptives at Denver, Colorado, the sum of Fifty Thousand Dollars ($50,000.00), to be made part of the general sinking fund of that institution; to the Cleveland Jewish Orphan Asylum of Cleveland, Ohio, the sum of Ten Thousand Dollars ($10,000.00); to the Jewish Hospital Association of Louisville, Kentucky, the sum of Ten Thousand Dollars ($10,000.00), (provided that if at the time of my death the name of this institution shall have been changed, this bequest shall become void, and the amount thereof become part of my residuary estate, and if within five (5) years after my death the name of this institution shall be changed, the amount herein bequeathed to it shall be repaid by the said institution to my estate at the time when its name is changed, and the said sum thereafter shall become a part of my residuary estate. In paying the amount of this bequest over to the said legatee, my executors and trustees shall secure a satisfactory agreement to carry into effect the provisions hereof); to the Federation of Jewish Charities of Louisville, Kentucky, the sum of Ten Thousand Dollars ($10,000.00), and to the Hachnosas *Orphim* (Jewish Sheltering Home) of Philadelphia, whose office is now on Third Street below Spruce Street, Philadelphia, the sum of Two Thousand Dollars ($2,000.00).

Eighth: I give and bequeath to my wife, Delia Granfelder, the sum of One Hundred Thousand Dollars ($100,000.00), of which Twenty-five Thousand Dollars ($25,000.00) shall be paid to her by my executors within two (2) months of my de-

cease, Twenty-five Thousand Dollars ($25,000.00) within four (4) months of my decease, and the remaining Fifty Thousand Dollars ($50,000.00) within six (6) months of my decease.

Ninth: I give and bequeath to my niece, Ricka Grabfelder, widow of my nephew, Samuel Grabfelder, who was the son of my brother, Morris Grabfelder, the sum of Two Thousand Five Hundred Dollars ($2,500.00), and to each of his children the sum of Two Thousand Dollars ($2,000.00), payable to male children as they attain the age of twenty-one (21) years respectively, and payable to female children as they respectively attain the age of twenty-one (21) years or marry, whichever shall happen first. In case any of my said legatees under this clause of my will shall have died at the time of my decease, I give and bequeath his, her or their said legacies to his, her or their children living at the time of my decease and to the issue of such of his, her or their children as shall have then died; the issue of a deceased child to take, however, only such share as his, her or their parent would have taken if then living. And in case any of the said children of my said nephew shall have died at the time of my decease without leaving children or the issue of deceased children then surviving, I give and bequeath the legacy which otherwise would have been payable to him, her or them, in equal parts, share and share alike, to the other children of my said nephew living at the time of my decease and to the children and issue of deceased children of such of them as shall then be dead; the children and issue of deceased children of a deceased lega-

tee to take, however, only such share as his, her or their parent would have taken if then living.

I desire to state that I am not making a bequest in this will to my brother, Morris Grabfelder, only for the reason that I know that he would have no use therefor, and not that I have forgotten him or that he is not dear to me.

Tenth: I direct that all inheritance and succession taxes and charges of any kind on all legacies heretofore given in this will, shall be paid out of my residuary estate, and shall not be deducted from the said legacies.

Eleventh: I give, devise and bequeath to the Land Title and Trust Company of Philadelphia, my nephew, Moses Grabfelder, and Horace Stern, Esq., of Philadelphia, upon the trusts hereinafter named, the following described property, namely:

A. All life insurance of every description which shall be payable to and collected by my estate.

B. Five Hundred Thousand Dollars ($500,000) in market value of mortgages, bonds, and stocks (other than stock of the corporation of S. Grabfelder and Company), which may be owned by my estate at the time of the selection hereinafter next referred to; such mortgages, bonds and stocks to be selected by my wife, Delia Grabfelder, by writing given to my executors hereinafter named, within four (4) months of the time of my decease, without any restriction on her choice, and to be taken by my said trustees as part of the said trust estate at their market value at the time they are selected as aforesaid. In case my wife shall not

make any selection within said period, my executors shall within one (1) month after the expiration of said period of four (4) months make said selection in writing, the mortgages, bonds and stocks so selected to be taken by my trustees as part of the said trust estate at their market value at the time they are selected as aforesaid.

My said trustees shall hold the said trust estate in trust to pay the net income thereof to my wife, Delia Grabfelder, during the term of her life, said net income derived from item "A" aforesaid to be paid from and immediately after its collection aforesaid, and said net income derived from item "B" aforesaid to be paid from and immediately after its selection aforesaid. My said Trustees shall collect all rents, profits, dividends and other income from the trust property, pay all the costs, expenses, insurance, repairs, taxes and all other charges of every character in connection therewith, and shall pay the net income to my wife either monthly, quarterly or semi-annually, as she shall from time to time elect. They shall have full power and authority to retain the investments of the trust estate, or from time to time sell any or all of the real and personal property comprising the trust estate, either at public or private sale for cash or on credit and on such terms as they shall think best, and to execute to the purchasers proper conveyances in fee simple or otherwise, for such property, and without any liability on the part of the purchasers to see to the application of the purchase money. They shall also have power from time to time to reinvest the trust estate in such investments as they may deem safe investments for trust funds as distinguished from busi-

ness or speculative risks, but I do not confine them to what are technically known as legal investments. In making reinvestments, I desire that my trustees shall, whenever practicable, consult my wife and make no reinvestment of which she does not approve. In case my trustees shall receive or purchase investments at a premium, I direct that the premium shall be considered principal, and shall not be refunded from the income.

Upon the death of my wife, I give, bequeath and devise the principal of said trust estate to such persons and or charitable institutions and purposes and for such estates as my said wife, Delia Grabfelder, may by her last will direct and appoint, and in default of such appointment, I give, bequeath and devise the same to such persons as would be entitled thereto under the intestate laws of the State of Pennsylvania had I at the time of the death of my said wife died intestate, seized and possessed thereof in fee and absolutely.

Twelfth: I give and bequeath to my said wife, Delia Grabfelder, all the bric-a-brac, furniture, personal trinkets, automobiles, etc., which I may own at the time of my death, except, however, my jewelry, which I direct shall be distributed by my wife among my own blood relatives in such manner as she shall deem best, and except also my diamond watch case, which I give and bequeath to Richard S. Goldman, son of my said wife's niece. The legacies given in this clause shall be free and clear of all inheritance and succession taxes and charges of all kinds, which taxes and charges I direct shall be paid out of my residuary estate.

Thirteenth: All the rest, residue and remainder of my property and estate, real, personal and mixed, I give, bequeath and devise as follows:

A. One equal third part thereof to my sister, Babette Lowenstein, wife of Leopold Lowenstein, now of Brooklyn, New York.

B. One equal third part thereof to Moses Grabfelder, Abraham Grabfelder and Robert Grabfelder, children of my deceased brother, Ben Grabfelder, in equal parts to be divided among them, share and share alike.

C. One equal part thereof to all the children of my deceased sister, Lena Mueller, late of Brooklyn, New York, in equal parts to be divided among them, share and share alike.

In case any of the devisees and legatees under this clause of my will shall have died at the time of my decease, I give, bequeath and devise his, her or their said devises and legacies to his, her or their children living at the time of my death, and the issue of such of his, her or their children as shall have then died, the issue of a deceased child to take, however, only such share as his, her or their parent would have taken if then living. And in case any of the said devisees and legatees shall have died at the time of my decease without leaving children or the issue of deceased children then surviving, I direct that the devises and legacies which otherwise would have been payable to him, her or them shall be distributed as in this clause of my will provided among the other devisees and legatees who would have shared with such deceased devisees and legatees a said one equal third part of said residuary estate, and the children and issue of deceased children of such other devisees and legatees who may not be living at the time of my decease. And in case there be no such other devisees and legatees or children or issue of de-

ceased children of deceased devisees and legatees who would have shared a said one equal third part as aforesaid, then said devises and legacies shall revert to and form a part of my said residuary estate, and be distributed among the other devisees and legatees in the manner provided for in this clause of my will, it being my intent and purpose that I shall not die intestate as to any part of my said residuary estate.

Fourteenth: I give to my executors full power and authority to sell any or all of my real and personal estate except as herein above otherwise provided at public or private sale, either for the purpose of division of my estate, or for any other purpose, for cash or on credit and on such terms as they shall think best, and to execute to the purchaser or purchasers proper conveyances therefor in fee simple or otherwise, without any liability on the part of such purchaser or purchasers to see to the application of the purchase money.

I give to my executors full power and authority to retain the investments, both real and personal property, or any of them, which I may hold at the time of my death, during their administration of my estate; or from time to time to sell any or all thereof, except as hereinabove otherwise provided. They shall also have power during said administration from time to time to reinvest all or any part of my estate except as hereinabove otherwise provided, in such investments as they may deem safe investments for trust funds as distinguishable from business or speculative risks, but I do not confine them to what are technically known as legal investments.

Fifteen: I nominate and appoint my nephew, Moses Grabfelder, Horace Stern, Esq., of Philadelphia and the Land and Trust Company of Philadelphia executors of this will. I direct that none of my executors and trustees shall be required to give bond or surety.

In witness whereof, I have hereunto set my hand and seal this fourth day of June, A. D., One Thousand Nine Hundred And Eighteen (1918).

Samuel Grabfelder (Seal)

Signed, sealed, published and declared as and for his last will and testament by the said testator, Samuel Grabfelder, in the presence of us, who, at his request, in his presence and in the presence of each other, have hereunto subscribed our names as witnesses.

Goldie Rosenbaum
1821 Diamond St.
Morris Wolf,
1517 N. 16th Street, Phila.

I, Samuel Grabfelder, being a citizen and resident of the City of Philadelphia, State of Pennsylvania, do hereby make, publish and declare the following as a codicil to my last will and testament, dated June 4, 1918, hereby ratifying and confirming the said last will and testament in all other respects;

I am about to give to my wife, Delia Grabfelder, the sum of Three Hundred Thousand Dollars

($300,000.) outright. I therefore amend and modify clause "B" of the 11th paragraph of said will by changing the figure Five Hundred Thousand Dollars ($500,000.) therein to Two Hundred Thousand Dollars ($200,000.)

WITNESS my hand and seal this 22nd day of August, 1918.

SAMUEL GRABFELDER (SEAL)

Signed, sealed, published and declared by the testator as and for a codicil to his last will and testament dated June 4, 1918, in our presence and in the presence of each other, and at his request, hereunto have subscribed our names as witnesses.

GOLDIE ROSENBAUM
GEORGE J. SCHORR
MORRIS WOLF

RE: SAMUEL GRABFELDER ESTATE
FEDERAL ESTATE TAX

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } SS.:

SIEGFRIED BLOCK, being duly sworn, deposes and says: I reside at No. 502 Washington Avenue, in the Borough of Brooklyn, City of New York. I am a physician and surgeon duly licensed to practice my profession as such in the State of New

York, and I have been in active general practice in the Borough of Brooklyn, City of New York, since 1905. I am affiliated with the following hospitals:

Greenpoint Hospital;
Holy Family Hospital;
Samaritan Hospital;
Long Island College Hospital.

I was formerly an instructor in the Long Island Medical College.

Myocarditis is an infection of the heart muscle which may be acute or chronic. It may follow any strain or disease or general infection. *It may exist without the patient's knowing its presence.* and it may exist over a period of years and unless the patient is told of the fact as the result of a medical examination, he may not know it exists at all. A sudden strain, excitement, a severe shock, physical or mental, may be enough, in a case, to cause undue dilation of the heart and sudden death. This is especially true in the aged.

I am informed that Samuel Grabfelder was 75 years of age; that he was in apparent good health as far as those who observed him could see; that his personal opinion was that he was in good health and he never wanted to see doctors and resented the medical examination that his wife forced upon him.

That he was accustomed to take a cold shower every single morning of his life and that he took walks as long as two miles every day of his life. Furthermore, I have read all the affidavits which have been submitted in the brief of the attorneys for the estate, and it is my opinion that the de-

ceased did not know that he was suffering from myocarditis, if he was suffering from that disease within the last two years of his death. I am also informed that the last day he took a cold shower was the day before his death, and that he was about to take a cold shower on the morning of his death and was found dead in his bathroom, just prior to stepping under the shower.

A long period of anxiety causing a state of fear of a real or imagined consequence, which he never disclosed, could have been a common producing cause of myocarditis and resultant death, particularly in a man of his age. A sudden death of myocarditis happens most frequently.

I have read the examination of Doctor Roy A. Wolbert, the doctor who signed the death certificate, and which will be submitted on the hearing, and in no place does it appear that Doctor Wolbert informed the deceased that he had the slightest organic or functional disturbances of the heart and hence, the man did not take any special precaution or prevent any mental or physical strains.

In Babcock's "Diseases of the Heart and Arterial System" page 547, under "Diagnosis of Myocarditis" we are told that "it is evident that in the diagnosis of degeneration of the myocardium, but limited information is derived from a study of the heart" (so that, even a physician could not tell from an examination). * * * * "In valvular defects, there are murmurs to serve as guide posts. In hypertrophy or dilation, there is obvious alteration of size. In the affection under consideration, the volume of the organ may, or may not, be changed, and, therefore, great de-

pendence must be placed on age, state of the vessels, history and symptoms."

On page 549 under Prognosis, Babcock says: "The further one gets beyond middle life, the stronger becomes the probability of the cardiac insufficiency, being due to myocardial degeneration and of the obstacle to circulation, proving too much for the weakened heart walls."

It is readily discernible, therefore, that the age of the deceased played an important part in this whole matter. If there was any strain, that, coupled with his old age, could have readily brought about acute myocarditis even without the slightest knowledge of the condition in the mind of the deceased. This is borne out by the studies of Osler, whose opinions are found in "The Principles and Practice of Medicine," particularly on page 791 where he says that "there are cases in which sudden death occurs with or without previous indications of heart trouble." He further states that many patients never complain of cardiac distress and enjoy unusual vigor of mind and body.

To the same effect is Strumpell in his "Text Book of Medicine," Volume 1, page 417, where he says "We must first mention that sometimes quite extensive cicatricial formation may be found in the cardiac muscle post mortem, without the occurrence of any manifest symptoms referable to the heart during life. We see then, that the heart may, under some circumstances, undergo quite a considerable loss in its contractile substances, without injury."

In my opinion, therefore, the deceased may have gone on for many years with myocarditis without the slightest knowledge concerning the malady.

SIEGFRIED BLOCK.

Sworn to before me this
10th day of December, 1923.

SIGMUND H. FUCHS
Notary Public New York County
New York Co. Clk's No. 401 Reg. No. 5378
Kings Co. Clk's No. 56 Reg. No. 5201
Queens Co. Clk's No
Commission expires March 30, 1925.

Court of Errors and Appeals

STATE OF NEW JERSEY.

In the Matter

of

Inheritance Tax upon the Estate of Samuel Grabfelder, Deceased.

REPLY BRIEF FOR PROSECUTOR-APPELLANT.

Succinctly stated, the appellant's main brief asserts error in the determination of the Comptroller and in the affirmances of that determination by the Prerogative Court and by the Supreme Court for the reason that there was no competent evidence in support of the finding that the gift in question was made in contemplation of death, and that such a finding must be reversed, if it is founded (as it was in the instant case), merely on suspicion, presumption or surmise, even though such suspicion, presumption or surmise be engendered by the advanced age of the donor, or like facts, where the record affirmatively discloses that contemplation of death was not the proximate cause for making the gift. We have said that in the instant case the testimony conclusively establishes that the gift

in question was made because the donor desired (a) to please his wife (b) to render her financially independent, and (c) by the same means to reduce his income surtaxes.

We have said also that where the evidence conclusively indicates that a gift is made because of a motive other than contemplation of death, a finding to the effect that it was made in contemplation of death and based solely upon a suspicion to that effect arising from the physical condition of the donor and/or the age of the donor, and/or the fact that at some time the donor had contemplated making a testamentary disposition of the same subject matter to the same donee must be reversed.

It has been demonstrated in our main brief that the determination of the Comptroller, affirmed by the Prerogative Court and by the Supreme Court, was based not only upon mere surmise, and speculation, but was in direct collision with the uncontroverted testimony to the effect that the gift in question was made by Mr. Grabfelder for reasons other than contemplation of death. There is no occasion at this time to review the facts, as set forth in our main brief, or the universal current of the modern cases sustaining the propositions of law there advanced. It is the purpose of this brief, however, to indicate to the court that not only did the Comptroller err in rejecting the uncontroverted testimony to the effect that the gift in question was not made in contemplation of death, and based his determination upon mere speculation, surmise and suspicion, and not only was his line of reasoning indulged in by the members of the Prerogative and Supreme Courts who affirmed his determination, but *that the learned Attorney General at this time in an attempt to sustain the decisions below has resorted to the same vicious line of reasoning.*

We desire to indicate to the court at this time that the proof submitted on behalf of the State indicates on is own face that not only was the testimony to the effect that the gift was motivated by a cause other than contemplation of death, unquestioned, but that the learned Attorney General, in attempting to sustain the decision below, has found it necessary, even before this tribunal, to resort to arguments which, far from being supported by the record, are at variance with every fact disclosed.

Appellant has contended in each of the courts below that the burden of proving taxability was in the first instance to be assumed by the State and that the State failed to meet that burden. It was argued in the Prerogative Court and in the Supreme Court that since the State had failed to meet that burden in the first instance, the determination of the Comptroller should have been reversed. Seemingly, that is a simple proposition, and it should give the learned Attorney General no difficulty. He attempts to meet it, however, by citing cases to the effect that on appeal, the burden of proving error below rests upon the appellant. Without going into the merits of that rule, if it be a rule, it would appear that the argument of the Attorney General is that these two burdens offset each other, and that, therefore, the determination of the Comptroller should not be reversed. The argument will not stand logical analysis. It was error for the Comptroller to have arrived at the determination he had arrived at, in view of the fact that the State failed to meet the burden of proof which it should have assumed in the first instance. Appellant, before the Prerogative Court and the Supreme Court, established the fact that the State had failed in the first instance to assume that burden of proof. It satisfactorily proved that the

determination of the Comptroller was wrong. In other words, proof by the appellant before the Prerogative and Supreme Courts of the State's failure to prove its case before the Comptroller constituted such a showing of error below that should have resulted in a reversal of the Comptroller's determination.

There is no evidence, certainly no substantial evidence, in support of the determination made by the Comptroller.

It is contended by the State on this appeal that the judgment of the Supreme Court "should not be reversed unless against the clear weight of the evidence," and further, "that there is ample evidence in support of the finding of fact of the Comptroller." We desire to analyze that "ample evidence" referred to by the Attorney General, and to indicate to the court that even upon the facts referred to by the State at this time, it is manifest that the judgment below is at variance with all of the evidence contained in the record and is based on surmise and suspicion inconsistent with the uncontroverted testimony.

In the first place, it is intimated by the Attorney General that the court must be lenient in placing a value upon the evidence proffered by the State for the reason that in cases such as this one, the only evidence available is that of interested witnesses. The innuendo is clear that every one of the witnesses who testified in these proceedings was an interested witness, and interested in the sense of being antagonistic to the State. The record destroys that innuendo. Eight witnesses testified in these proceedings. With the exception of his widow, not one of them had an interest direct or indirect in the estate of Samuel Grabfelder. How

it can be claimed that Mrs. Grabfelder had an interest adverse to the estate is a little difficult to conceive, if it is remembered that the testator provided for her by making a gift of $100,000 to her and by establishing a trust fund of $200,000 for her benefit, at the same time directing that all taxes be paid out of his residuary estate in which she does not participate. All of the other witnesses are persons who knew the testator either professionally or socially. Not one of them had any interest in the distribution of his estate. It is difficult to comprehend, therefore, what could have caused the Attorney General even to intimate that the testimony of any of the witnesses in this proceeding must necessarily be subjected to rigid scrutiny for the reason that they had interests adverse to that of the State.

In an attempt to marshall facts in proof of the allegation that there was SOME evidence in support of the determination of the Comptroller, the Attorney General directs his attention first, to "the condition of health of the testator," and approaches this question of fact with the statement that "the testimony of the witnesses is quite confusing as to all of the important features surrounding the donor's physical condition" (p. 14, Appellee's Brief). With great deference, it is respectfully submitted that that statement is unjustified and was injected solely for atmospheric purposes. The record, as fairly reviewed in the appellant's main brief, indicates that until the date of the making of the gift in question, and for at least a year thereafter, the testator enjoyed remarkably good health for a man of his years and that although it had been almost a life-long habit for him regularly to consult a physician twice a year, this was for preventive purposes only.

The Attorney General hangs his assertion that there is some confusion about the testator's physical condition on a statement in an affidavit made by Mrs. Grabfelder to the effect that for a substantial period before and after the making of the gift in question, Mr. Grabfelder had not been attended by a physician. There is no reason to suspect that Mrs. Grabfelder in making that statement did not tell the truth. She may have been as ignorant of the testator's visits to his physician, since they were never occasioned by even a sign of ill health, as she was of his business activities. Certainly, when she stated that the decedent did not visit a physician for some time previous to his death, she stated the truth as it was uncontrovertedly proved on the record. For it was not until February 20, 1920, eighteen months after the making of the gift in question, that the decedent suffered the first symptoms of ill health and consulted a physician about it (Appellee's Brief, p. 16).

Thus, the Attorney General in taking occasion to indicate that Mrs. Grabfelder must have been "mistaken" about the fact that her husband (Appellee's Brief, 15) had been in the custom of making semi-annual visits to physicians throughout his life, has sought to intimate that every one of the other nine witnesses who have testified in these proceedings must, for some reason not shown, have been equally mistaken when they testified to the effect that the testator was in perfectly good health at the time of the making of the gift in question, and that until February 20, 1920—eighteen months thereafter—he led a far more vigorous life than that of most younger men.

On page 16 of the appellee's brief, it is said "that between February 20, 1920, and April 16,

1920, the decedent consulted Dr. Woolbert on seven occasions with respect to his health," and it is, therefore, argued that at the time of the making of the gift in question, he could not have been in a healthy physical condition. Of course, the Attorney General does not defeat his own argument by showing that these visits occurred over a period of eighteen or twenty months *after* the making of the gift in question. The argument he presents is in effect that since the decedent on seven occasions between the period of less than two months to one day prior to his death consulted his physician, he must have, therefore, been in very poor health twenty months before his death at the time he made his gift, and, therefore, since he must have been in poor health at the time the gift was made, he must be presumed to have made the gift in contemplation of death.

On the same page reference is made to a statement of Dr. Riesman that "in February, 1920, the decedent's heart gave definite signs of weakness." That statement has no more relevancy than the statements made on the basis of Dr. Woolbert's testimony. Evidence of the decedent's health in February of 1920, even though it were competent, certainly could not be accepted as proof in any degree of his physical condition in August of 1918. The difficulty with the argument based on Dr. Riesman's statement is that not only is it illogical, but that the statement itself is incompetent. The record indicates that this doctor's statement was not made under oath as required by statute. Moreover, the statement itself indicates that the doctor had no basis for forming an opinion as to the decedent's condition prior to February, 1920, and there is nothing on which to base the conclusion that Dr. Riesman had seen Mr. Grabfelder at or about that time.

On page 17 of the appellee's brief, effort is made to attack the credibility of Dr. Woolbert's testimony to the effect that even in February of 1920, Mr. Grabfelder was not in good health, and on the basis of that attack, it is argued that at that time —eighteen months after the making of the gift— Mr. Grabfelder was probably a sick man. Even if the attack on Dr. Woolbert's credibility were warranted, it would not be a sufficient basis to arrive at a conclusion of fact that in February of 1920 Mr. Grabfelder was sick. And even if such a conclusion of fact were warranted, it cannot be argued from it that in August of 1918 Mr. Grabfelder's physical condition was such as to turn his mind toward thoughts of death. It will be noted, however, that here the Attorney General is dealing not with facts, but with *arguments* of his own creation based on his own *opinion*. It is interesting to note, therefore, the opinion of a cardiologist contained in this record.

Dr. Siegfried Block, a heart specialist practicing in Brooklyn, N. Y., states in his affidavit that he has noticed from a reading of the testimony that at no time had any physician, including Dr. Woolbert and Dr. Riesman, ever intimated to Mr. Grabfelder that he was suffering from any kind of heart condition (R. 114). He proceeds to indicate in the following language that there is no reason to believe that Mr. Grabfelder had at any time thought that he was suffering from a heart condition (R. 115-116):

> "It is readily discernible, therefore, that the age of the deceased played an important part in this whole matter. If there was any strain, that, coupled with his old age, could have readily brought about acute myocarditis even without the slightest knowl-

> edge of the condition in the mind of the deceased. This is borne out by the studies of Osler, whose opinions are found in 'The Principles and Practice of Medicine,' particularly on page 791 where he says that 'there are cases in which sudden death occurs with or without previous indications of heart trouble.' He further states that many patients never complain of cardiac distress and enjoy unusual vigor of mind and body.
>
> * * * * * * *
>
> In my opinion, therefore, the deceased may have gone on for many years with myocarditis without the slightest knowledge concerning the malady."

It is respectfully submitted that if the case is to be determined on the question of the *probability* as to whether or not the doner, eighteen months aften the making of the gift, had an idea that he was suffering from a heart condition, the opinion of a cardiologist on that subject should carry a little more weight than that of the Attorney General.

On page 18 of its brief, the State, in an attempt to produce SOME testimony in support of the determination below, cites the alleged statements of Judge Stern and Dr. Riesman to the general effect that at some time during his lifetime they believed that Mr. Grabfelder was suffering from a heart condition. It should be noted in the first place that both of these statements are incompetent for the reason that neither of them were taken under oath. Aside from this technical objection, however, it is apparent that they could have no value in determining the state of mind of the donor at the time of the making of the gift, for they show by their very language that Mr. Grabfelder was en-

joying excellent health in 1918, the time that he made the gift.

Reference is also made (pp. 18 and 19 of Appellee's Brief) to an alleged statement of one Louis E. Stern to the effect that Mr. Grabfelder had at some time told the declarant that he would have to give up playing cards for the reason that "that was too great a strain on his heart." It will be noted with respect to this alleged statement that it is of no evidentiary value for the reasons that it was not taken under oath, and that Mr. Stern was never produced for the purpose of submitting for cross-examination. *Moreover, no time is set as to when this alleged incident occurred.* It might well have been, for all the record indicates, that if Mr. Grabfelder did make such a statement, he made it within the last two months of his life. The alleged incident would have relevancy in this proceeding if it could be shown that it occurred contemporaneously with or prior to the making of the gift in question. But nothing is shown by the Attorney General which would warrant the court in making that presumption.

Reference is made also to an alleged statement of Mr. Vollmer that Dr. Riesman had told the testator "that he would have no excitement." It must be noted in connection with this statement that it was not made under oath as required by statute and, therefore, it did not have any evidentiary value. Moreover, there is nothing indicated in the record which would show *when* such a statement was made by Dr. Riesman, if ever such a statement was made.

This concludes all the statements which, according to the Attorney General, constitute SOME EVIDENCE upon which the Comptroller might reasonably have found that at the time of the mak-

ing of the gift the decedent knew that he had a heart condition, and from which it can be, therefore, assumed that the gift was made in contemplation of death. They are, according to the Attorney General, a sufficient basis also for the opinion of the Vice-Ordinary to the effect "that there is also evidence in the record to show that he had a heart disease and that he knew it before he made the gift."

With great deference, it must be stated that there is no such evidence, as this summary of the statements relied on by the Attorney General indicates. The testimony of every one of the witnesses, reviewed in our main brief, is clear and uncontradicted to the effect that throughout 1918 and 1919, and down to the middle of February, 1920, the testator was a perfectly healthy man, engaged in the supervision of his many business interests and in the contribution of his time, energy and monies to a variety of philanthropic organizations. There is not a line of testimony upon which it can even be surmised that at any time in 1918 he had any thought of impending death in the sense that such a thought might have been warranted by his physical condition. The record is clear that it was not until February of 1920 that even his physicians believed that he was beginning to show the first symptoms of a heart condition. Not one of the statements referred to by the Attorney General in his brief indicates anything to the contrary. It is obvious, therefore, that the ARGUMENT of the Attorney General is based on surmise which in itself is annihilated by the record. Since the determination of the Comptroller, therefore, was based upon a presumption inconsistent with the admitted facts, the determination was erroneous. Moreover, that argument upon which the Comptroller's determination was based

is not only inconsistent with the facts, but is inconsistent with competent medical opinion.

The remainder of appellee's brief is devoted to arguments equally unsupported by the facts and in reality antagonistic to the evidence adduced before the Comptroller.

It is said in effect (p. 22 *et seq.,* Appellee's Brief) that since on June 4, 1918, the testator had executed a will devising the same property to the donee and the fact that on August 22, 1918—two months thereafter—he made a gift *inter vivos* of the same property to her, the gift was made because of impending death. But the record destroys that argument, for it shows that on August 22, 1918, Mr. Grabfelder enjoyed the same degree of good health that he had at the time of the execution of the will—two months earlier—and that his real motive for making the gift was not because of his fear that he was about to die, but rather that he wanted to please his wife by making her financially independent, and at the same time effect a reduction of his income surtaxes. And the adjudicated cases reviewed in our main brief show that in every other jurisdiction where the question has arisen, the courts have held that the mere fact that the donor had at some time contemplated making a testamentary disposition to the same person of the property involved in an *inter vivos* gift is an insufficient basis for assuming that the gift was made in contemplation of death, where, as a matter of fact, the record shows a different and valid motive therefor.

On this point, appellee cites *In re Bottomley* as authority for his contention. It must be remembered that that case, upon which he rests so heavily, was governed by the presumption incorporated in the 1924 amendment, and that that presumption has no application to this case.

At page 24 of the appellee's brief it is indicated that this gift represented a "substantial portion of the testator's estate," and it is argued inferentially that, therefore, the gift must have been made in contemplation of death. A short answer to that contention is that although the size of the gift is important in construing a case arising under the 1924 amendment, it is of no importance in this action.

Appellee contends (p. 25 *et seq.*, Appellee's Brief) that there is some confusion as to the real motive for the making of this gift, and seeks to substantiate that statement by an attack upon the credibility of one of the witnesses examined before the Comptroller. Suffice it to say at this point that the record shows that there is no such confusion and that the Attorney General's statement to the contrary is unwarranted. All of the evidence is clear and indicative of the fact that the motives entertained by the decedent in making this gift was, as was said so many times, his desire to please his wife by making her financially independent, and at the same time effect a reduction of his own income surtaxes. An attempt is made to question the credibility of the witness Kern. That effort falls flat. Mr. Kern was not an interested witness. He had no part in the distribution of the estate, and the learned Attorney General has failed to show any reason why his testimony should not be believed.

A fair example of the type of argument offered by the Attorney General may be found at page 26 of the brief submitted on behalf of the State in this court. It is there stated:

> "It seems reasonable to conclude that if Mr. Grabfelder went to his lawyer on Au-

> gust 22, 1918, and discussed with him the possibilities of reducing his inheritance taxes he must have been contemplating his death within the reasonably near future, since the former is a consequence of the latter."

The argument thus advanced in effect comes to this: It is a fact that Mr. Grabfelder saw his lawyer on August 22, 1918. If that is the fact, then it is not unreasonable to assume that on that occasion, Mr. Grabfelder discussed with his lawyer the possibility of reducing inheritance taxes. Of course, that conclusion is unwarranted for the reason that the decedent's attorney testified that Mr. Grabfelder did not discuss the question of inheritance taxes with him on that occasion or on any other occasion. But the Attorney General having made that assumption is encouraged to make another. He states that if on that occasion Mr. Grabfelder discussed the question of reduction of inheritance taxes, then it must be fair to assume that he was at that time not only considering impending death, but that he made the gift in question in the belief that he would very shortly die. These mental processes exhibited by the Attorney General are worthy of analysis at this point because they are typical of the manner in which the Comptroller arrived at his determination and the manner in which the Prerogative Court and the Supreme Court decided to affirm the determination below. There is nothing in the record to indicate any basis for believing that on August 22, 1918, Mr. Grabfelder discussed inheritance taxes with his lawyer or that at that time he contemplated death, or that because he was contemplating death and believed in his near demise, that he made the gift in question.

As a matter of fact, the record affirmatively shows that on August 22, 1918, Mr. Grabfelder did not discuss any such topic with his lawyer; that he was not worried about his physical condition; and that the true motives for the making of this gift were far different than that of contemplation of death, but were on the contrary, contemplation of continued life.

The quoted argument of the Attorney General, serves as a further indication that the judgment appealed from was arrived at by indulging in a series of presumptions which were inconsistent with the proven facts.

It is respectfully submitted that the appellants, to quote the language of the Attorney General, fairly established that the record is without facts in support of the several findings of the judgment of the Supreme Court affirming the decree below, and that therefore, the judgments of the Prerogative Court and of the Supreme Court affirming the determination of the Comptroller should and must be reversed.

Respectfully submitted,

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Court of Errors and Appeals

STATE OF NEW JERSEY.

IN THE MATTER OF THE Inheritance Tax upon the Estate of SAMUEL GRABFELDER, deceased.	On Certiorari on Appeal from Supreme Court.

BRIEF FOR PROSECUTOR-APPELLANTS.

Statement of the Case.

Appeal from a judgment of the Supreme Court, entered January 22, 1930, affirming in all respects the decree of the Prerogative Court, filed February 11, 1929, confirming the determination of the Comptroller of the Treasury, to the effect that a transfer of property by Samuel Grabfelder, the deceased, on August 22, 1918, of the estimated fair market value of $280,382.57, was made by the said decedent in contemplation of death and, therefore, taxable pursuant to the provisions of Chapter 228, Laws of 1909, Section 1, subdivision 3, as amended by Chapter 151, Laws of 1914.

The problem raised by this appeal is whether or not the transfer in question, concededly a gift *inter vivos,* made by the testator to his wife, constituted a gift made in contemplation of death within the meaning of the cited statutes, and was, therefore, taxable.

Grounds of Appeal.

The prosecutor-appellant contends upon this appeal:

(1) That the Supreme Court erred in determining that the gift by the decedent to his wife was made in contemplation of death, or that there was any legal evidence to support such a finding;

(2) That the Supreme Court erred in failing to set aside the decree of the Prerogative Court, and in failing to vacate and set aside the assessment of the comptroller; and

(3) That the Prerogative Court erred as a matter of law in holding that the burden of proof was upon the prosecutor.

Statement of Facts.

The deceased herein was born in Germany (p. 93). At an early point in his boyhood, he immigrated to this country and settled in Louisville, Ky. (p. 93). This record indicates that he entered into the business of the manufacture and distribution of liquors, and it is apparent that he prospered (p. 43). He married and had children, but they died in infancy. He transacted his business through a corporation bearing his own name and known as S. Grabfelder & Co., Inc. (p. 33).

Beginning in 1900, it was his practice to spend the summer with his wife and some of her relatives in Atlantic City (p. 50). In 1904, at the age of fifty-nine, and when he had accumulated a considerable fortune, he left Louisville with the intention of establishing his domicile elsewhere (p. 41).

The exact motive for this change is not conclusively established by this record, nor is it important in a consideration of the merits of the problems raised by this appeal. His old friend, Judge Stern, testified at the hearings had before the Comptroller "that he wanted to get into a larger field of social activities" (p. 23). On the other hand, his wife and the latter's niece, who had lived with the Grabfelders since her own infancy, testified that the change was made because of Mrs. Grabfelder's desire to live in New York (p. 15). Mr. Grabfelder himself preferred Philadelphia, and immediately after their departure from Louisville, they resided in that city. From there they moved to Atlantic City, then to New York, and then back to Atlantic City, where, from about 1905 to the time of his death, Mr. Grabfelder continued to reside either in a rented house or at the Hotel Breakers uninterruptedly except for an annual trip in January of each year for the purpose of attending the corporate meeting of S. Grabfelder & Co., Inc. (pp. 44, 50). IT IS NOT DISPUTED BY ANYONE THAT MR. GRABFELDER DID NOT CHOOSE ATLANTIC CITY AS HIS HOME BECAUSE HIS HEALTH REQUIRED IT (p. 44). He left Louisville partly because of the promptings of his wife, partly because he felt that he had reached a stage where it was no longer necessary for him to devote himself whole-heartedly to the management of his business, and partly because he knew that if he remained in Louisville, he would not be able "to rid himself of those details" (p. 43). The only motive for his choice of Atlantic City as his permanent home thereafter was because he had met a number of people there whose company he had enjoyed and whom he wanted to be near (p. 44).

His departure from Louisville did not result in his actual retirement from business. Some time in

1904 he had sold 30 per cent. of the stock of S. Grabfelder & Co., Inc., to one Joseph Kern and the latter's brother, giving them the option to purchase an additional 10 per cent. of that company's stock at a later period (p. 33). After he had definitely established his home in Atlantic City, he rented a three-room suite of offices in a building about two miles distant from his residence. He employed a stenographer and a secretary, who was also a public accountant (p. 55). Thereafter and until the day immediately preceding his death, it was his invariable habit to devote the entire morning to a review of the progress of his business in Louisville, and of such other corporate enterprises in which he was a stockholder (pp. 60-61). Until 1919, when prohibition had resulted in the forced liquidation of S. Grabfelder & Co., Inc., he continued to be the dominant stockholder and the president of that corporation (pp. 44-45). His participation in the affairs of that company is tersely described in the cross-examination of his younger associate, Mr. Kern (p. 41):

> "Q. In 1905 Mr. Grabfelder changed his residence from Louisville to Atlantic City, and that was coincident with his practical retirement from the active management of S. Grabfelder & Company? A. Well, he was about as active a person to be away from business as we ever saw, because we furnished him with weekly statements, and he kept track of all the affairs of the business. He was virtually the same as if he was in Louisville, and the correspondence was very voluminous at all times, and he really directed it as much as those who were there at Louisville."

He was equally interested in the subsidiaries of S. Grabfelder & Co., Inc., Murphy, Barber & Company and The Claremont Company (pp. 44-45).

It is important to note that one of those subsidiaries, The Gynnbrook Plant, was not launched until after he had established his residence in Atlantic City and that he took "a very active interest" in its business. He seems to have been equally vigilant in following the progress of a Denver hotel in which he was a stockholder. His bent for philanthropy was expressed not only in gifts, but in the devotion of a considerable part of his working day toward the affairs of the Jewish Hospital for Consumptives in Denver, Colorado (pp. 44-45). From Atlantic City he supervised and directed the policies and finances of that institution (pp. 60-61).

Essentially, the problem as to whether or not the gift made by Mr. Grabfelder to his wife in 1918 was made in contemplation of death depends for its answer upon Mr. Grabfelder's mental processes at that time. It may not be amiss, therefore, to review the description of his personality and his physical appearance as reflected in this record.

Mr. Grabfelder was a calm and even-tempered man (pp. 63, 42). Evidently, he had no business problems which gave him concern from the time that he came to Atlantic City until the day of his death. He was never known to be morose, but, on the contrary, he was a contented and a gregarious individual (p. 79). For many years prior to his death, he was concerned with the state of his wife's health. Mrs. Grabfelder evidently was never a robust woman, and it was her own belief that she would predecease her husband (p. 53).

Physically, Mr. Grabfelder looked as well as any man of his years. He was 6 feet tall, weighed about 180 pounds, and had a healthy complexion (p. 42). It had been his habit for many years

prior to his death, and in fact, as long as his niece, who was thirty-seven years of age when she testified, "could remember," to make semi-annual visits to his physician (p. 64). These, however, had a purely preventive purpose (p. 38). Until 1920 he had no subjective or objective symptoms of disease whatsoever. At no time prior to his death did he ever take any medicine, and at no time had he been required to take to his bed (p. 51). A younger man might well have envied the vigor of his daily routine. He rose at seven, invariably, took a cold shower, preceded his breakfast with a long walk, and then, except in stormy or inclement weather, walked a distance of two miles to his office where he remained in company with his private secretary until about noon. He devoted the rest of the day to his friends in whose company he walked or played cards (pp. 51, 39, 47-50).

The gift which he made to his wife on August 22, 1918, had received his consideration for many years prior to that time (p. 21). As early as 1914, he had informed his attorney and friend,, Mr. (later Judge) Stern, that he intended to transfer a substantial part of his fortune to his wife. But, although he mentioned that intention on a number of occasions during the next ensuing years to Judge Stern, he never actually carried it out until the day we have mentioned. The reason for that delay is set forth in the testimony of Judge Stern himself. After testifying to Mr. Grabfelder's earlier intimations of his desire to make such a gift, Judge Stern said that the matter was never actually completed at that time for the reason that "being in personal relations, we were not as sharp and efficient in our professional connections with him as we otherwise would have been, and we just let the matter drift" (p. 21). Some months prior to the

actual transfer, however, Mr. Kern, Mr. Grabfelder's associate, and purchaser of a minority interest in the stock of S. Grabfelder & Co., Inc., directed Mr. Grabfelder's attention to the fact that one legitimate method of reducing income surtaxes was for a man to make an outright gift of part of his income producing property to his wife. Mr. Kern told Mr. Grabfelder that his information on this point had been confirmed by a gentleman of authority in the Internal Revenue Office in Louisville, and by an item which he had read in the Wall Street Journal (p. 36).

Thereafter, Mr. Grabfelder instructed his secretary, Mr. Vollmer, to aid him in composing a list of the appropriate securities in the aggregate of approximately $300,000 from those already owned by Mr. Grabfelder, which the latter intended to give to his wife. His sole purpose in making that gift, as communicated to his secretary, was that he wanted to reduce the amount of his income surtaxes (p. 60). After the selection of these securities, Mr. Grabfelder went to Philadelphia to see his attorneys in order to complete what he considered might be the legal formalities necessary in order to make the gift valid. At that time, Judge Stern was absent from Philadelphia, being actively engaged in the government's service at Washington. Mr. Grabfelder, therefore, consulted Mr. Stern's partner, Mr. Morris Wolf. When asked as to what transpired on that occasion, Mr. Wolf testified as follows (pp. 28-29):

> "A. I do. Mr. Grabfelder came to me and told me that as he had intended to give a certain amount of property to his wife in his will, he had concluded that it would be better to give that to her during his life, because by so doing he would be able to reduce his own taxes, and at the same time

carry out the intention that he always had had that she should receive a certain amount of his property. He had with him a list of the securities that he wanted to give to his wife, and I told him that there was no objection that I could think of to his making the gift, and that the effect of it would be to reduce the income taxes that he would have to pay, but that in order for the intention which he had to be carried out, it was necessary that he really give her the securities. I told him that merely pretending to give them, or seeming to give them, would accomplish nothing, but he had actually to give them to her and withdraw any expectation he might have that he would benefit by those securities afterwards.

Q. Did he say anything in reference to that? A. He said he understood that. I told him by that I meant that the income from these securities would have to be Mrs. Grabfelder's own money, and would have to go into her bank, and be used as she wanted to, and I think I told him it would be prudent to engage a separate box for her, and I am inclined to think he said that she did have a box and that these securities should be placed in that box.

Q. Was there anything said about inheritance taxes at that time? A. I couldn't say specifically. I don't remember. We were considering whether the making of this gift would reduce the taxes.

Q. You mean the income taxes? A. *Income taxes was in my mind at the time. If anything was said about inheritance taxes, I have no recollection of it.*

Q. But you are certain what was in your mind and what you supposed was in his mind was income taxes which would be reduced by that action? A. Yes.

Q. You also, at the same time, prepared a letter, didn't you—at the same time you prepared the codicil? A. I prepared the

codicil at the same time I prepared the letter. I prepared a letter giving Mrs. Grabfelder these securities, and then prepared the codicil reducing the amount she was to receive under the will by the sum equal to the value of the bonds which Mr. Grabfelder was giving to her at that time."

The letter prepared by Mr. Wolf on that occasion follows:

"August 22, 1918.

Mrs. Samuel Grabfelder:

My dear Wife:

Carrying out an intention of long standing, I have decided to make you an outright gift of the following bonds, my purpose being to render you financially independent of me during your life:

John D. Alkire Investment Co...	4 at	500
	49 "	1000
American Smelting & Refining..	11 "	"
Atlantic Water & Elec. Power..	9 "	"
Baltimore & Ohio R. R.....	10 "	"
Bangor and Aroostock R. R.....	10 "	"
Central Illinois Light Co.....	5 "	"
Chicago, Rock Island & Pac.....	5 "	"
Columbus Gas Co.....	5 "	"
Commonwealth Power Co.....	5 "	"
Consolidated Cities L. P. & T....	10 "	"
Denver Gas & Electric Co.....	15 "	"
Empire Refining Co.....	10 "	"
Galveston Terminal R. R.....	6 "	"
Indiana, Columbus and Eastern.	10 "	"
Indianapolis Gas Co.....	10 "	"
Lehigh Valley R. R. Co.....	10 "	"
Midland Valley R. R.....	20 "	"
Missouri Metals Corp.....	10 "	"
C. R. Myers Hotel Co.....	25 "	"
Paducah Water Supply.....	28 "	"
Palmer Hotel Co.....	10 "	"

Parr Shoals Power Co.....	10	"	"
Philadelphia & Balto. Cen.....	10	"	"
Philadelphia Electric.....	9	"	"
	10	"	100
Pittsburgh Cin. Ohio & St. L....	10	"	1000
Seaboard Air Line Ry.....	12	"	"

In accordance with your wish, I have rented a box for you at the Fidelity Trust Company of Philadelphia, in which these securities are deposited for you.

Affectionately yours,

S. G."

(pp. 96-97).

Two months and twenty-two days prior to the making of this gift, Mr. Grabfelder had executed a will by the terms of which he had left $100,000 in cash outright to his wife, and the sum of $500,000 together with the proceeds of his life insurance policies in trust for her benefit during her life, giving her the power of appointment upon her death (pp. 103, 106). On the date of the transfer of the securities above referred to, he executed a codicil to that will wherein he recited that he was about to make the gift in question of securities of the value of $300,000 at that time, and that he amended that provision in his will relating to the trust fund for his wife by "changing the figure Five Hundred Thousand Dollars ($500,000.) therein to Two Hundred Thousand Dollars ($200,000.)" (p. 112).

After his interview with Mr. Wolf, Mr. Grabfelder returned to his home in Atlantic City, and on meeting his wife, the following conversation ensued (p. 11):

"Q. When did you first hear about this gift of $300,000? A. Mr. Grabfelder came

> home from his office. I was sitting on the front porch. We lived in Atlantic City. He said, 'Well, Colonel, I made you absolutely independent.' I didn't understand what he meant and said, 'What do you mean, dear?' 'Well, I made you a present to-day of such and such a sum of money. Now you are your own boss to do with it as you please.' "

In addition, Mr. Grabfelder told his wife on that occasion that thereafter she would be in a position, and he would expect her, to pay for all her personal expenses out of her own monies (p. 12). It appears that Mrs. Grabfelder had a number of relatives who were not very well off and that it was her habit to render certain financial assistance to them. In addition, she was apparently interested in a number of charities. Mr. Grabfelder accordingly told his wife that thereafter he would not contribute any of his monies for these purposes; that since she was independent, she was to pay the salary of her own chauffeur and the upkeep of her automobiles, and such other incidental personal expenses as she might incur (p. 12). He informed her that his secretary, Mr. Vollmer, would deposit the income of her bonds in a checking account in her own name (p. 14). It is undisputed that the intentions of the parties in this respect were actually carried out. Mr. Grabfelder's conversation with his secretary on this subject is incorporated in the following testimony (pp. 56-57):

> "Q. Do you remember any conversation had with Mr. Grabfelder in 1918 concerning any gift to his wife? A. Well, he said he was going to pick out a certain number of securities and give them to her outright.
>
> Q. Was there any other conversation? A. Well, that he wanted to make her so that she would not bother him with her personal

charities, automobile bills, etc. She had a lot of personal charities, relatives of hers who were not so well off.

Q. Did you make any entry in your books of account in reference to that gift? A. Yes.

Q. Have you the ledger with you? A. Yes.

(There is produced a private ledger.)

Q. And that ledger was always kept in the office in the safe? A. Yes.

Q. And after his death, what happened to the ledger? Did you always have it? A. Yes, until I brought it to your office.

Q. You put that ledger in a case and you opened that case last night at my office? A. Yes.

Q. And it was in the same condition it was when you handed it to me? A. Yes.

Q. Turn to that page in that ledger and show anything which would indicate items of stocks and bonds appertaining to this gift. A. I kept an S. Grabfelder account and every month I would determine what his loss or gain was and the difference was deducted from or added to his capital amount.

Q. What was it a month before August, 1918? A. He had a net credit of $1,804,000 on August 22. I took out of his account and transferred to Mrs. Grabfelder's account $319,038.10. The expenses of that month above his income was $33,091.80. He reduced his capital account to $1,481,681.81.

Q. You also kept books for Mrs. Grabfelder? A. At the time the $319,000 was given to her we went through the ledger, he picked out the items that made up this $319,000."

Because Mrs. Grabfelder had a broken arm and, therefore, could not write very well, she did not herself draw each check charged against her ac-

count (pp. 13, 14). This was actually attended to by Mr. Vollmer, Mr. Grabfelder's secretary. She did, however, sign every such check (p. 13).

Nor is there any question about the fact that the intent to make the gift articulated in the letter of August 22, 1918, was carried out as therein indicated. Shortly after this date, Mr. Grabfelder, accompanied by his secretary, journeyed to Philadelphia, rented a safe deposit box in the name of Mrs. Grabfelder, and deposited therein all the securities set forth in the letter of August 22, 1918, with the exception of certain bonds known as the Alkire securities which were too bulky and were, therefore, retained in Samuel Grabfelder's box (p. 58). No question is raised in this record about the honesty of this transaction. The Comptroller does not contend that a *bona fide* gift *inter vivos* was not contemplated by Mr. Grabfelder and was not effected, nor would such a contention find a scintilla of support in this record. It is undisputed that after the gift had been made and the bonds physically transferred to the box rented for Mrs. Grabfelder and the rent for which was paid out of her income, the dividends on these securities were deposited in her banking account in Atlantic City, and as these accumulated new securities were purchased, which were, at intervals, transferred to the safe deposit company in Philadelphia (pp. 66, 67). Mr. Vollmer, acting upon instructions, submitted separate income tax reports on the estates of Mr. Grabfelder and Mrs. Grabfelder as a result of this transaction (p. 60).

Shortly thereafter, in a conversation with his brother-in-law, Mr. Grabfelder informed the latter that he had made a substantial gift to his wife (p. 69).

It is apparent, therefore, that Mr. Grabfelder had a dual motive in making this gift to his wife. He wanted to reduce the surtax on his income (pp. 34, 28, 29). By making the gift, he succeeded in doing that. He also wanted to please his wife by creating a separate estate for her. Whether or not there was any real necessity for effecting this latter purpose is immaterial.

Reference has been made herein to Mr. Grabfelder's state of health in the years following his removal to Atlantic City. It should be noted at this point that all the testimony is in accord in establishing that at the time he made the gift in question (*more than a year and seven months prior to his death*), he was still enjoying good health. There is an intimation in the testimony of Judge Stern, which has been made much of by the State on the arguments before the Supreme Court and before the Prerogative Court, that at this time Mr. Grabfelder *may* have had an idea that he was suffering from a heart condition (p. 24). It should be noted, however, that Judge Stern himself testified that he could not be certain whether this was before or after the gift had been made (p. 25). If it be conceded that this testimony given by Judge Stern constitutes a scintilla of evidence in support of the Comptroller's contention, it is, nevertheless, annihilated by all the positive testimony contained in the record affirmatively establishing the fact that at this time the donor enjoyed good health and was not concerned with his physical condition. The daily routine which we have referred to above was continued by him until the day of his death. At the time that he was discussing the making of this gift, which was a few months before the actual transfer, his vigor was such that he outwalked his younger companions

(p. 39). In November, following the making of the gift, he actively participated in aiding the drive for funds for the Jewish War Relief, and made a public address on its behalf in Atlantic City (pp. 72, 73). His activities in connection with his various business interests have not abated. He participated in the liquidation of S. Grabfelder & Co., Inc., and of its subsidiaries (p. 40). In January of 1919 he left Atlantic City to attend the annual corporate meeting of S. Grabfelder & Co., Inc. (p. 37). Later in that year he informed his brother-in-law that he intended to take a trip to Europe with his wife and visit Germany (p. 70). He explained that up to that time, because of the condition of his wife's mother, he had been unable to persuade his wife to accompany him on that trip, and that he did not want to go without her. In 1919, however, his mother-in-law had died and he felt that his wife was, therefore, free to accompany him (pp. 70, 71).

In January, 1920, he again journeyed to Louisville and spent ten days there devoting himself to certain other business interests (p. 42). Seven months before his death he celebrated his seventy-fifth birthday in a manner which did not indicate any thought of impending death (p. 91). In or about February of 1920, however, he was advised by his physician that it was unwise for him to continue his daily habit of taking a cold shower (p. 90). But if his physician was worrying about his condition at that time, certainly he himself was not. He informed his medical adviser that he would not at that time break a lifelong habit (p. 90).

In or about February, 1920, he developed the first subjective and objective symptoms of myo-

carditis (p. 94). There is no definite testimony in the record, however, that even at this time he knew the nature of the illness from which he was suffering, and it is the opinion of an expert cardiologist that even though he had been suffering from this disease, he himself may have known nothing about it (p. 112). That opinion is confirmed by his own conduct. He was examined by his physician on four different occasions between February, 1920, and April 17, 1920, the date of his death (p. 8). He submitted to these examinations under protest and only upon the insistence of his wife, who felt that long walks were bad for him (pp. 7, 17). On this subject, his physician, Dr. Woolbert, testified as follows (p. 8):

> "When I made my first examination, he said he didn't see any need for it at all. I didn't find any more heart trouble than I would expect in a man of his age, nor did I tell him he had heart trouble, and I reported to him that he was in very good condition for a man of his years, but that he ought to keep in touch with me out of a matter of precaution. He didn't come to see me until March 10th when he came at my request. I think I said to him, 'Why don't you come over and let me look you over?' I found no change in him. He came again on the 20th and 24th, and on April 1st at my request. The reason I persuaded him to come was that he was a man of means and he could afford to pay me for services, and I would advise any man at that age to submit to constant medical supervision. Mr. Grabfelder's attitude was one of indifference, and I should assume from his attitude that his demise was farther from his thoughts than his age from a medical standpoint would probably warrant."

He was examined again by his physician on April 16, 1920, the day preceding his death (p. 8). His condition on that occasion, as testified to by his physician, may be found in the following excerpt (p. 8):

> "He came again on the 9th and on the 16th and I found no change in him. The last time he was to my office, which was on the 16th, I had him stand on one foot and then on the other and pick up pins. I had him make these physical efforts so that I might detect any heart trouble. At that time I told him that so far as his heart was concerned he was in good condition. I had told him previously that cold baths were not good for him; that they were not good for any man of his age, but he said he had been taking them all his life and he did not propose to stop now. His blood pressure was normal for a man of his age. He weighed about 180 pounds, and appeared to be well preserved."

The next morning, he rose at his regular hour, drew the shades in the bedroom occupied by himself and his wife so as to permit his wife to continue sleeping, and entered his bathroom for the purpose of taking a cold shower (p. 10). His valet appeared a few minutes later than usual. He found Mr. Grabfelder dead (p. 10).

This summary constitutes a review of all the competent testimony taken before the Comptroller. There is, in addition, an abundance of testimony of a number of Mr. Grabfelder's casual acquaintances, including lawyers and other professional men, to the effect that they had believed that he was perfectly healthy and that each of them was surprised upon learning of his sudden death (pp. 75, 79, 81, 85, 91). There is in addition the opinion testimony of a number of respectable and disin-

terested witnesses who were intimately acquainted with the deceased's affairs to the effect that it was their opinion that the gift here in question was not made in contemplation of death; that Mr. Grabfelder never had any thought of impending death; that there was never any occasion for Mr. Grabfelder to deceive them as to his purpose in making the gift; and that they believed that when he stated at the time he made the gift that his double purpose was to make his wife independent and at the same time reduce his income surtaxes that he was telling the truth. There is the testimony of Judge Stern to the effect that from a personal, social and professional angle his relationship with the decedent was an ideal one, based, as it was, on mutual respect and long standing friendship, and Judge Stern's belief that if the decedent had made the gift in contemplation of death, or with any such thought, he would have advised his lawyer friend of that fact (pp. 23, 26).

One further reference to the record completes this statement of facts. As we shall indicate below, the statute provides for an investigation in a proper case, by the Comptroller on his motion, or upon the application of any interested party, of the facts in connection with any gift or other transfer alleged to have been made in contemplation of death. The statute further provides that the Comptroller or his duly authorized appraiser may take testimony *under oath* as to those facts. Included in this record are excerpts of statements made by certain individuals interviewed by the Comptroller's special agent which are purely hearsay. They were not adduced on an examination under oath; nor were they submitted in affidavit form. Included among such statements is that of one Louis E. Stern, who at one time during the life of the de-

cedent acted as his attorney. Mr. Stern, according to the report of the special investigators, explained that he had known Mr. Grabfelder because at one time the decedent had invested some of his funds in mortgages, and in the making of these investments the declarant represented the decedent. The alleged statement proceeds to the effect that at a subsequent period the decedent discontinued this form of investment and thereafter "I didn't have anything to do" (p. 92). The alleged statement concludes with this sentence: "The gift was probably in contemplation of death. I believe that's what he had in mind. Your suspicions are probably well founded, but you'll have a hard time to establish it."

This alleged statement merits particular attention because it is the only intimation in this record that the gift by Mr. Grabfelder to his wife was in the nature of a testamentary disposition. That that statement has no evidentiary value is a proposition which will not merit extended consideration. But that it had its effect in the determination of this issue not only by the Comptroller, but also by the Vice-Ordinary, is apparent. If, as the appellant contends, that statement has no evidentiary value, then the determination of the Comptroller is based upon the pyramiding of presumptions, and the affirmances of the determination in the Prerogative Court and in the Supreme Court are based upon the further presumption that the Comptroller was probably right in the first instance.

Thus, we are presented with a case in which the Comptroller, finding a gift of a substantial sum of money by a man of advanced age to his wife, has presumed that because the man was old, his mind was directed toward thoughts of death; and having presumed this, the Comptroller proceeds to presume

that because the man's mind was probably turned toward thoughts of death, he made a gift to his wife in order to defeat the imposition of a tax on his estate. The Vice-Ordinary in affirming the determination of the Comptroller has not only accompanied the Comptroller in the making of these presumptions, but has indulged in the further presumption that in all probability the Comptroller was correct in his determination, and, therefore, the Vice-Ordinary would not interfere with it. The opinion of the Supreme Court in affirming the decree of the Prerogative Court establishes the fact that the judicial process followed the same course in that tribunal.

POINT I.

Since the decedent died prior to 1922, there is no presumption that the gift to Mrs. Grabfelder was made in contemplation of death.

The decedent died on April 17, 1920. At that time, Chapter 228 of the Laws of 1909, as amended by Chapter 151 of the Laws of 1914, provided:

> "A tax shall be and is hereby imposed upon the transfer of any property, real or personal * * * in the following cases:
>
> * * * * * * *
>
> Third: When the transfer is of personal property made by a resident or is of real property within this State or of goods, wares and merchandise within this State, or of shares of stock of corporations of this State or of national banking associations located in 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."

By Chapter 174 of the Laws of 1922, Chapter 151 of the Public Laws of 1914 was amended so as to add to the provision above cited the following:

> "Every transfer by deed, grant, bargain, sale or gift made within two years prior to the death of the grantor, vendor or donor, of a material part of his estate, or in the nature of a final disposition or distribution thereof, and without an adequate valuable consideration, shall, in the absence of proof to the contrary, be deemed to have been made in contemplation of death within the meaning of this section."

It cannot be argued that there is a presumption here that the gift made by Mr. Grabfelder was made in contemplation of death. Such an argument would involve an acceptance of the contention that the amendment of 1922 is retroactive. But inheritance tax statutes, like all others, are generally construed as prospective unless expressly declared to be retroactive in their operation.

In *Schwab* v. *Doyle* (258 U. S. 529, 42 Supreme Court Reporter 391), the Supreme Court in holding that the Internal Revenue Law, Section 202 (39 Statutes 777-780), could not be deemed retroactive for the reason, among others, that it contained no declaration of retroactivity, "clear, strong and imperative," said:

> "The initial admonition is that laws are not to be considered as applying to cases which arose before their passage unless that intention be clearly declared. 1 Kent 455;

> Eidman v. Martinez, 184 U. S. 578, 22 Sup. Ct. 515, 46 L. Ed. 697; White v. United States, 191 U. S. 545, 24 Sup. Ct. 171, 48 L. Ed. 295; Gould v. Gould, 245 U. S. 151, 38 Sup. Ct. 53, 62 L. Ed. 211; Story, Const. S. 1398. The comment of Story is:
>
> 'Retroactive laws are, indeed, generally unjust, and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact.'
>
> There is absolute prohibition against them when their purpose is punitive; they then being denominated ex post facto laws. It is the sense of the situation that that which impels prohibition in such case exacts clearness of declaration when burdens are imposed upon completed and remote transactions, or consequences given to them of which there could have been no foresight or contemplation when they were designed and consummated."

Similarly, the Supreme Court has applied this principle by holding that insurance policies taken out prior to the statute fixing the excess of such policies over $40,000 were not subject to the tax.

> *Frick et al.* v. *Lewellyn,* 298 Fed. 803, aff'd 69 L. Ed. 585.

So in *Oliver's Estate,* 273 Pa. 400, 117 Atl. 81, the court held that the Pennsylvania statute taxing gifts in contemplation of death is not retroactive.

The courts of three other states have dealt with the problem in the same way.

> *Brown* v. *Pennsylvania Ins. Co.* (Del.), 126 Atl. 715;
>
> *Woestman* (Mo.), 253 S. W. 773; and
>
> *Belser* v. *Tax Commission* (S. C.), 112 S. E. 261.

For a review of other pertinent authorities on this question, the court is respectfully referred to Gleason & Otis, "Inheritance Taxation," 4th Edition—1925, pages 304-305.

In the first instance, therefore, the question before the Comptroller was whether or not the gift made by the decedent was made by him in contemplation of death, and in the solution of that problem, the Comptroller was not authorized to indulge in any presumption in favor of the State's contention.

POINT II.

A transfer is made in contemplation of death only when contemplation of death is the cause without which the gift would not have been made.

It has been well settled by an abundance of authority that a gift is made in contemplation of death only when the expectation of death is so strong that in its absence the gift would not be made. In the jargon of the law of causation, a gift is made in contemplation of death only when contemplation of death is the proximate cause for the making of the gift.

In *Rea* v. *Heiner,* 6 Fed. (2nd) 389, the question presented was whether or not a gift of $10,000,000, made by a mother, at that time seventy-five years of age, to her daughter, her only child, six months prior to the death of the donor, fell within the ambit of Section 402 of the Revenue Act of 1918. The court found that at the time of the making of the gift, when the donor was seventy-five years of

age, it was her habit to visit her physician regularly, but that apparently she was in as good health at that time as any woman of her age could be; "that she rarely spoke of death and that she was impressed with the idea that she would live as long as her mother who died at the age of ninety-two."

The donor's home was in Pittsburgh, but at the inception of hostilities in 1917, her daughter, the donee, had gone to Washington where she was actively engaged in Red Cross work at the Walter Reed Hospital. In 1918, the donor, fearing that the attractions of the Capitol would wean her daughter from Pittsburgh, made the gift with the purpose of involving her daughter in the various Pittsburgh activities represented by the stock comprising the gift. In concluding that the real motive for the making of the gift was not that contemplation of death referred to in the statute, the court reviewed the definition of that term as found in the various adjudicated cases and arrived at its own definition as follows:

> "Under the authorities the words 'in contemplation of death' have a distinctive meaning. Lord Mansfield once said: 'We all have in us the seeds of mortality. But "contemplation of death" is not the general knowledge of all men that they must die some time.'
>
> "In Spreckels v. State, 30 Cal. App. 363, 158 P. 549, the court said: 'A reasonable and just view of the law in question is that it is only where the transfer of property by gift is immediately and directly prompted by the expectation of death, that the property so transferred becomes amenable to the burden; or, as counsel for the respondents with singular aptness states the proposition: "It is only when contemplation of death is the motive without which the conveyance would not be made, that a transfer may be sub-

jected to the tax." That is, the expectation of death must be the direct, specific, and immediately animating cause of the transfer.'

"In State v. Pabst, 139 Wis. 561, 121 S. W. 351, the court said: 'It is manifest that (the words) were intended to cover transfers of parties who were prompted to make them by reason of the expectation of death, and which, in view of that event, accomplished transfers of the property of decedents in the nature of a testamentary disposition. It is therefore obvious that they are not used as referring to that expectation of death generally entertained by every person. The words are evidently intended to refer to an expectation of death which arises from such a bodily or mental condition as prompts persons to dispose of their property and bestow it on those whom they regard as entitled to their bounty.'

"In Schwab v. Doyle, 269 F. 321, the Circuit Court of Appeals said: 'On principle, and without reference to authority, the ultimate question concerns the motive which actuated the grantor; that is to say, whether or not a specific anticipation or expectation of her own death, immediate or near at hand (as distinguished from the general and universal expectation of death some time), was the immediately moving cause of the transfer.'

"In Meyer v. United States (not yet reported) the Court of Claims said: 'If it be said that there need not be a conviction that death is imminent, there must be at least a belief that it is to be expected in the very near future, rather than in the usual course of events, and in this state of mind, in this belief, in the near approach of death, must be found the motive for the conveyance if it is properly to be characterized made in contemplation of death.'

"In harmony with these opinions may be cited Armstrong v. State (Conway's Estate),

72 Ind. App. 303, 120 N. E. 717; Rosenthal v. People, 211 Ill. 306, 71 N. E. 1121; Trust Co. v. Treasurer and Receiver General, 209 Mass. 373, 95 N. E. 851, Commonwealth v. Fenley, 189 Ky. 480, 225 S. W. 154, and many other cases.

"These principles have been applied with great uniformity in the adjudicated cases, both in the state and federal courts. There is a common agreement that the words 'contemplation of death' mean not the general knowledge of all men that they must die; that it must be a present apprehension, from some existing bodily or mental condition or impending peril, creating a reasonable fear that death is near at hand; and that, so arising, it must be the direct and animating cause, and the only cause, of the transfer. If this apprehension, so arising, is absent, there is not that contemplation of death intended by the statute, especially when another adequate motive actuating the gift is shown."

So in *People* v. *Burkhalter,* 247 Ill. 600, the court, in holding that a gift made by decedent, who died at the age of seventy-five, within a few days of death, the gift constituting all of his property, was not in contemplation of death, said: "The contemplation of death must be the *impelling* motive without which the conveyance would not be made, in order to subject a transfer of property to the inheritance tax."

So in *Smart* v. *U. S.,* 21 Fed. (2nd) 188, the court, in holding that a gift made by the decedent, then aged eighty-four, of property of a value of $413,000, was not made in contemplation of death, for the reason that another motive, to wit, her own inability to devote her energies and her finances toward the proper care of the property, had been

proved, reviewed the definitions of that term set forth in *Meyer* v. *U. S., supra,* and *Schwab* v. *Doyle, supra,* and said:

> "The evidence points to other motives which better explain and justify the transfers. *The transfers were not made within two years prior to the death of Mrs. Graves, and there is no presumption under the act that they were made in contemplation of death.*"

Similarly, in *Re Baird's Estate,* 219 App. Div. 418, 219 N. Y. Supp. 158, the court, in holding that a gift *inter vivos* of a one-half interest, valued at $25,000, in certain real estate, by the donor to her niece, was not made in contemplation of death, despite the fact that at the time of the making of the gift the donor had already reached an advanced age, and despite the further fact that at the time of the making of the gift she was in poor health, and that within two months after the transfer had been completed she died of a cerebral hemorrhage, and despite the further fact that in a will executed prior to the transfer and in her last will and testament executed subsequent to the transfer she devised this very interest to the donee, for the reason that the gift had been prompted by another motive, to wit, an intention of long standing to make the gift to her niece prior to her own death, said:

> "The deceased certainly had in mind the situation which would exist at her death in respect to this farm at the time that she made the deed. In a general sense, therefore, it could be said that the transfer was in contemplation of death; but this is not the meaning of those words as used in the statute. *The words have reference rather to a situation where the inducing cause of the*

> *transfer is the thought that death is imminent, or at least reasonably to be expected from a condition of ill health, or infirmity then existing, or where a transfer is made 'in bad faith,' or so as 'to evade' or 'defraud the state of the tax,' or 'to cheat the law.'"*

To the same effect, see *People* v. *Northern Trust Co.,* 324 Ill. 625, at p. 631, and *People* v. *Forman,* 322 Ill. 223.

In submitting this review of the recent adjudicated cases in the various courts of last resort, we have ignored those earlier New York cases which, according to the more recent legal critics, erroneously confused the term "gift made in contemplation of death" as meaning a gift *causa mortis.* It should be noted, however, that the authorities are unanimous in holding that the expression "a gift made in contemplation of death," as set forth in the New Jersey statute and in similar statutes elsewhere, refers to a gift made BECAUSE of the contemplation of death and because of no other reason. Even if the donor is aged and infirm and must, in the nature of things, apprehend the fact that death is not far distant, that in itself will not suffice to prove that the gift was made in contemplation of death within the meaning of the statute if it is shown that there was another and legitimate motive for the making of the gift. Such has been the holding by the courts in this State.

In *In re Estate of Louis Sacks,* 101 N. J. Eq. 709, a case governed by the presumption contained in Chapter 174 of the Laws of 1922 (*which presumption, it should be noted, is not applicable to the case at bar*), the court held that a gift made by a donor of $110,000, constituting 27½ per cent. of

his entire estate, to his son, at a time when the donor was seventy-three years of age, and a short period before the donor's death, was not made in contemplation of death. The court reached that conclusion despite the fact that during the last ten years of his life the donor had suffered from several illnesses, including a murmur at the apex of his heart, and from a dormant diabetic condition which latter, moreover, was a contributing cause of death.

The court held that the true motive for the making of the gift was the desire of the donor to see his son well established, and that, therefore, it could not be said that the gift was made in contemplation of death.

POINT III.

The burden of proving that the gift made by the decedent to his wife was made in contemplation of death, in the sense that contemplation of death was the proximate cause of the making of the gift, rested in the first instance upon the State of New Jersey. The State failed to sustain that burden.

It has already been held by the courts of this State that, except for a gift made under circumstances controlled by the presumption included in the statute, in Chapter 174 of the Laws of 1922, the burden of proving that a gift was made in contemplation of death, and is therefore taxable, rests upon the State.

In re Estate of Louis Sacks, 101 N. J. Eq. 709.

In every other jurisdiction where this question has arisen, courts of last resort have reached the same conclusion.

In *In re Wadsworth,* 198 App. Div. 483, 190 N. Y. S. 819, aff'd N. Y. , the court found that the donor, who died on May 2, 1918, at the age of seventy, had made a gift to his wife, eleven days prior to his death, of securities of a value of approximately $500,000. The facts showed that the donor and donee intermarried some time in 1901, and that since the marriage the donor had given to his wife "at first $10,000 and latterly $12,000 each year for her personal use."

On various occasions for several years prior to his death, he had told his wife and others that he had intended to make an outright gift to her of the principal from which these sums were derived. For twenty-five years prior to his death the donor had been afflicted with diabetes, and while this condition was a serious one, he enjoyed normal health for a man of his years when he followed rigidly the strict diet that had been prescribed for him.

Early in 1917 he had intended to make the actual transfer, but that desire was frustrated by the absence of his personal attorney. Before the latter's return, the donor was taken ill with pneumonia. Upon his recovery on April 22, 1918, exactly eleven days prior to his death, the transfer was made. It was found that at this time he had completely recovered from the pneumonia attack and that he was enjoying what for him constituted normal health. Upon his recovery, and coincident with the making of the gift, he had formulated plans for spending the summer at his country residence in Massachusetts. Two days after the mak-

ing of the gift, he was stricken with an acute throat disease from the effects of which he died on May 2nd.

The court, in affirming the decision of the Surrogate to the effect that this gift was not made in contemplation of death, held that the burden of proof rested upon the State, and that the State had not met that burden. In so holding, the court said:

> "(1) *The burden is on the State to show that the gift was made in contemplation of death, and that seems to be conceded by appellant.* Matter of Enston, 113 N. Y. 174, 21 N. E. 87, 3 L. R. A. 464; Matter of Beyer's Estate, 190 App. Div. 802, 180 N. Y. Supp. 396.
>
> (2) *Special tax laws like the one under consideration are always construed against the Government and favorably to the taxpayer.* Matter of Vassar, 127 N. Y. 1, 27 N. E. 394; Matter of Wadsworth's Estate, 100 Misc. Rep. 439, 166 N. Y. S. 716.
>
> In the case of Matter of Thorne's Estate, 44 App. Div. 8, 60 N. Y. S. 419, it was said by the court:
>
> > 'The right to impose the tax must rest upon evidence sufficient in probative force to bring it within the statute, and must establish a case from which the law clearly authorized its imposition.'
>
> (3) *This tax did not attach unless the transfer was made by Mr. Wadsworth in contemplation of death.* Matter of Crary, 31 Misc. Rep. 72, 64 N. Y. S. 566; Matter of Spaulding's Estate, 49 App. Div. 541, 63 N. Y. S. 694; Matter of Hendricks' Estate, 163 App. Div. 413, 148 N. Y. S. 511, affirmed 214 N. Y. 663, 108 N. E. 1095."
>
> "In making the gift of these bonds which represented the principal on the amount he

> had paid his wife ever since his marriage, he was carrying out a purpose long since formed and frequently expressed to her and others. There is no reason to assume that the gift was made to avoid the inheritance tax, or in contemplation of death, except the inference indulged by appellant that because the donor died ten days after the bonds were delivered, the transfer must have been in contemplation of death. *That is pure assumption.* The evidence is all the other way, and I can see no good reason why several apparently respectable witnesses who testified to the facts concerning this transfer should not be believed. If what they testified to is true, then there is no justification whatever for the assumption that the bonds were transferred either to avoid the inheritance tax or in contemplation of death."

Upon the same facts, the federal courts reached the same conclusion (*Vaughan* v. *Riordan,* 280 Fed. 742).

A similar problem was projected in *In re Thorne's Estate,* 60 N. Y. S. 419, 44 App. Div. 8. The question there presented was whether or not a gift made by the donor, an elderly man, was intended to take effect only after his death, and therefore taxable under subdivision 3 of Section 220 of the Tax Law of New York. It was found that the donor had transferred all his personal property (constituting the gift in question) to the donee some time before his death; that no written agreement accompanied this gift, and that *thereafter he executed his will bequeathing all of his personal property to the donee.* The testimony of the donee showed that she was to have absolute possession of the property during the life of the donor and was to make reasonable provision for him during his lifetime. The Surrogate found

upon these facts that the gift fell within the provisions of the statute, and accordingly imposed a tax. The Appellate Division, in reversing that decision, said:

> "The claim made by the respondent is that the testimony of Mrs. Huff that she was to care for Thorne during his lifetime, and to furnish him with money as he needed it, taken in connection with the execution of the bill of sale of all his personal property to Mrs. Huff, and the subsequent making of a will by which he devised to her all his personal property, when he possessed none if the former gift had been absolute, authorized a finding by the appraiser that Thorne retained a beneficial interest in the property, and was entitled to the employment of a part, at least, and, if his necessities required, could appropriate the whole. We are of opinion that this contention cannot be sustained. There is nothing in the testimony of Mrs. Huff, or in the papers which effected the transfer of the stock to her, from which it is possible to gather any agreement of reservation or property right in Thorne, either as a matter or inference of law. The most that can be claimed from the testimony of Mrs. Huff in this regard is that she was to care for Thorne during his lifetime, and furnish him money as he needed it. This constituted an agreement upon her part which Thorne might have enforced in his lifetime if there had been breach of its conditions. But it placed no limitation whatever upon the right of Mrs. Huff to use and enjoy the property which she received to its fullest extent. The title in her was absolute, and she could make any disposition of it which she chose. She was not required to use the specific property or its proceeds for the benefit of Thorne. Her entire obligation would be discharged when she furnished him with money and otherwise provided for his

> wants as she had agreed, whether she took it from this property or from any other that she possessed, or however otherwise she might have procured it. Nor is this fact changed by any consideration of the unreliability of Mrs. Huff's testimony. It may be conceded that she did not make a single truthful statement, but her evidence is inconsistent and contradictory, and that the appraiser would have the right to take such parts of her testimony as he chose to believe, and base his finding thereon. But this will not avail in the absence of proof from which it may *be affirmatively found that Thorne reserved to himself the beneficial use and enjoyment of the property during his life. The right to impose the tax must rest upon evidence sufficient in probative force to bring it within the statute, and must establish a case from which the law clearly authorized its imposition.* In re Vassar, 127 N. Y. 1, 27 N. E. 394; In re Bronson's Estate, 150 N. Y. 1, 44 N. E. 707."

So, in *People* v. *Forman,* 322 Ill. 223, the Supreme Court of Illinois, in reversing the judgment below, held that a conveyance of a large farm representing a substantial portion of his estate by a father, who was at the time eighty-five years of age, to his only son, and within nine months prior to his death, did not constitute a gift made in contemplation of death. In reversing the judgment, the court took notice of the great age of the donor at the time of the making of the gift, and of the further fact that his physical condition at that time would not be considered normally good even for a man of his age. It was found that at the time of the making of the gift the decedent suffered from "a slight prostatic condition" and had "an old man's heart"; he suffered from hardening of the arteries and from those other ailments which generally attend advanced age.

The court's decision was predicated upon the undisputed fact that for a period of ten years prior to his death the decedent had contemplated making the gift in question, and that although this particular gift represented a substantial portion of his estate, nevertheless, he had retained sufficient property to furnish him with a home and a reasonable income. In so holding, the court said (pp. 229-230):

> "The burden of showing that a transfer is subject to the inheritance tax rests upon the State. (In re Minor, 180 Pac. 813; In re Wadsworth, 166 N. Y. S. 716.) We held that the State in this case has not proved, by the preponderance of the evidence, that the deed to the 659 acres of land was made in contemplation of death, within the meaning of the statute, or that the conveyance as to that land was testamentary in character. There was absolutely no expression of any kind by the testator at the time he signed and acknowledged the deed, or at the time that it was written, that indicated that the donor thought that he was going to die or that he had a malady or disease that would soon end his life."

So, in *In re Estate of Minor,* 180 Cal. 291, the Supreme Court of California reversed the decision below on the ground that the state had failed to meet the burden of proof normally imposed upon it. In that case, the question arose as to whether a gift by an aged man to his second wife, pursuant to an antenuptial agreement, was made in contemplation of death. The donor, a rich man and the father of a number of children by a former wife, married the donee in August, 1908, and at the same time entered into an oral antenuptial agreement whereby he promised to deliver to his wife securi-

ties of the value of $100,000. Upon the date of his marriage, he partly executed that agreement by giving his wife $50,000 in cash. Three years later, he gave her an additional $50,000. In 1912, the following year, he executed his will wherein he made mention of the gift of $100,000.

The court, in reversing the judgment below, said (p. 294):

> "The facts hereinbefore narrated do not support the finding of the Trial Court that the transfers in controversy were made in contemplation of death within the meaning of the statute just quoted. This is so whether the statute be considered and construed separately and solely in the light of its own language, or with the aid of the amendments thereto whether or not the phrase, 'in contemplation of death,' is defined to mean that expectancy of death which actuates the mind of a person on the execution of his will, and not merely that expectancy of death which actuates the mind of a person in making a gift causa mortis. (See Section 27 of the Inheritance Tax Act as amended in 1911 [Stats. 1911, p. 726].) That is to say, that when measured either by the commonly accepted or by the statutory definition of the phrase 'in contemplation of death' the transaction here involved cannot, upon the undisputed facts of the case, be fairly brought within and subjected to the provisions of the Inheritance Tax Act as it existed and was in force and effect when the transaction was initiated and finally consummated."

And so, in *People* v. *Northern Trust Company*, 324 Ill. 625, the court, in reversing a decision below to the effect that the creation of a trust fund by a father, at the time of the making of the gift

sixty-three years of age, and made three years prior to his death, in favor of his son, held that the transfer was not made in contemplation of death because there was an apparent and a *bona fide* motive other than contemplation of death, to wit, a desire to insure the financial independence of his twenty-two-year-old son. The court reached this conclusion despite the fact that for a period of twelve years prior to the making of the transfer, the donor had been afflicted with *locomotor ataxia,* and that six years prior to the making of the gift, this disease had resulted in complete and continued blindness.

In holding that the state had failed to meet the burden of proof in establishing that the gift was made in contemplation of death, the court said (pp. 629-631):

> "At the time of his death, Beardslee was 62 years of age and his son was 22 years of age. Beardslee in 1907 became afflicted with locomotor ataxia. The disease progressed until about the year 1913, and he completely lost his sight from that time until his death. From that time, the course of the disease was virtually stationary, with occasional acute attacks of increased pain. The disease did not affect him mentally, and he continued to direct the transaction of his own business and affairs up until the time of his death. He was more than ordinarily intelligent and was well versed in business methods and the laws with relation to the transfer of property and the creation of trusts. He had had the subject of the creation of a trust for the benefit of his son under consideration for a considerable time before October 7, 1919. Prior to that time, he had fully discussed the matter with the officials of the trust company, and the fact that the transfer of 1919 was not made in contem-

plation of death is evidenced by the fact that he then stated that he expected in the future to make other transfers of like nature when the circumstances of his securities should be favorable for so doing. While he was afflicted with an incurable disease, there is no evidence in the record that he at any time prior to his death had any expectation of death in either the immediate future or within a comparatively few years, but, on the contrary, the evidence from all the witnesses, including a physician who treated him, is that he was a believer in Christian Science, that his state of mind was very cheerful, that he believed that he was getting better and had great hopes of eventually getting well. As one witness expressed it, 'he was a 100% optimist.' He was apprehensive that his only son, Harland, later in life might be similarly afflicted, and stated that he wished to make provision for him under these trusts in such a way that no matter what the physical condition of the boy might be, he would always have sufficient income to take care of him during sickness or health. He did not attempt to make any disposition of his entire estate, but only of less than one-quarter thereof. The trust agreement contained a clause with reference to the payment of estate or inheritance taxes, and it is contended by appellee that that is evidence that the transfers were made in contemplation of death. With reference to this clause, one of the officials of the trust company testified that this clause was always inserted in their trust agreements for the protection of the trust and the trust company, and that it was inserted at his request.

Whether or not a transfer is made in contemplation of death is a question of fact, and the burden of showing that such transfer is subject to an inheritance tax rests upon the State. (In re Minor, 180 Pac. 813.) The Inheritance Tax Act was not intended to apply to the gift by a parent of a part

of his estate to a child so long as the same is made simply as a gift and not for the purpose of evading the Act by disposing of the donor's property just before or in anticipation of his death. The words 'in contemplation of death' as used in the Inheritance Tax Act, have reference to that apprehension of death which arises from some existing disease or infirmity of such a character as prompts one to make a disposition of his property, and they do not mean or refer to the general expectation that is common to all rational mortals that they will die some time. (People v. Forman, 322 Ill. 223.) That Beardslee did not expect to die shortly is evidenced not only by all of his declarations, but by the further fact that just a few days before his death, he gave instructions to his agent with reference to investments which he expected to make thereafter. The evidence in the case shows that the donor retained no interest in the res, and that interest upon the trust fund was immediately, and before the donor's death, to be used by the trust company for the son's benefit. Appellee has not in this case sustained the burden resting upon it to prove by a preponderance of evidence, that either of the transfers was made in contemplation of the death of the donor or intended to take effect in possession or enjoyment at or after such death.

The judgment of the County Court must therefore be reversed and the cause remanded to that court, with directions to enter a judgment in accordance with the views herein expressed."

In *Meyer* v. *United States,* 60 Court of Claims Reports 474, the court reversed the ruling of the Commissioner of Internal Revenue to the effect that the gift in question was one made in contemplation of death where the following facts appeared:

The donor, on October 7, 1919, conveyed real estate to her daughter of the value of $238,000, representing one-fourth of her entire estate. At that time, the donor was sixty-four years of age and was suffering from Bright's disease. Although she did not know the exact nature of her illness, it appears that she led a guarded life. Death occurred on December 1, 1919, less than three months after the making of the gift.

The court held that this evidence, even when buttressed by the presumption contained in the federal statute, failed to prove that the gift in question was made in contemplation of death for the reason that it affirmatively appeared that for a considerable period prior to the actual making of the gift, the donor had contemplated such a transfer, and for the further reason that despite the donor's illness and age, the thought of death was not predominant in her mind, as evidenced by the fact that at the time of the making of the gift, she had already formulated her plans for spending the ensuing winter in Florida and had participated to some extent in the necessary preparation for the removal of her household to the South.

In so holding, the court said (pp. 482-483):

> "A review of the authorities is scarcely necessary to sustain the proposition that the contemplation of death referred to in the statute is not that contemplation of death which must be present with all of us, mindful of its certainty at some time, we know not when, but it is that state of mind which by reason of advanced age, serious illness, or other producing cause induces the conviction that death in the near future is to be anticipated. If it be said that there need not be a conviction that death is imminent,

> there must at least be a belief that it is to be expected in the very near future rather than in the usual course of events. And in this state of mind, in this belief in the near approach of death, must be found the motive for the conveyance if it is properly to be characterized as made in contemplation of death."

And in this respect added (p. 485):

> "Some stress is laid upon her age. It is said (italics included) with the above quotation as a basis that 'AGE was in her mind when she TALKED about the gift. Is it unreasonable to assume that it was in her mind when she MADE the gift?' With the vigor of youth still flowing through his veins, counsel is perhaps not to be blamed if perchance he is not able to look upon life, its beauties and its prospects, through eyes which, though possibly dimmed by the passage of years, yet look with keen anticipation upon the fruition of the years yet to come. Mrs. Leavitt was 64 years old when she made this deed. She had yet remaining to her six years of the biblically allotted period, and under the usual rule applicable in the compilation of mortality tables, of which the courts take judicial knowledge, she had an expectancy of eleven years. And, for ought that appears, she, in common with the rest of humanity, expected to outlive her allotted time."

In holding that despite the presumption contained in the statute, the government had not proved its case, the court said (pp. 483-484):

> "But while this is a view properly to be applied in the determination of this case under the evidence as we see it, we see no necessity for the invoking of any rule of liberality in behalf of the taxpayer, for under any con-

ceivable rules of evidence properly applicable to the determination of a proposition not in the nature of a tangible fact, the plaintiffs have sufficiently assumed the burden which under the law they must assume to relieve the transaction in question of its presumptive character.

We do not find it necessary to review in detail the facts set out in the findings. Not one, in our judgment, tends to support the presumption in which the government may indulge under the law, but combined they very successfully rebut that presumption. This conveyance had been contemplated for several years and for manifest reasons. It was substantial, or, in the language of the statute, a material part of the whole estate, but it was less than one-fourth in value of the entire estate, it passed to an only child, and in the hands of the grantor, it was an unproductive part of her estate. We have not found it necessary to set out in the findings proven facts bearing upon the possible utilization of the property for development purposes by the husband of the daughter."

In *Re Mahlstedt's Estate,* 73 New York Supp. 818, the court, in reversing the decree of the Surrogate's Court affirming a transfer tax decree on a gift by the testator to his wife of certain securities on the 29th day of March, 1899, three weeks before the testator's death on April 20, 1899, found the following facts:

The testator was the owner of 560 shares of stock of J. A. Mahlstedt Lumber & Coal Company. His last illness began in February, 1899; during the period of his illness, he had been informed by his physician that he would probably recover and that upon his recovery it would be necessary for him to take an extended vacation; upon receiving this information he expressed the desire to trans-

fer the stock owned by him, in his corporation, to his wife so as to vest in her authority to run his business during the period of his absence. Accordingly, on March 29, 1899, he assigned to her 559 shares of the 560 shares owned by him, retaining only one share so as to qualify as a director. On the same day, he executed his last will and testament, making his wife the sole beneficiary thereof.

The court, after stating that there was no direct evidence as to whether or not this gift was made in contemplation of death, said:

> "The fact that he did die within three weeks of the transfer, and that he died of the same illness with which he was afflicted at the time, has no bearing upon the question. The only point to be determined is whether the transfer was made in the then belief that he was not going to get well; that it was made in contemplation of his impending death, and for the purpose of defrauding the state of the transfer tax; for that is the essence of the matter, and there is no presumption that a man intends to commit a fraud of any kind. Chamberlayne's Best Ev. S. 308, and authorities there cited. The rule is also well settled, that *where two inferences may be drawn from a given state of facts, one of which is lawful and the other unlawful, the result which is consistent with innocence is to prevail.* Chamberlayne's Best Ev. S. 326. See also, Section 334. Looking at the facts in this case in the light of these rules, we are led irresistibly to the conclusion that they do not warrant holding that the transfer of the 559 shares of stock was made in contemplation of death, in the sense in which that phrase is used in the statute. Mr. Mahlstedt had a natural right to give this stock to his wife; it was an entirely lawful transaction, and the manner in

which it was performed, the circumstances surrounding him, and the acts of Margaret L. Mahlstedt after becoming the owner of the stock, all indicate that the transfer was made for the purpose of relieving Mr. Mahlstedt from the cares of business, and transferring those duties upon the wife. The evidence is undisputed that Mrs. Mahlstedt has appeared at all of the meetings of the corporation since the transfer of the stock to her; that no objection has ever been made to her voting the stock; that she acted as treasurer from the time of her election; that she signed drafts that day, or the next after her election; and this, in connection with the fact that her husband retained one share of the stock, indicates clearly that *the transaction was in good faith, and that it was not made in contemplation of death.*"

To the same effect, see:

Flannery v. *Willcuts,* 25 Fed. (2nd) 951.
In re Safford et al. v. *United States,* 66 Ct. Claims 242.
Off v. *United States,* 35 Fed. (2nd) 222.
In re Bullard's Estate, 78 N. Y. Supp. 491.
Matter of Keutor's Estate, 187 (So. Dak.) N. W. 625.
Spreckels v. *State of California,* 30 Ca. App. Rep. 363.
In re Thompson's Estate, 269 Pac. 103.
Rea v. *Heiner,* 6 Fed. (2nd) 389.
In re Baird's Estate, 219 App. Div. 418, 219 N. Y. Supp. 158.
Fidelity & Columbia Trust Co. v. *Lucas,* 7 Fed. (2nd) 146.
Smart v. *United States,* 21 Fed. (2nd) 188.
Wells et al. v. *United States,* 39 Fed. (2nd) 998.
Tips v. *Bass,* 21 Fed. (2nd) 461.

It is respectfully submitted that in the case at bar, the State of New Jersey failed in the first instance successfully to meet the burden of proof imposed upon it as to the question of whether or not the gift made by this decedent to his wife was made in contemplation of death. There is no proof whatsoever in this record to the effect that Mr. Grabfelder, in making the gift in question, was actuated by the thought of death, or, to use the language of the cases, that contemplation of death was the motive without which he would not have made the gift, or, that contemplation of death was the proximate cause of the gift. The only motives which have been ascertained for the making of the gift, as disclosed by this record, were his desires (1) to reduce his income surtaxes, and (2) to please his wife by rendering her financially independent of him, and so ridding himself from the burden of attending to the payment of her personal expenses and the care of her personal philanthropies.

The record contains an abundance of testimony given by apparently respectable citizens of this State to the effect that these were the true motives for the making of the gift. No reason appears upon this record to question the credibility of this testimony. More important still, there is not a scintilla of evidence that any other motives than those referred to, prompted the decedent in the making of the gift. Surely, the alleged statement of Mr. Louis E. Stern, included in the report of the special investigator, cannot be construed as constituting even a scintilla of evidence as to the decedent's motive in making this transfer. That alleged statement was not taken under oath as required by Section 18 of Chapter 228 of the Laws of 1909. Obviously, it was hearsay, and the statute referred to pre-

cluded the Comptroller from giving it any evidentiary value in arriving at his determination. But even if it had been taken under oath, it, nevertheless, would have been incompetent as constituting an opinion upon a matter directly in issue before the Comptroller,

Packard v. *Bergen Neck R. Co.*, 54 N. J. Law 553,

and, therefore, of no value in this proceeding.

Schwab v. *Doyle*, 269 Fed. 321.

With the exception of this incompetent and hearsay statement, the only testimony contained in the record as to the motive of Mr. Grabfelder in making the gift in question is to the effect that it was made by him not as a substitute for a testamentary disposition of his property, but for the *two* legitimate reasons already referred to and which he considered sufficient at the time. It follows, therefore, that the State failed to meet the burden of proof that this gift was made in contemplation of death.

It may be noted, moreover, that the federal authorities have held upon the same facts as were presented to the Comptroller that the gift made by Mr. Grabfelder was not in fact made in contemplation of death, and, therefore, not taxable. We mention this federal ruling not only because of the fact that it may be relevant on the general theory of *stare decisis*, but also because the Internal Revenue Department measured these same facts, in arriving at its determination, in the light of the presumption contained in the federal statute.

POINT IV.

The circumstances attendant upon the gift in question did not warrant the presumption that it was made in contemplation of death when the uncontradicted testimony established a contrary and valid motive therefor.

There was no evidence to support the determination of the Comptroller, but on the contrary, the undisputed facts annihilated the inferences upon which his determination was predicated. It follows that the affirmances of his determination by the Prerogative Court and the Supreme Court constitute error.

A review of the testimony leads inevitably to the conclusion that the only motive for the making of the gift in question by Mr. Grabfelder was the latter's *dual* purpose of rendering his wife independent during his own lifetime, and of reducing his own income surtaxes. That the latter was a legitimate and valid purpose has not and cannot be disputed.

Scottish Union Ins. Co. v. *Bowland,* 196 U. S. 611; 49 L. Ed. 619.
Mitchell v. *Leavenworth,* 91 U. S. 206; 23 L. Ed. 302.
45 Cent. Dig. "Taxation," S. 141.
27 *Cyc.* 770 (e).

In the absence of any testimony to the effect that the decedent was animated by a desire to make this gift as a testamentary disposition of part of his estate, the determination of the Comptroller can be explained only on the theory that the Comptroller was satisfied that the circumstances sur-

rounding this gift warranted the *presumption* or *inference* that it was made in contemplation of death. It will be contended by the defendant-respondent before this court that because the donor at the time the gift was made was seventy-three years of age, the Comptroller was warranted in making that presumption, and no error was committed by either the Prerogative Court or the Supreme Court in their respective affirmances. As circumstances alleged to buttress the validity of that presumption, it will be contended here that the gift was in reality a testamentary disposition of the donor's estate for the reason that the donor had on a prior occasion, by the execution of his will, indicated his intent to leave the same sum of money to his wife, and by the further alleged fact that at the time of the making of the gift, he was suffering from a serious ailment. *We have said that there is not a scintilla of evidence that in 1918, when this gift was made, the donor had even an intimation that he was suffering from any disease. At that time he enjoyed unusual vigor for a man of his years, and the fact that he himself had no thought of impending death is evidenced by his comparatively strenuous daily routine.*

But even conceding (for the purpose of argument only) that in 1918 the donor was suffering from a heart condition and/or that he knew that he was so suffering, it is submitted that these facts in themselves furnish an insufficient basis for the conclusion arrived at by the Comptroller, and certainly do not warrant an affirmance of the Comptroller's determination by an appellate court.

As has already been indicated, the mental processes of the Comptroller in arriving at his conclusion were attained by the pyramiding of a number of presumptions. That the donor at the time

of the making of the gift was seventy-three years of age is undisputed. That a short time prior to the actual transfer he had executed a will by the terms of which he bequeathed property of the same value as that constituting the subject matter of the gift is also conceded. That the donor at the time of the making of the gift was in ill health is a contention that finds no support in the record, but was evidently accepted as a fact by the Comptroller. Viewing these facts together, the Comptroller has concluded that because Mr. Grabfelder had passed the biblical span of life, his thoughts must necessarily have been turned towards death. Having presumed that his thoughts must necessarily have been turned towards death, the Comptroller proceeded to make another presumption, to wit, that because presumably Mr. Grabfelder was thinking of impending death, he made the gift in question to his wife, and that, therefore, the gift constituted a testamentary disposition of part of his estate. In arriving at that conclusion, the Comptroller has arbitrarily rejected the undisputed facts abundantly proved by the record which in themselves negative the presumptions indulged in by the Comptroller. No reason can be advanced by anyone for the impeachment of the credibility of the statements contained in this record to the effect that Mr. Grabfelder in making the gift in question to his wife was acting upon an intention of long standing, and that his real purpose in making it was to render his wife independent and at the same time reduce his own income surtaxes.

The finding of the Comptroller, therefore, rests upon inferences which are in themselves annihilated by the uncontroverted evidence contained in the record. This in itself constitutes reversible

error, and should have resulted in a reversal of the Comptroller's determination by the Prerogative Court.

It is elementary that presumptions may not rest on presumptions, nor inference on inference.

Price v. *N. Y. Cent. Ry. Co.,* 92 N. J. Law 429.

McCombe v. *Public Service Ry. Co.,* 95 N. J. Law 187.

Adriance v. *Schenck Bros.,* 95 N. J. Law 185.

Plotnick v. *Plotnick,* 172 N. Y. Supp. 584, 185 App. Div. 15.

Smith v. *Pa. R. Co.,* 239 Fed. 103.

Warner v. *N. Y. O. & W. Ry. Co.,* 204 N. Y. Supp. 607, 209 App. Div. 211.

Lamb v. *Union Ry. Co. of N. Y. Co.,* 195 N. Y. 260.

Looney v. *Met. R. R. Co.,* 200 U. S. 480, 26 Sup. Ct. Rep. 303.

Or stated affirmatively, verdicts and findings must have a more substantial basis than mere surmise, speculation or conjecture.

Midland Valley Rd. Co. v. *Fulgham,* 181 Fed. 91, 95.

Samuel v. *Weidermann Co.,* 295 Fed. 314, 316.

Osier v. *Consumer's Co.,* 41 Idaho 268, 239 Pa. 735.

Nadeau v. *Stevens,* 111 A. 749, 79 N. H. 502.

Ingram v. *Dunning,* 159 Pa. 927, 60 Okl. 233.

Chamson v. *Amer. Ry. Ex. Co.,* 189 N. W. 529, 178 Wis. 286.

Lucas v. *Inter Paper Co.*, 115 N. Y. Supp. 814, 131 App. Div. 368.
White v. *White Motor Co.*, 144 N. Y. Supp. 960, 159 App. Div. 716.

Verdicts based on conjecture cannot be upheld.

Oliver v. *Clark*, 209 Ky. 519, 273 S. W. 46.
Fisher v. *Buttle Elec. Co.*, 72 Mont. 594, 235 Pa. 330.
Heinbach v. *Doubleday, Page Co.*, 114 N. Y. Supp. 278, 130 App. Div. 34.

And testimony that raises a mere suspicion or surmise of the existence of a fact sought to be established in legal contemplation falls short of being sufficient to support an affirmative finding that such fact did exist.

Clark v. *Granby Mining & Smelting Co.*, 183 (Mo. App. 1916) S. W. 1099.
Galveston St. S. & A. Ry. Co. v. *Fred*, 185 (Tex. Civ. App.) S. W. 896.

These rules find particular application here, for the reason that the tax sought to be imposed is a special, not a general tax, and it is fundamental that special tax laws are to be construed strictly against the government and favorably to the taxpayer, and that a citizen cannot be subjected to special burdens without clear warrant of law.

Matter of Will of Vassar, 127 N. Y. 1, at page 12.
Matter of Bronson, 150 N. Y. 1, at page 7.
Matter of Enston, 113 N. Y. 174.
American Net & Twine Co. v. *Worthington*, 141 U. S. 468.

Benzinger v. *U. S.*, 192 U. S. 38, at page 55.
Gould v. *Gould*, 245 U. S. 151.

The courts of this and other states have applied these rules in cases such as the one at bar in reviewing assessments for the purpose of ascertaining whether or not any evidence had been adduced in support thereof.

It has accordingly been held that in the absence of any testimony to the effect that a particular gift was in reality made in contemplation of death, the mere fact that at the time of the making of the gift the donor had attained a great age is not in itself sufficient to sustain an assessment. Such was the determination in *In re Meyer* v. *U. S.*, *supra*, and in *In re Sacks*, *supra*.

Speaking on this subject at length, the Supreme Court of Wisconsin in *State* v. *Thompson*, 154 Wisc. 320, said:

> "We do not think the court can fix any particular age limit and say that after it is reached, a party can give his property away only in contemplation of death. In a sense, old age is a relative term. Some men are old at sixty, although they may have no organic disease. Others are vigorous in mind and body at seventy, and still others long after they have passed their 80th milestone. There are octagenarians among the members of the Dane County Bar at the present time. One is as actively engaged in his professional work as he was twenty-five years ago. Another is creditably administering the affairs of an important office. The third is retired from active labor. Chief Justice Fuller performed his arduous labors until he reached the age of 77. Justice Harlan did likewise until he was 78; Justice Field until he was

83; and Chief Justice Taney until he was passed 87. The venerable ex-chief Justice Lyon of this court recently died at the age of 91, retaining his bodily and mental vigor until a short time before his death. Ex-Speaker Cannon, now passed 77, is an antagonist who might well command both fear and respect in any forensic encounter in which he might see fit to engage.

Age in itself is not a very important factor in determining the capacity of persons to deal with their property or in ascertaining the motives which actuated them in disposing of it.

The deceased in this case might have made the gifts which he did because he expected to die at any time. But it was just as reasonable an inference for the trial court to draw that he made the gifts without any particular thought of death and because he wanted his daughter and her family to enjoy the benefits of a part of his accumulations and to see her and them use what was given while he was still alive so that he could observe the uses to which it was put. It is an erroneous concept to conclude that aged persons dispose of their property because they think that death is staring them in the face. The hypochondriac or the pessimist might entertain such an idea, but such a one rarely attains old age. On the contrary, we think it is true that persons who have lived long and who are free from disease generally entertain the feeling that they have a few years longer to live no matter how old they are and that they do not regard death as imminent."

To the same effect, see:

Spreckels v. *State of California,* 30 Cal. App. Rep. 363.

In re Safford et al. v. *United States,* 66 Ct. Cls. 242.

In re People v. *Burkhalter,* 247 Ill. 600.

Even in those cases where at the time of the making of the gift the donor had not only reached an advanced age, but was also suffering from a serious ailment, the courts have held that these facts in themselves were insufficient to warrant a presumption that the gifts were made in contemplation of death, if the record showed as a matter of fact that at the time of the making of the gift the donor's thoughts were not directed toward thoughts of impending death, but toward continued life.

In *In re Wadsworth, supra,* where the donor at the time of the making of the gift was seventy years of age and suffered from a chronic and serious case of diabetes, and had, at the time of the making of the gift, shortly recovered from a grave attack of pneumonia, and within eleven days after the making of the gift died from an unforeseen throat ailment, the court held that none of these circumstances would support the presumption that at the time of the making of the gift he had a testamentary purpose in mind, when it was conceded that at that time he was formulating his plans for spending the summer at his country residence.

So, in *Spreckels* v. *State of California, supra,* the court held that a gift by a mother, seventy-nine years of age, to her children, within a few weeks of her death, and at a time when the donor was suffering from a serious myocardiac condition, could not have been presumed to have been made in contemplation of death where it was affirmatively established that at the time of the making of the gift the donor, despite her age and physical condition, was contemplating making a trip abroad for the dual purpose of purchasing furnishings for one of her elaborate residences, and also of visiting one of her children.

Thus, in *Meyer* v. *United States, supra,* it was held that mere advanced age, even when accompanied by a serious illness, cannot result in the conclusion that the gift in question was made in contemplation of death when it was shown that although the donor died within a few months thereafter, nevertheless, at the time of the making of the gift, she was in no way depressed by her physical condition, and was, in fact, making actual preparation for spending the winter at a Southern resort.

To the same effect, see:

Wells v. *United States,* 39 Fed. (2d) 998.
People v. *Northern Trust Co., supra.*
In re Safford et al. v. *United States,* 66 Ct. Cls. 242.
In re Mahlstedt's Estate, supra.
Flannery v. *Willcuts,* 25 Fed. (2d) 951.

The authorities are unanimous in holding that if the gift in question was made pursuant to a preconceived plan, that fact in itself negatives any presumption that it was made in contemplation of death, even though at the time of the making of the gift the donor had reached an advanced age and was suffering from a serious disease.

In *Wells et al.* v. *United States, supra,* the Circuit Court, in reversing the decision below, held that gifts made by a father who died at the age of seventy-three, during a period within two years of his death and comprising a substantial part of his estate, were not made in contemplation of death, despite the fact that during this entire period he was suffering from ulcerative colitis and asthma, both of which ailments required his submitting to a number of operations during this period. The

court held that the uncontradicted testimony to the effect that it had been the policy of the donor to make substantial gifts to his children during his lifetime was sufficient proof of the fact that the gifts were not made in contemplation of death.

So, in *In re Baird's Estate, supra,* the court held that any inference that the gift in question might have been made in contemplation of death arising from the advanced age and serious illness of the donor at the time of the making of the gift was destroyed by proof of the fact that for a long time prior to the actual transfer the donor had intended to make the gift in question.

To the same effect, see:

Smart v. *United States, supra.*
Rea v. *Heiner, supra.*
Fidelity & Columbia Trust Co. v. *Lucas, supra.*
In re Baker's Estate, 83 App. Div. 530, 82 N. Y. Supp. 390.
People v. *Forman, supra.*
In re Minor, supra.
Flannery v. *Willcuts, supra.*
People v. *Northern Trust Co., supra.*

Evidence of any motive which in itself is in contradiction to the presumption of contemplation of death resulting from advanced age accompanied by illness results in the destruction of the presumption, and an assessment based on the presumption, under these circumstances, must be reversed by the appellate court.

So, in *In re Mahlstedt's Estate, supra,* the court in reversing the decree of the Surrogate Court affirming a transfer tax decree on a gift by the testator to his wife of certain securities made on the 29th day of March, 1899, three weeks before the testator's death on April 20, 1899, found the facts referred to *supra,* and after stating that there was no direct evidence as to whether or not this gift was made in contemplation of death, said:

> "The fact that he did die within about three weeks of the transfer, and that he died of the same illness with which he was afflicted at the time, has no bearing upon the question. The only point to be determined is whether the transfer was made in the then belief that he was not going to get well; that it was made in contemplation of his impending death, and for the purpose of defrauding the state of the transfer tax; for that is the essence of the matter, and there is no presumption that a man intends to commit a fraud of any kind. Chamberlayne's Best Ev., § 308, and authorities there cited. The rule is also well settled, that *where two inferences may be drawn from a given state of facts, one of which is lawful and the other unlawful, the result which is consistent with innocence is to prevail. Chamberlayne's Best Ev., § 326.* See, also, section 334."

To the same effect, see *McDougald* v. *Wulzen,* 34 Cal. App. 21, where the court held that a gift of a substantial part of his estate by a husband, then eighty-three years of age, to his wife, within eighteen months of his death, did not constitute a gift made in contemplation of death, for the reason that it was prompted by his desire to see her enjoy the fruits of his efforts.

The rule that an assessment may not be predicated upon a presumption when the facts themselves negative the presumption applies with equal force to those cases wherein the donor at the time of the transfer had not only attained a ripe age and was suffering from a serious ailment, but where the facts indicate that he had at one time contemplated making a testamentary disposition of the same property to the same persons.

In *In re Baird's Estate, supra,* where it was found that the gift in question constituted a one-half interest in certain real property and comprised a substantial portion of the donor's estate and was made at a time when the donor had reached an advanced age and was in poor health, the court held that the gift was not made in contemplation of death despite these facts and despite the further fact that it was established that by a will executed prior to the making of the gift, and by a second will executed subsequent to the making of the gift, the donor had devised this same property to the donee. The court, in reversing the decision below, held that these facts, i. e., the existence of an intention of long standing, rebutted the presumption contained in the statute to the effect that the gift, because made within two years of death, presumably was made in contemplation of death. With respect to the alleged significance of the fact that the same property had been devised in successive wills to the donee, the court said:

> "The deceased simply created a condition by the transfer which she had long contemplated, whereby a tax upon the transfer would not be applicable. A person who sells taxable property and buys nontaxable bonds does not thereby evade the payment of a tax,

> or act in bad faith, or cheat or defraud the government, even though he intends to put his estate into such form as not to be subject to taxation. Evasion, cheating, and defrauding import a moral delinquency which is wholly absent here."

So, in *Re Mahlstedt's Estate, supra,* where it was found that on the same day the donor made the gift there in question, he executed a will making his wife the sole beneficiary. The court, in reviewing this aspect of the case, said:

> "The fact that he made a will on the same day is not evidence of the contemplation of death, except as a remote contingency, and cannot overcome the legitimate presumptions and the positive evidence in support of the appellant's theory that the transfer was made for the purpose of vesting the property in his wife, so that she should be able to take his place in the management of the business."

In *Smart* v. *United States, supra,* the court, in reversing the decision below, found that the donor at the date of her death, July 29, 1919, was eighty-nine years of age; that within a period of five and one-half and four and one-half years prior to her death, she had conveyed real estate to her daughter, her granddaughter and her grandson of a value of $413,000. At the time of the making of these gifts and for forty years prior to her death, she had suffered from rheumatism, but except for this condition, she was in normal health for a woman of her age. The motive for the transfer was found in the fact that the property required certain improvements if it were to continue to be income producing, and the donor felt that she had neither the time nor the energy to devote to this purpose.

Prior to the making of the gifts, she had executed a will by the terms of which she devised the same property exactly in accord with the gifts inter vivos. Upon the trial, the government did not introduce any testimony, but restricted itself to the testimony produced by the plaintiff. *The court held that mere advanced age when coupled with a chronic illness could not in itself create the presumption that the gifts were made in contemplation of death, and that the mere fact that at one time the donor had contemplated making a testamentary disposition of these properties did not sustain the contention that the gifts were made in contemplation of death where it was established that there was in fact another motive for the transfer.*

In so holding, the court said:

> "When the evidence in the case is considered in the light of this test, it does not seem to me that it can be said that the transfers were made by Mrs. Graves in contemplation of death. It is true that, when each of the transfers was made, she had attained a great age. That is the only fact supporting the contention of the defendant. It is not sufficient. While it is certain that a very aged person must realize that death is not far distant, it cannot be said, in the absence of any other proof as to apprehension of death, that such a person, from the fact of age alone, apprehends death as imminent and likely shortly to occur out of the natural course of events. If, at the time of the transfers, Mrs. Graves had had knowledge, not only of her great age (of which, of course, she did have knowledge), but had knowledge also that she was then suffering from an illness likely to be fatal, the knowledge of these two facts might justify a conclusion that she expected death imminently. But

she did not have knowledge that she was suffering from a fatal illness. She was not suffering from a fatal illness. Her illness was one from which she had suffered for 40 years. Therefore I think that it cannot be said that she had in her mind the expectancy of death in the near future. *Moreover, even if it might be said from the evidence that she did have such an expectancy in her mind, it seems to me it cannot be said that was the motive actuating the transfers of the property in question. The evidence points to other motives that much better explain and justify the transfers. The transfers were not made within two years prior to the death of Mrs. Graves, and there is no presumption under the act that they were made in contemplation of death."*

In *In re Safford et al.* v. *United States, supra,* the court in reversing the ruling of the Commissioner of Internal Revenue held that the gifts there in question were not made in contemplation of death. The donor died on January 11, 1923, at the age of eighty-eight. Four years prior thereto, on May 31, 1919, she had executed a will by the terms of which she left to the donees who were also her nieces and with whom she lived (the donor having no issue) the sum of $100,000 each. Thereafter and on April 9, 1921, two years prior to her death, she conveyed to the donees certain securities having a value of $442,000, representing approximately one-quarter of her entire estate. The gift was prompted by the advice of her attorney to the effect that since a substantial portion of her estate consisted of property located in Mexico, and since conditions in that country were unsettled, there might be some question as to whether the natural objects of her bounty would upon her death actually receive the provisions made for them in her will. In holding

that under these circumstances the government had failed to prove that the gifts in question were made in contemplation of death, the court said (pp. 245-246):

> "If the rule laid down in the case just cited is applied, we think it clear that the transfer in question cannot be held to have been made in contemplation of death. The evidence fails to show that the decedent had any reason to expect death in the very near future. There was nothing in her demeanor or her activities to indicate such an expectation. On the contrary, the circumstances surrounding the execution of the transfers in question tend to show that she did not expect death in the near future. The evidence shows that in the first instance the gifts were actuated by the advice of her attorney who called attention to the condition of her property in Mexico and suggested that she make some provision or codicil so as to make sure that the persons who were nearest to her received the full amount of the legacies in the event that upon her death her estate might not be equal to meet all of the legacies, and that her purpose was also to gratify a desire that the donees should receive the money at once in order that they could enter upon the enjoyment of it.
>
> There is, upon the other side, the fact of her advanced age with a comparatively short expectancy of life, and also the fact that her hands shook, especially when writing, and not long after the execution of the transfers, she had a discharge from one of her breasts which, however, subsequently healed. But advanced age alone is insufficient to show that a transfer was made in contemplation of death, and none of the other matters are sufficient to show at the time of the transfers any belief on her part in the near approach of death. The evidence shows that she was cheerful, active for a person of her age, and

> in other respects her acts and conduct were not such as to indicate that she had any fear or expectation of impending death."

Similarly, in *Off* v. *United States, supra,* the court in reversing the ruling of the Commissioner of Internal Revenue, found the following facts:

The donor was a man of advanced age, who was apparently enjoying normal health. On April 8, 1919, he executed a will leaving substantially all of his estate to his sons. On the following day, April 9th, he transferred by way of a gift, in equal parts, to his sons, stock in a mining company, valued at $147,000 and representing one-fourth of his entire estate. He died on June 26, 1920, fifteen months after the making of this gift and after the execution of his will. The court held that the fact that the making of the gift and the execution of the will were almost contemporaneous in time in no way created any presumption that the gift was made in contemplation of death when it was found that the donor was in apparently good health at that time, and that the gift was prompted by the belief that his sons were entitled to those securities. It was held in effect that although the gift had changed the will *pro tanto* in so far as it converted into a gift *inter vivos* what had formerly been intended as a gift *causa mortis,* but that this fact, even when buttressed by the presumption contained in the federal statute did not prove the Government's case. In so holding, the court said:

> "It is strenuously urged that, because the execution of the will and the gift of the stock to the sons the next day came so closely together, they were a part of the same transaction, and that the transactions should be construed as a single testamentary disposition of the property here involved.
>
> * * * * * *

> In this case, it is apparent that, between the time of the execution of the will and the making of the gift, the decedent concluded he wanted to nullify the testamentary disposition in the will and change the stock from a gift causa mortis to a gift inter vivos, which was the effect of what he did. The decedent had a perfect right to do exactly what he did, and, from the nature of the transaction, it is scarcely possible that he gave the estate tax feature the slightest consideration. The transaction shown by this evidence discloses the fact that the testator did not wish to make a testamentary disposition of the stock, but rather a gift in praesenti."

These cases constitute a fairly comprehensive review of the authorities on the question as to what facts suffices as a sufficient basis for the inference that a gift was made in contemplation of death. *In effect, they hold that even where by statute a presumption is created that a particular gift was made in contemplation of death, yet if the evidence fails to furnish any testimony in support thereof, but on the contrary, establishes a motive other than the contemplation of death for the transfer, the presumption incorporated in the statute is defeated even though the decedent at the time of the transfer had reached an advanced age and/or was afflicted with a serious disease, and/or at one time had contemplated a testamentary transfer of the same property to the donee.* If there is any merit in the reasoning of these cases, it follows that the determination of the Comptroller was unwarranted. For certainly there was no testimony in the case at bar to the effect that the gift in question was made in contemplation of death, and with equal assurance, it may be said that there was an abundance of evidence to the effect that in the making of the gift, he was prompted by other motives.

Moreover, it should be noted that the Comptroller's determination is predicated upon and imports the inferential finding that Mr. Grabfelder was motivated in making this gift by the desire to relieve his estate in part, at least, from the imposition of an inheritance tax. Although the testimony adduced before the Commissioner is entirely inconsistent with that theory, the Comptroller must be deemed to have arrived at that conclusion. The absurdity of that contention is manifested by the provisions of Mr. Grabfelder's will, which requires all inheritance taxes to be paid out of the residuary estate, and not to be deducted from the legacies. When it is realized that some of the numerous residuary legatees received as little as one one hundred thirty-second part of the residuary estate, it becomes apparent that the decedent could have had no such motive. By the terms of his will, Mr. Grabfelder first made ample provision for his wife. Then, after setting forth the fact (p. 106) that he made no provision for his brother "only for the reason that I know that he would have no use therefor," he proceeded to distribute his estate among his other realtives. The only inference that can be deduced from this distribution is that there was no one so dependent upon him, or whom he was so greatly interested in, as to create in his mind the thought of making any effort toward increasing the size of his estate. Certainly, having divided his residuary estate into one hundred thirty-two parts, he could not have been contemplating any attempt at avoiding the imposition of an inheritance tax in order that each one one hundred thirty-second part should be as great as possible.

It follows also that the affirmance of the Comptroller's determination both in the Prerogative

Court and in the Supreme Court was erroneous for the reason that the record contained no evidence—certainly no substantial evidence—in support of the Comptroller's findings (*In re Estate of Dupignac,* 96 N. J. Eq. 284; *In re Estate of Ralph E. Miller,* 98 N. J. Eq. 318).

The presumptions indulged in by the Comptroller in arriving at his determination were at variance with the testimony adduced before him. It follows, therefore, that that determination was not based on any evidence, and should, therefore, have been reversed in the Prerogative Court.

CONCLUSION.

The judgments of the Prerogative Court and of the Supreme Court affirming the determination of the Comptroller should and must be reversed.

Respectfully submitted,

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The Hecla Press, 225 Varick St., N. Y. Tel. Walker 1480.

New Jersey Court of Errors and Appeals

In the Matter of the Inheritance Tax upon the Estate of Samuel Grabfelder, deceased.	*On Certiorari* / *On Appeal*

BRIEF OF ATTORNEY GENERAL FOR DEFENDANT-APPELLEE

This is an appeal from a judgment of the Supreme Court, entered January 22, 1930, affirming a decree of the Prerogative Court, entered February 11, 1929, which in turn sustained an assessment of transfer inheritance taxes by the Comptroller of the Treasury in the Matter of the Estate of Samuel Grabfelder, deceased, late of Atlantic County, New Jersey.

The only point at issue is whether a certain transfer by the decedent a short time prior to his death was made by him in contemplation of death, within the meaning of the Transfer Inheritance Tax Act—section 1, subsection 3, Chapter 288, Laws of 1909, as amended and supplemented to the date of his death.

STATEMENT OF FACTS

The determination of this issue must, of course, depend almost entirely upon the facts of the case, which of necessity must be reviewed in detail in the argument to follow. It is, therefore, not deemed advisable to relate the facts at length at this point. The statement will be confined to a very brief resume of the circumstances leading up to the Comptroller's assessment and its affirmance by the Prerogative Court and the Supreme Court.

Samuel Grabfelder, the decedent, died a resident of Atlantic County, New Jersey, testate, April 17, 1920. His personal estate at the time of death, exclusive of the transfer in question, was valued by the Comptroller at $1,201,370.01. The property which was the subject of the transfer was valued at $280,382,50. (R. 100.)

On August 22, 1918, one year, seven months and twenty-five days prior to the date of his death, Mr. Grabfelder transferred to his wife, Delia Grabfelder, in the form of a gift, securities of an estimated market value of $280,382.50. (R. 96, 97.) Contemporaneously therewith, the decedent amended by codicil, an existing will to take into account this gift of approximately $280,000 to his wife. (R. 111, 112.)

Considering all of the circumstances, including the physical condition of the decedent at the time of the transfer, the testamentary nature thereof, and the various other elements which will be reviewed in detail hereinafter, the Comptroller concluded that the transfer was one made in contemplation of the death of the donor and was therefore within the provisions of section 1, subsection 3, Chapter 228, Laws of 1909, as amended by chapter 151, Laws of 1914. Accordingly, bill for inheritance tax, including that chargeable upon the transfer determined to have been made in contemplation of death, was rendered by the Comptroller under date of June 1, 1927. This tax was paid under protest and appeal taken, as by statute provided, to the Prerogative Court for the purpose of reviewing the determination of the Comptroller. The assessment was sustained, as evidenced by decree entered under date of February 11, 1929. (R. 102, 112.) On review by certiorari the Supreme Court affirmed the decree below. ((R. 3a.)

GROUNDS FOR REVERSAL

The prosecutors-appellants (hereinafter referred to as appellants) allege that the decree of the Prerogative Court should have been reversed by the Supreme Court because:

(a) *The gift was not, under the facts, made in contemplation of death.*

(b) *There was no proof in the record to sustain the findings of the Comptroller and the Prerogative Court that the transfer was made in contemplation of death.*

(c) *The Prerogative Court erred as a matter of law in holding that the burden on the appeal was on the appellants.*

ARGUMENT

POINT I

THE BURDEN ON APPEAL TO THE PREROGATIVE COURT FROM THE COMPTROLLER'S ASSESSMENT IS UPON APPELLANT'S TO PROVE WHEREIN THE ASSESSMENT IS ERRONEOUS.

We shall pass, for a moment, grounds (a) and (b) and deal with appellants' objection to the affirmance of the assessment by the courts below as raised by ground (c). Appellants claim that the Prerogative Court, and also the Supreme Court, because of its affirmance of the decree below, erred "in holding that the burden of proof was upon the appellants."

Vice-Ordinary Buchanan, in his conclusions in the case sub judice, says: (R. 12a.)

> *"The burden on the appeal is on appellants.* It is the conclusion of this court that they have failed to sustain such burden; that they have failed to show that the Comptroller erred in adjudging the transfer in question to be a gift made in contemplation of death.'"
> (Italic Appellee's.)

The "burden" there referred to is of the common garden or hornbook variety and not of the statutory specie as appellants seems to think.

The burden of showing error on an appeal is always on the appellant.

> *Loweree* v. *Newark,* 38 *N. J. L.* 151.
> *Smith v. Newark,* 33 N. J. Eq. 545, 552.

The presumption in inheritance tax matters is in favor of the correctness of the assessment and the burden is on the party alleging error to show affirmatively wherein it is wrong.

In re Pierce, 89 N. J. Eq. 171, 172.
In re Bottomley, 92 N. J. Eq. 202, 204..
In re Dupignac, 96, N. J. Eq. 284, 287.
In re Moore, 7 N. J. Adv. Rep., 659. 145 Atl. Rep. 727.

Vice-Ordinary Backes, in dealing with an appeal involving the Comptroller's valuation of stock of a close corporation, says:

> "* * *The presumption is in favor of the correctness of the assessment, and the burden is upon the appellant to point out and establish wherein it is wrong. * * *"
> (*In re Pierce, supra,* at p. 172.)

In an appeal from the Comptroller's determination as to the taxability of a gift in contemplation of death, Vice-Ordinary Buchanan says:

> "It is not the function of this court to weigh the evidence or substitute its judgment for that of the comptroller, but only to determine if error has been committed. * * *"
> (*In re Dupignac,* supra at p. 287)

This rule regulating procedure on appeals from inheritance tax assessments is so well settled as to hardly require further discussion, or citation of additional authority.

Appellants seem to think that the lower court was referring to the two year statutory presumption under the inheritance tax act. It is respectfully submitted, however, that there is not the slightest intimation anywhere in the opinion that the Vice-Ordinary, by the foregoing expression, was referring to the statutory presumption that all gifts made within two years of death are presumed to have been made in contemplation of death, unless proved otherwise. The opinion does not say that

the gift is "presumed" to have been made in contemplation of death. Merely, that if appellants' claim that the Comptroller's determination that the gift was so made is erroneous or illegal, the "burden" is upon them to affirmatively establish that fact by clear and convincing proofs.

The act first raising the two year presumption did not become effective until March 11, 1922 (Chapter 174, Laws of 1922), whereas the decedent died April 17, 1920. Appellee on the argument of this case before the Prerogative Court readily conceded that the burden of proving the transfer to have been made in contemplation of death was in the first instance upon him, but did, of course, urge that he had amassed sufficient evidence to sustain his findings and, therefore, it was incumbent upon appellants to definitely establish wherein his determination was erroneous and illegal. The Prerogative Court and the Supreme Court in affirming the assessment have approved this contention.

POINT II

THE JUDGMENT OF THE SUPREME COURT AFFIRMING THE DECREE OF THE PREROGATIVE COURT SHOULD NOT BE REVERSED UNLESS AGAINST THE CLEAR WEIGHT OF THE EVIDENCE.

Before passing to a consideration of the testimony and proofs upon which the Comptroller based his conclusion that the transfer *sub judice* was made in contemplation of death, it is appellee's desire to point out one other procedural rule which stands squarely in appellants' way and that is that this Court, on appeal from a judgment of a trial court, will accept the findings of fact of that court if there be any legal evidence to warrant them.

Town of Montclair v. Scola, 76 N. J. L. 137.

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

Sexton v. Newark, Dist. Tel. Co., 84 N. J. L. 85.

That is the rule whether the proceeding is to review the findings of an *inferior court,*

Sexton v. Newark Dist Tel. Co., supra,

or of an *administerial officer;* or *board* which has acted in a quasi-judicial capacity.

Zober v. Turner, 7 N. J. Misc. Rep. 171.
Martin v. Smith, 100 N. J. L. 50.
Crane v. Jersey City, 90 N. J. L. 109.
Reilly v. Jersey City, 64 N. J. L. 508.

It hardly requires mention that the question of whether a transfer was made in contemplation of death is purely one of fact:

Gleason & Otis on Inh. Taxation (4th Ed.) p. 359.
In re Sacks, 139 Atl. Rep. 53.
People v. Danks, 289 Ill. 542.
People v. Kelly, 218 Ill. 509.

The Prerogative Court has many times said that on an appeal from an inheritance tax assessment by the Comptroller it will not weigh the evidence for the purpose of reaching an independent conclusion, but will inquire only as to whether there is any substantial evidence upon which the findings of the Comptroller are based, and if there is, its duty is to affirm the assessment.

In re Pierce, 89 N. J. Eq. 171, 172.
In re Hall, 94 N. J. Eq. 398, 406.
In re Dupignac, 96 *N. J. Eq.* 284, 287.
In re Moore, 7 N. J. Adv. Rep. 659. 145 Atl. Rep. 727.

Vice Ordinary Backes, in *In re Pierce,* supra, states the rule concisely: (p. 172)

> "* * * It is not the duty nor the privilege of this court on appeal, to weigh the evidence or to substitute its judgment, as to values, for that of the comptroller, and assess-

ments will be upheld if legal principles have been correctly applied and the appraisement is supported by the evidence."

On an appeal from the findings of fact of a trial court it is elementary that the appellate court will not weigh the evidence. Its duty is to affirm the decree below if there be any legal evidence upon which it is founded.

Sexton v. Newark, Dist. Tel. Co., supra.
Ryer v. Turkel, supra.
Israelow v. Kreitzer, 2 N. J. Misc. Rep. 154.
Zober v. Turner, supra.
Martin v. Smith, supra.

The Supreme Court, in a *per curiam* in the case of *Zober* v. *Turner, supra,* clearly states the rule: (p. 178)

"* * * It is not within our province, under the decisions already referred to and others that might be cited, to review the entire evidence with a view of ascertaining whether or not we might reach a different conclusion from that reached by the director, but, as was observed in another case, the rule is well settled as follows: 'If the court were not circumscribed and limited in its duty in this instance by the well settled rule of law applicable to cases of this character, it might properly be urged to weigh the testimony and, if possible, reach a conclusion different from that which has been reached by the trial tribunal. *But the settled rule of law is that if there be evidence upon which the trial tribunal may reasonably be found its conclusion of guilt or innocence, this court will not reverse the judgment by weighing the testimony for the purpose of forming an independent judgment. If the judgment of the trial court can be fairly supported by the record,*

the duty of this court is at an end so far as further investigation is concerned.'"
(Italics—Appellee's)

The Supreme Court reviewed the decree of the court below by *writ of certiorari.* The function of writ in such a case is that of a *writ of error,* (Ryer v. Turkel, supra) and for this reason the Supreme Court deemed itself bound to accept the findings of the Prerogative Court if there was any legal evidence to warrant them. Justice Green in the case of *Ryer v. Turkel,* supra, says: (p. 683)

> "* * * The function of a writ is that of a writ of error. Coles v. Blythe, 40 Vr. 666, 668 (1903). The Supreme Court in such a case does not settle disputed facts or review the evidence, but accepts the findings of the inferior court upon the facts, if there be any legal evidence to warrant such findings.* * *"

The jurisdiction of the Prerogative Court in matters arising under the inheritance tax laws of this state is appellate only,

In re Miller, 81 N. J. Eq. 476.
In re Lake, 82 N. J. Eq. 327.
In re Budell, 100 N. J. Eq. 273.

so that it is readily discernible why the Prerogative Court has long since adopted the rule as announced by the foregoing cases.

The Prerogative Court, in the review of an inheritance tax appeal, fully recognizes the fact that it is not necessary that the evidence supporting the assessment should be so conclusive as to leave no room for doubt that the transfer was made in contemplation of death. It is enough if there be sufficient evidence,

> "* * * from which a reasonable man might fairly, even though not necessarily, draw the inference of fact that he made the gifts in the contemplation of death."

(*In re Dupignac,* supra)

See also:

Conway's Estate, 120 N. E. Rep. 717, 719.
In re Pauson, 186 Cal 358.

The Court in *Conway's Estate,* supra said: (p. 719)

> "The trial court inferred from the facts and circumstances of the case shown by the evidence that the conveyances under discussion were made in contemplation of the death of the grantor. While there is no direct evidence warranting such inference, when the age, condition of health, statements, conduct and surroundings of the decedent are considered in connection with the conveyances made by him, it appears that the trial court may reasonably have drawn such inference, though it may be said that other and contrary inferences may with equal, or greater certainty be drawn from the facts and circumstances shown by the evidence."

Vice Ordinary Buchanan in the matter *sub judice* says: (R. 14a)

> "It cannot be said under all the evidence that the Comptroller erred in finding that the gift so long withheld and finally made in substitution for a testamentary gift, was made in the contemplation of the real possibility of death in the not distant future, and in lieu of a testamentary bequest."

In other words, the Court concluded that while there was testimony both ways, nevertheless, there was sufficient, substantial evidence from which the Comptroller might reasonably draw an inference of fact that the transfer was made in contemplation of death and that that Court on appeal would not reverse the determination merely because there may be some testimony to the contrary.

The Comptroller's findings have been judicially scrutinized twice and in both instances the assessment has been upheld. It is therefore appellants' task to establish that each of these three agencies have erred in its determination. Appellants, to successfully urge reversable error, must clearly show that there is no substantial evidence in support of the findings of the two judicial and one administrative agency which have heretofore ruled upon this case. That, it is respectfully submitted they have failed to do.

POINT III

THERE IS AMPLE EVIDENCE IN SUPPORT OF THE FINDINGS OF FACT OF THE COMPTROLLER AND THE AFFIRMANCES BY THE COURTS BELOW.

Both the Supreme Court and the Prerogative Court found that there was sufficient, substantial evidence in the record upon which the Comptroller based his findings and, therefore, affirmed the assessment. This evidence, and a few of the salient rules applicable in such matters, will be reviewed as briefly as possible.

Testimony relative to condition of health is not the sole test of whether a transfer is made in contemplation of death.

It is well settled in this State that gifts *inter vivos,* as well as gifts *causa mortis,* are within the intendment of that section of the statute taxing transfers made in contemplation of death, when the circumstances are such as to lead to the conclusion that death within the reasonably near future was the impelling motive therefor and such gifts were testamentary in character.

In re Bottomley, 92 *N. J. Eq.* 202.
In re Hall, 94 N. J. Eq. 398.
In re Dupignac, 96 N. J. 284.
Pierce v. Bugbee, 128 Atl. Rep. 252.
aff'd 101 N. J. Law, 411
128 Atl. Rep. 253.

The same view is held by other jurisdictions.

In re Reynolds' Estate, 169 Cal. 600.
Merrifield v. People, 212 Ill. 400.
State v. Pabst, 139 Wis. 561.
Conway's Estate, (*Ind.*) 120 N. E. 717.

It is therefore not at all necessary for the State to establish that the donor was covered with the damp of death at the time of the transfer in order to bring the same within the statute. For this reason facts relating to the condition of health are not solely dispositive of the issue.

Appellants emphasize the testimony of various witnesses relating to the decedent's physical condition at about the time of the transfer. Appellee does not, of course, deny that this is an important factor, but does respectfully submit that it is not the sole test of whether a transfer is, in fact, taxable. There are many other elements, of equal importance, which must be taken into account in order to determine, if possible, the "intent" of the donor in making the transfer, since, after all, the final determination must hinge upon whether the donor "intended" the transfer in contemplation of his death.

Needless to say, what was in the decedent's mind at the time of the transfer is a matter of conjecture.

Kunhardt v. Bugbee, 3 N. J. Misc. Rep. 1107, 1109, 130 Atl. Rep. 660.

and must be gathered not merely from the condition of his health, as alleged in many instances by the mere conclusions of *interested witnesses,* but from a consideration of all of the facts.

Rosenthal v. People, 211 Ill. 306.
People v. Danks, 289 Ill. 542.
Re Pauson, 186 Cal. 358.

The Supreme Court of Illinois in *People v. Danks,* 289 Ill. 542, says:

> "* * * What prompts the making of such a conveyance rests upon the facts and circumstances surrounding each particular case. No general rule can be formulated which will fit all cases, but each case must be examined and determined on its own facts and circumstances, in the light of the experience which the courts have gained in dealing with such matters. *For this purpose the donor's age, physical condition and any action contemplated to be taken by him with respect to his health, as well as the length of time he survives the making of the transfers are all proper matters to be considered in determining whether or not the act was done in contemplation of death.*"
>
> (Italics Appellee's)

The courts have not overlooked the fact that the duty of the State to collect proof establishing the taxability of the transfer is not an easy one and one which can be fulfilled by showing conclusively that the transfer was made in contemplation of death. This is principally so by reason of the fact that in most instances the only testimony available is from parties directly interested in the result or from those who have been employed by them or, at least, to some extent obligated to them.

> *Matter of Spaulding,* 49 App. Div. 541, 555.
>
> *In re Price's Estate,* 116 N. Y. Supp. 283, 285.

Mr. Justice Spring in his dissenting opinion, in *In re Spaulding, supra,* states appellee's contention precisely (p. 555):

> "In this case the proof depended upon the recipients of the old gentleman's bounty. Their interest was averse to the imposition of the tax. Their *ipse dixit* that the gifts were not in expectation of death would, of course, not be controlling. If Mr. Spaulding was covertly striving to keep from the tax-

> gatherer this large property, he would not proclaim that purpose from the house tops. We must gather his intention from the circumstances surrounding the transaction."

In Price's Estate, supra, the Court said, (p. 285):

> "* * * To prove that property is transferred in contemplation of death is exceedingly difficult as the only parties whose intimacy with decedent would afford them an opportunity of being cognizant of his intentions are usually those whose interests would be served by testimony to the effect that the gift was not made in contemplation of death; and the State is therefore compelled to rely upon conclusions derived from the testimony of witnesses who are interested in disproving its contention. It is also in large measure the attempted proof of the operations of a man's mind."

Then, too, such testimony at the most is generally only in the nature of conclusions, since the inquiry must, in the final analysis, turn on whether the decedent, in view of his condition of health, must have apprehended death and made the transfer when he did in anticipation thereof. In other words, it is testimony attempting to prove what was in the mind of a dead man.

Other factors surrounding the transfer are therefore of most vital importance in reaching a conclusion. Such factors are possible of definite proof and it has been found, in the majority of cases, that they throw far more light upon the real intent of the donor than do volumes of testimony of interested witnesses as to his physical status.

These elements, of course, vary in different cases but the following constitute those which generally may be looked to as best indicating the intentions of the donor:

(a) *Condition of health.*
(b) *Age of decedent.*
(c) *Testamentary character of transfer.*

(d) *Does the transfer constitute a material portion of his estate?*
(e) *Length of time donor survives transfer.*
(f) *Motive prompting transfer.*

These factors will be considered in their order.

(a) Condition of Health.

The testimony of the witnesses is quite confusing as to all of the important features surrounding the donor's physical condition. In the first place, it is hard to tell with certainty as to whether the decedent was, in fact, attended by a physician at or about August, 1918, when he made the gift of a value of approximately $280,000 to his wife. Delia Grabfelder, widow of the decedent and donee of the transfer, says (R., 78):

> "My husband, to my knowledge, never consulted any doctor, for a long time before and for a long period after August 22, 1918."

To the contrary, we have the statement of Alexander Vollmer, decedent's personal secretary, to the effect that (R., 90):

> "Decedent went to Dr. Riesman, of Philadelphia, about every six months for perhaps ten years prior to his death for a general looking-over. Dr. Riesman told him to go slow and that he should not have any excitement. * * *"

Elsie Goldman, niece of the decedent by marriage, says (R., 54), that the decedent had been seeing Dr. Riesman for "years and years before" the two-year period immediately preceding death. Joseph Kern, decedent's partner in business, says (R. 38), that the decedent was regularly attended as early as 1913.

There appears to be no reason whatever for any conflict in the testimony as to whether the decedent was receiving the regular attention of a physician. Certainly Mrs. Grabfelder must have known

whether her husband was being regularly attended for a considerable period before and a considerable period after August 1918. Notwithstanding the testimony of three other witnesses, however, she declares that her husband was not receiving medical attention during this period. It would seem that the conclusion must be that she is mistaken.

When we look to the reason for the attentions of a physician we are met again with the same conflicting stories. Mrs. Grabfelder (R., 10) intimates that the decedent was seeing a doctor because *she* wished it. She further says that the decedent on one occasion, when returning from a visit to the doctor (Dr. Woolbert), stated to her that the doctor said (R., 10): "Grabfelder, you're all right, don't come around bothering me. Let me attend to people who need me." Dr. Woolbert"s testimony, however, is quite to the contrary. He says (R., 8), that he persuaded the decedent to come and see him regularly and that he advised decedent that a man of his age should submit to constant medical supervision.

The testimony of Mrs. Grabfelder and Dr. Woolbert is evidently for the purpose of establishing that the decedent gave little concern to his health. This does not seem to coincide with statements of Joseph Kern (R., 38), to the effect that: "Mr. Grabfelder was a man who paid particular attention to his health. I recall when my mother was operated on in Atlantic City, she was then about seventy years old and she is now eighty, which would make it about ten years ago, at that time he had regular attendance of a doctor, not that he needed any but I think that he just wanted to keep in good physical condition and the doctor who he recommended to me was Dr. Riesman."

Several witnesses testified as to the robust health of the decedent. Appellants in their brief, of course, fully point out all of these favorable declarations. However, there are many statements to be found in the record which are quite favorable

to the conclusion that the decedent was not nearly the picture of health that some of the testimony might lead one to believe.

While Dr. Woolbert testifies (R. 7) that: "Mr. Grabfelder was a man who from appearance seemed to be in good physical condition for one of his age," it is hardly conceivable that as of February 20, 1920, when the decedent first submitted to examination by Dr. Woolbert that he was in perfect physical condition. It is noted that the doctor's statement is qualified in three respects. He says that from "appearance" he "seemed" to be in good physical condition. Also, that the expression "good physical condition" must be considered in the light of decedent's age.

The record shows that Dr. Woolbert examined the decedent on the following dates: (R. 8.)

February 20, 1920;
March 10, 1920;
March 20, 1920;
March 24, 1920;
April 1, 1920;
April 9, 1920;
April 16, 1920.

Is it to be believed that the decedent could have been in such fine physical condition at that period in view of these various physical examinations all within a period of two months and terminated by death in April, 1920?

Dr. Riesman, the former physician, says that as of February, 1920, the decedent's heart gave definite signs of weakness. (R. 94.) Therefore even the doctor's' testimony is not in accord.

The fact is that Dr. Woolbert, when interviewed by the Special Investigator of the Comptroller, said that the decedent had had a "warning" or two, "perhaps." (R. 90.) Further, that he had remonstrated with the decedent about taking cold baths because of the fact that the shock was too severe. (R. 90.) Dr. Woolbert attempted to qualify the statement as to the "warnings," but he

does not seem to have tempered it much. At page 9 of the record he says: "I am asked whether I made a statement to Mr. Lanning that Mr. Grabfelder had had a warning. I remember making no such statement. If I used the word 'warning' at all, it was merely the expression of my thought from a medical standpoint that every man when he arrives at a certain age has what might be termed a 'warning.' "

While it is true that the testimony of Dr. Woolbert deals with the condition of the decedent's health from February 20, 1920, to the date of death, whereas the gift was made during August of 1918, it is referred to for the purpose of illustrating how testimony of witnesses respecting the condition of health runs. For instance, Dr. Woolbert says that the decedent's condition of health was good even as of that time, which was only approximately two months before death, when he was submitting to regular examination by his physicians and with death following shortly and when decedent's former physician (Dr. Riesman) had stated that decedent's heart had given definite subjective and objective signs of weakness. It is hard to believe that a man of the age of seventy-three whose heart had given definite signs of weakness and who was receiving regular medical attention could be considered as being in "good physical condition," as claimed by Dr. Woolbert and some of the other witnesses.

It appears most likely that the doctor's explanation of what he meant by the word "warning," if he used it at all, accurately expresses the facts of the decedent's case. He was a man advanced in years and unquestionably had a heart condition which is borne out by the testimony. He, in all probability, had such a "warning," as this Court concluded Mr. Kunhardt must have had in the case of *Kunhardt v. Bugbee, supra,* and which was found sufficient to arouse the decedent's apprehension of death; perhaps not immediately, but within the reasonably near future.

Dr. Woolbert says (R. 8): "I did not find any more heart trouble than I would expect in a man of his age nor did I tell him he had heart trouble * * *."'

Dr. Riesman, the physician who had attended the decedent for many years prior to 1920, says (R. 94): "I would state that the late Mr. Samuel Grabfelder prior to the time of his death was always of clear mind. With regard to his physical condition I would say that Mr. Grabfelder had slight trouble with his heart, not enough during the year 1918 to interfere materially with his daily routine."

Horace Stern testifies (R. 24) as follows: "He did tell me, just what time I cannot say, that he thought he had a bad blood circulation. I think he may possibly have gone so far as to say that he thought he had a heart condition." Further, at pages 25-26 of the record, Mr. Stern says: "He always struck me, if you want my opinion—he always struck me as a man in perfectly good health, but who may have been told or may have had the thought, and possibly or probably was the fact, that he had some heart condition and that he was conscious of it and that it may have bothered him in the sense that it has bothered me for a great many years."

Judge Stern, when interviewed by the department's investigator (R. 92), said: "I knew for perhaps ten years that Grabfelder had a high blood pressure, though I have no reason to believe that he made the gift in contemplation of death."

This conclusion of Judge Stern does not appear to be at all without foundation when we remember that the decedent for many years had been regularly attended by a physician and especially in view of the fact that Dr. Riesman's letter dealing with the decedent's physical condition talks entirely of the condition of his heart.

Louis E. Stern, Esquire, who drafted the decedent's will in 1916, says (R. 92): "I didn't know so much about him at the last, but I do know he

was subject to some sort of trouble and had to take care of himself. I met him once on the Boardwalk and he told me he would have to stop playing pinochle because the excitement affected his heart."

It seems reasonable to conclude from the foregoing that the medical solicitations of the donor were due to a heart condition of which he was well aware. Dr. Woolbert was the "heart man" for the draft board of Atlantic City during the war (R. 90), and it is not reasonable to presume that the decedent was so dull of apprehension as not to take all of these facts into account. (*Kunhardt* v. *Bugbee, supra.*)

Mr. Vollmer, decedent's personal secretary, said that decedent was examined every six months for perhaps ten years prior to death by Dr. Riesman and that the doctor had "told him to go slow and that he should not have any excitement." (R. 90.)

The testimony is such, in appellee's estimation, as would permit a reasonable man to conclude that the transfer by the decedent on August 22, 1918, was made under apprehension of death. The Prerogative Court, in *In re Dupignac,* 96 *N. J. Eq.* 284, 286, said:

> "This is, of course, not all the evidence, but is enough to show that sufficient basis existed from which a reasonable man might fairly, even though not necessarily, draw the inference of fact that he made the gifts in contemplation of death."

When we remember that several witnesses testified that decedent had been attended regularly by a physician for several years before death; that he had a heart condition for many years and he was concerned therewith; that his two physicians each declared that he had heart trouble and that he had had "warnings" of his condition; it can hardly be said that the decree of the Prerogative Court affirming the findings of the Comptroller lacks substantial evidence to support it.

Since final disposition of matters of this kind is dependent entirely upon the facts and each case must therefore be decided upon its own merits, with little aid coming from cases of a similar nature (*Kunhardt* v. *Bugbee, supra*), it has generally been the practice to dispense with a consideration of the conclusions reached in other reported cases except insofar as they relate to general principles. However, in this particular matter it is thought that a brief reference to the facts of two or three New Jersey cases will be of value to this Court and may throw some light upon that condition of health which is such as to warrant a tax on gifts *inter vivos.*

In re Bottomley, 92 *N. J. Eq.* 202, the decedent was 72 years of age and died of apoplexy. A stroke some years previously was looked upon by the Court as a sufficient warning to make decedent apprehend death. The donnor survived the transfer by one year and three months.

In re Hall, 94 *N. J. Eq.* 398, decedent died at age of 74 years. Heart trouble was the cause of death (p. 406). He survived the transfer by approximately two months.

In re Dupignac, 96 *N. J. Eq.* 284, the donor died of heart trouble at the age of 72 years (p. 287). Two gifts were involved. The decedent lived a year and five months after the first and a year and two months after the second. The Prerogative Court, in the Dupignac case, said:

> "Again, the daughters swear that 'during the whole of the year 1920' decedent was advised by his physician that 'there was no reason to anticipate that he would not live for many years.' It would seem highly probable that this statement was made by the physician in response to inquiry by decedent, and that such inquiry showed some solicitude by decedent, * * * ." (P. 287.)
>
> "The fact that, in connection with his advanced age, he had heart disease and knew

it, is not by any means eliminated as a factor in the case by the fact that his doctor had told him, in 1920, that there was no reason for him to anticipate that he would not live for many years to come. It is a matter of common knowledge that persons who know that they have heart disease are commonly apprehensive as to death ensuing therefrom, and the fact that decedent made inquiry in that behalf shows that he had at least some solicitude in regard thereto." (P. 288.)

Mr. Grabfelder had been consulting a physician for years before the transfer and it is not at all unreasonable from all of the facts of the case to infer that his physical condition gave him considerable concern, and was such, when coupled with the other elements of the case, as will be reviewed later, to permit a reasonable man to conclude that the transfer was prompted by the decedent's anticipation of death. This view the Prerogative Court accepted in affirming the assessment *sub judice*. Vice-Ordinary Buchanan, in the course of his opinion (R. 122), says:

> "There is also evidence in the record to show that he had heart disease, and knew it, for some time before the transfer. There is evidence in contradiction of this also, but when it is weighed, with the consideration of the respective witnesses, it assuredly cannot be said that an affirmative finding on this point would be unjustified."

(b) Age of Decedent.

Advanced age is an element which carries great weight in all matters of this kind. It is carefully pointed out as a factor in several New Jersey cases:

In re Bottomley, supra.
In re Hall, supra.
In re Dupignac, supra.
Kunhardt v. *Bugbee, supra.*

Other jurisdictions so treat it:

State v. *Thompson,* 154 *Wis.* 320.
People v. *Danks, supra* (Ill.).
People v. *Tavener,* 300 *Ill.* 373.
In re Pauson's Estate, supra (Cal.).
Matter of Dunne, N. Y. L. J., May 25, 1914.
Matter of Fitzgibbin, 173 *N. Y. S.* 898.

Mr. Grabfelder, at the time of the transfer, was approximately seventy-three years of age; that period in life when even the doctors concede that heart trouble is common. He had passed the scriptural mark of three score and ten years when death is not on the horizon of life but within the near future. (*In re Bottomley.*) He had many years before retired from business and in 1918 was unquestionably far more interested in the distribution of his property than in the acquisition of more.

The decedent's age, coupled with the fact that he had had "warnings" of his heart condition, must certainly justify the determination that he was apprehensive of death and made the transfer in the light thereof. (*Kunhardt* v. *Bugbee, supra; In re Dupignac, supra.*)

(c) Testamentary Character of Transfer.

That the transfer of the securities by the donor to his wife on August 22, 1918, was testamentary in character seems so conclusive on the face of the record as to hardly require very lengthy discussion. While it is true that the testimony at some points is to the effect that the donor had intended for many years to carry out the gift, nevertheless, it is a fact that he did not do so until within a very short time of his death. He had made a will in 1916 (R. 91). On June 4, 1918, the decedent executed another will—the one which was finally probated—by the terms of the eleventh paragraph of which he placed $500,000 in trust, to pay the net income therefrom to Delia Grabfelder, his

wife, for life, with disposition of remainder upon death to such persons or charitable institutions as she might by last will and testament appoint. On August 22, 1918, at the same time he made the gift to his wife, he executed a codicil to his last will and testament, under the terms of which he modified that particular clause of paragraph eleven by changing the figure $500,000 to $200,000 in order to give consideration to the fact that he was then making a gift to her of $300,000. The codicil so states (R., 111, 112).

It would hardly be possible to submit more conclusive proof of the testamentary character of the transfer. The following excerpt, taken from the case of *In re Bottomley, supra,* clearly shows that many years ago the rule was laid down that a transfer, testamentary in character, is within the purview of the act: (P. 207.)

> "Considering not only the language, but the nature and design of the entire statute and the history of the legislation upon the subject., I am convinced that a transfer made in lieu of making a testamentary disposition comes within the expressed intent of this legislative provision."

The execution of a will or the alteration of an existing one at or about the time of the transfer is very convincing evidence of the fact that the transfer is in lieu of a testamentary disposition. The Prerogative Court, in *In re Miller,* 98 *N. J.* 318, and in *In re Dupignac,* 96 *N. J. Eq.* 284, 286, thought it important to note that the transfers were made contemporaneously with the making of a will or codicil. The Supreme Court of Illinois, in *People* v. *Danks, supra,* and *Rosenthal* v. *People, supra,* also stresses this element. It is a factor which is given great importance in all jurisdictions where this problem has been mooted.

The Vice-Ordinary was of the view that the facts showed the transfer to be in lieu of a testa-

mentary gift, as evidenced by the following excerpt from his opinion: (R. 13a.)

> "The evidence further shows that the transfer was made in the place and stead of a testamentary gift. Decedent had made a will about two years before; he had made another will about two months before this gift, in which he provided for his wife by giving her $100,000 and a life interest in a fund of $500,000. On the day he made the gift, he executed a codicil reducing the fund to $200,000 and expressly recites as the reason therefor the making of the $300,000 gift."

(d) Does the Transfer Constitute a Material Portion of Decedent's Estate?

The securities constituting the *corpus* of the gift had a market value of $280,382.50. At the time of his death his total gross estate equalled $1,201,370.01. The transfer therefore covered approximately 19 per cent. of his estate. That 19 per cent. of an estate is a substantial portion thereof was conclusively held in *In re Dupignac, supra* (p. 284).

In fact, $280,000 is a material portion of any estate.

> "The size of the gift itself, irrespective of the size of the estate, has a direct bearing upon the answer. It was the legislative intent that a gift of a material part of an estate made within six years of the donor's death should not escape taxation. Now, a large sum of money is a material part of any estate no matter how large, because it is a matter of substance—a matter that is not immaterial." (*In re Stephen's Estate,* 171 *Wis.* 452.)

The Vice-Ordinary in this case had no hesitation whatsoever in concluding that the gift "was of a material portion of his estate (about 19 per cent)." (R. 12a.)

(e) Length of Time Donor Survived Transfer.

The gift was made one year, seven months and twenty-five days prior to the death of the donor. It was within that period now used by the Legislature as being a reasonable one within which transfers should be presumed to have been made in contemplation of death. (Chapter 174, Laws 1922.) Decedent was able to retain possession and enjoyment of this portion of his estate to within a very short time of his death. A year and seven months, as compared with the average span of life, is short. As hereinbefore pointed out, the decedent, in *In re Bottomley,* survived the transfer by one year and three months and in *In re Dupignac* by a year and five months. It was a period within reasonable proximity of death as would not work against the conclusion that the transfer was made in anticipation thereof.

(f) Motive Prompting Transfer.

The testimony as to the real motive actuating the transfer is almost as confusing as that relating to the donor's physical condition. The allegations are to the effect that the decedent had a dual purpose in mind. First, to avoid taxes; and, second, to make his wife financially independent.

Mr. Joseph Kern, in his testimony (R. 36), seems to claim much credit for the prompting of the decedent to make this transfer and expresses his opinion that the real motive was the question of income tax reduction. He says that he had given the subject a great deal of consideration and that he had called Mr. Grabfelder's attention to the fact that it would be a considerable saving to him if he would transfer some of his securities to his wife.

This view of the transaction is also borne out by the testimony of Morris Wolf, decedent's attorney, who actually took care of the legal phases of the gift on August 22, 1918. He says (R. 28), that decedent told him that he wished to make

the transfer to his wife in order that he might be able to reduce his taxes and at the same time carry out the intention that he always had that she should receive a certain amount of his property. When questioned specifically, however, as to whether or not the conversation with reference to tax reduction included any discussion as to inheritance taxes, he testified that "I don't remember" (R. 29), although it is interesting to note that his recollections of the other details of the transfer were quite definite.

Appellee does not, of course, contend that tax evasion is illegal or would in itself render the transfer taxable. Nevertheless, if the decedent at the time of the gift intended to evade the Transfer Inheritance Tax Act the conclusion that he made the transfer in contemplation of death is materially strengthened. To illustrate: A man at the age of twenty-five years making a gift to his wife would hardly conclude that he was avoiding a tax. While on the other hand a man at the age of seventy or eighty knows that if his property passes at death it will be taxed, and, if he makes a transfer thereof for the purpose of evading that tax, the only logical inference is that he did so in contemplation of death, because if he were not contemplating his early demise how could he be concerned with evasion since the tax only attaches to transfers at death or in anticipation thereof? The New York Supreme Court in *Matter of Cornell,* 66 *App. Div.* 162, 169, makes the point in the following manner:

> "If a transfer of property is made for the purpose of cheating the law and avoiding payment of the transfer tax, it may well be that a gift so made, although absolute and unconditional, is made in contemplation of death, and that a tax should be paid thereon although the grantor, vendor or donor may live for many years thereafter. * * *"

It seems reasonable to conclude that if Mr. Grabfelder went to his lawyer on August 22, 1918,

and discussed with him the possibilities of reducing his inheritance taxes he must have been contemplating his death within the reasonably near future, since the former is a consequence of the latter.

Notwithstanding the testimony of Mr. Kern and Mr. Wolf to the contrary, a fair conclusion seems to be that the reason for the transfer was that evidenced in writing by the decedent and found in the letter accompanying the gift. Mr. Grabfelder is the best witness as to his motive for the gift. He declares only one purpose in the following language (R. 96):

> "* * * * My purpose being to render you financially independent of me during your life."

If that were the impelling motive for the transfer, it is not in the least impertinent to ask why he left it so late in life to put it into effect. Decedent had not just acquired his wealth and, therefore, for the first time, been financially able to put his intentions into effect. The testimony is clear that he was a very wealthy man as far back as 1903, when he retired from active business. He was well able to provide for his wife many years before he did. Appellee does not deny that the purpose of the gift was to make his wife financially independent of him, but does say that the motive that prompted the gift at that particular time was his concern relative to his physical condition and his probable duration of life, and his desire to see that his wife was well taken care of before the happening of the inevitable, in order that she might be amply provided for thereafter.

It is many times the case that a motive, wholly contrary to contemplation of death, so clearly appears on the record that exemption of the transfer is inescapable. A couple of examples will illustrate the point. While they are stated here as hypothetical cases, they have actually come before the Comptroller and, in fact, are representative

of a class of cases of which the Comptroller receives many each year.

An old lady, eighty-five years of age at the time of transfer and in none too good a condition of health, made gifts to several charitable and religious corporations, aggregating $100,000. The facts were to the effect that she had always been charitably inclined and wished to financially aid these institutions but had never been able to do so because her estate was hardly sufficient to even support her, let alone give to charity. However, just prior to the making of the gifts she inherited the estate of an uncle of a value exceeding $150,000. She was, at the age of eighty-five years, for the first time in her life able to carry out her purpose. It is plain that the real motive back of the transfer was not her anticipation of an early death, but the inheritance of a considerable estate which made it possible for her, for the first time, to do that which she had always wished to do.

Another decedent, of advanced years, transferred approximately one-half million dollars for the benefit of a son. The transfer was made within a short time of her death and when her health was to some extent impaired. The proofs showed, however, that the reason for the transfer was the financial embarrassment of her son. He had been dealing in stocks and bonds on the market and had reached that point where scandalous results would follow unless some financial assistance was forthcoming. The exigency of the transfer was apparent. Decedent's contemplation of death played no part in the making of the gift.

The point attempted to be made by these illustrations is that if the motive for the transfer asserted itself for the first time when the gift was made, then it is reasonable to infer that contemplation of death was not the actual cause of the transfer. The Comptroller's determination that the motive prompting the transfer was the donor's anticipation of death and not the desire to make his wife financially independent was thought well

of by the Vice-Ordinary on the appeal. The following excerpt from the opinion is directly in point (R. 140):

> "The fact that he had been considering the making of a gift to his wife all those years, and that he had been perfectly able to do so all the while, and had not done so, is indicative that the desire to make her financially independent was not the thing which actually caused him to make the gift, when he finally made it."

Mr. Grabfelder had reached that stage in life when a prudent person makes disposition of his property, either by gift or under the provisions of a will, and bestows it upon those whom he regards as most entitled to be the recipients of his bounty. (*People* v. *Danks, supra,* p. 542.) He held on to this substantial portion of his estate just about as long as he could afford to safely.

The burden, of course, is upon appellants to show reversible error. It is incumbent upon them to establish their claim that there is no substantial evidence upon which the courts below affirmed the assessment. The Vice-Ordinary found that there was sufficient evidence in the record to support the findings of fact; that the transfer was a gift and not a sale; that it constituted a material part of the donor's estate; that he was of advanced age; that his death followed the transfer within a reasonable time; that the donor's physical condition was impaired; that he knew it; that the transfer was testamentary in character; and that the real motive actuating the gift was contemplation of death and not solely the desire to make his wife financially independent.

It is particularly important to note that the Vice-Ordinary concluded that the *donor knew* he had heart disease. (R. 13a.) Appellants, before the Supreme Court, vigorously urged that there was no proof in support of this conclusion. It is interesting to observe that they do not stress this

point before this Court. As a matter of fact, there is very pointed testimony in the record supporting the finding. Mr. Alexander Vollmer, decedent's personal secretary, testified as follows: (R. 90.)

> "Decedent went to Dr. Riesman, of Philadelphia, about every six months for perhaps ten years prior to his death for a general looking-over. *Dr. Riesman told him to go slow and that he should not have any excitement.* * * *."

And Judge Stern says (R. 25):

> "* * * I know I had the general impression *from him* that he had a bad circulation because I thought it came about perhaps through my saying to him how well he looked or something like that, and he would say that his looks were illusory, that he was not so well, or something of the sort, and I believe he did mention about the high color that he had as, perhaps, bearing on a heart condition, * * *"

* * * * * *

> "He always struck me, if you want my opinion; he always struck me as a man in perfectly good health, but who may have been told, or may have had the thought, and possibly and probably was the fact, that he had some heart condition, and that he was conscious of it, and that it may have bothered him in the sense it has bothered me for a great many years. * * *"

Appellants have not clearly established that the record is without facts in support of these several findings and the judgment of the Supreme Court affirming the decree below should therefore be sustained.

REPLY TO BRIEF OF APPELLANTS.

Appellants spend much of their brief upon a review of the cases, and the facts thereof, wherein transfers were held not to have been made in contemplation of death. Since the question of whether a transfer is or is not in contemplation of death is purely a question of fact, and since, as hereinbefore pointed out, each case must stand on its own state of facts, it is hard to see how a review of the cases and the facts of each, pro and con, can be of any material assistance in the disposition of the present matter. Appellee could proceed with a lengthy discussion of the cases and their facts wherein transfers *inter vivos* have been determined to have been made in contemplation of death, but such a review could serve no useful purpose. As a matter of fact, the list in New Jersey alone is substantial, and if we were to go beyond this jurisdiction the discussion would simply reach an unbearable length. It seems sufficient to say that in every one of the cases in the following list the transfer was found to have been made in contemplation of death and the donor at the time of the gift was not on his death bed:

In re Bool's Estate, 98 *Cal. App.* 714.
In re Estate of Pauson, 186 *Cal.* 358.
People v. *Tavener,* 300 *Ill.* 373.
Rengstorff v. *McLaughlin,* 21 *Fed Fep.* (2d Series)
People v. *Danks,* 289 *Ill.* 542.
People v. *Porter,* 287 *Ill.* 401.
Abstract & Title Guaranty Co. v. *State,* 173 *Cal.* 691.
Merrifield's Estate v. *People,* 212 *Ill.* 400.
Conway's Estate v. *State,* 72 *Ind. App.* 303.
Rosenthal v. *People,* 211 *Ill.* 306.
Chambers v. *Larronde,* 196 *Cal.* 100.
In re Snyder's Estate, 71 *Cal. App.* 324.
Tax Commissioner of Ohio v. *Parker,* 117 *Ohio* 215.

State Tax Comm. v. *Mullally, N. Y. Law Mar.* 15, 1930.

Matter of William A. F. Smith, N. Y. Law J., June 11, 1930.

This list is not represented as a complete registration of every case wherein the tax was sustained. It simply shows the great number of cases of this kind and demonstrates the folly of attempting to consider the facts and circumstances of each case and the reasons for the conclusions therein reached.

Appellants, at p. 55 of their brief, do make one claim which it is desired to refute. They say that:

> "The authorities are unanimous in holding that if the gift in question was made pursuant to a preconceived plan, that fact in iteslf negatives any presumption that it was made in contemplation of death, even though at the time of the making of the gift the donor had reached an advanced age and was suffering from a serious disease."

In the first place it should be borne in mind that there is a marked difference between a *pre-existing plan* and a *pre-conceived plan.* Of the former class is *In re Miller,* 98 *N. J. Eq.* and the case of *Wells* v. *United States,* 39 *F.* (2d) 998, cited by appellants at p. 55 of their brief. Of the latter class is the present case and cases such as *Kunhardt* v. *Bugbee, supra.*

In re Miller, supra, the record disclosed that the donor as early as 1904 commenced giving his wife approximately one-half of his yearly earnings. These yearly gifts increased in amount and from 1912 to the date of his death the record showed that practically every year he made very large donations to his wife. The state attempted to tax the last seven of these gifts which were made over a period of approximately five years prior to his death. The court set aside the assessment on all but the last two gifts which were made only a few days before he died. Here was a clear case

of a long *existing plan* which was not prompted at its inception, or continued, under fear of impending death. It was a plan which the donor had adopted many years before his death and the last seven gifts were merely a continuation of that plan.

That case is an apt illustration of a *pre-existing* plan. But that is not what we have in the case *sub judice.* We are here confronted simply with an alleged *pre-conceived* plan. That is, a plan formulated in the mind of the donor but never acted upon. The prosecutors in *Kunhardt* v. *Bugbee, supra,* urged that the gift there in question had been conceived at least two years before it was actually perfected, at which time the donor was in robust health and, therefore, it could not be concluded that it was made in contemplation of death. It is quite apparent, however, from a reading of the opinion of the Supreme Court on rehearing (134 *Atl. Rep.* 118) that the court gave little attention to this claim.

There is no proof in the present record that Mr. Grabfelder had inaugurated a plan years before of making substantial gifts to his wife and that the transfer under consideration was merely a continuation of that plan. In fact, the record is clear that this was the first gift of moment which he had made to her. It was, therefore, not a part of a *pre-existing plan.* The best than can be said of it is that it had been pre-conceived; but what effect can that have upon the question of whether it was finally made in contemplation of his death?

It is quite likely the rule and not the exception that gifts made by donors in the declining years of their lives are the result of premeditation and not acted upon spontaneously. When a man distributes a very substantial portion of his estate to the natural objects of his bounty it is only reasonable to believe that the plan has received his careful and prolonged consideration. He may be in perfect health, in fact even young in years, when he conceives the plan, but how can that fact enter

into the question of whether the transfer was finally effectuated in contemplation of death, if, when the gift is ultimately carried out, he is in a bad way physically? Prosecutors say that it matters not that the donor at the time of the gift may be of advanced age and suffering from a serious disease, if it can be shown that the plan was first conceived when he was in good health. The very statement of the proposition seems to defeat it. If contemplation of impending dissolution is not the motive which finally prompted the transfer, then why was it not carried out when first conceived? It cannot be seen how a transfer made by a man in contemplation of his death can be said not to be within the statute simply because he had intended or planned to do it years before when he was in good health. Certainly the statute makes no such exception. If this were the sole test of a taxable transfer, then it is obvious that the statute would be rendered worthless. The gift may have been a forethought, but if the motive actually prompting its making was contemplation of death it must be held to be within the statute. In other words, it is the actuating motive for the transfer and not the conception of the plan which determines its taxability.

For the foregoing reasons it is respectfully submitted that the judgment of the court below should be affirmed.

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