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New Jersey Supreme Court.

THE PLAINFIELD TRUST COMPANY, as substitutionary administra- tor with the will annexed of the estate of ALBERTINA T. RUSSELL, deceased, <i>Prosecutor,</i> <i>against</i>	} On Certiorari.	10
JOHN McCUTCHEON, as Comptrol- ler of the Treasury of the State of New Jersey; ALBERT C. MIDDLETON, as Treasurer of the State of New Jersey, <i>Defendants.</i>		20

AFFIDAVIT ON APPLICATION FOR WRIT OF CERTIORARI

(Filed September 27, 1929)

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

H. DOUGLAS DAVIS, being duly sworn, according to law, upon his oath, deposes and says: that he is a trust officer of the Plainfield Trust Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, having its principal place of business at No. 202 Park Avenue, Plainfield, New Jersey. Said corporation is the duly qualified and acting substitutionary administrator with the will annexed of the estate of Albertina T. Russell, who died a resident of the County of Mercer, State of New Jersey, on or about February 11, 1918, letters of substitutionary admin- 30

istration having been duly issued to said corporation by the Surrogate's Court of the said County, on or about the 10th day of March, 1920.

Deponent further says, upon information and belief:

That upon the death of said Albertina T. Russell, her will was offered for probate in the Surrogate's Court of the County of Mercer and was admitted to probate therein on or about the 28th day of
 10 February, 1918. Letters testamentary were issued on or about said date to Archibald D. Russell, the executor named in said will who qualified and acted in said capacity until the date of his death, which occurred on November 29, 1919. The said Archibald D. Russell as said executor filed with the Comptroller of the Treasury of the State of New Jersey a return for transfer inheritance tax in order to have the amount of the said tax, if any, fixed and assessed, in accordance with the require-
 20 ments of an Act of the Legislature of the State of New Jersey, entitled "An Act to tax transfers of property of resident and non-resident decedents by devises, bequests, descent, distribution, by statute, gift, deed, grant, bargain and sale in certain cases," approved April 20, 1909, and the several supplements and amendments thereto. Thereafter and on or about October 30, 1919, the said Comptroller assessed the inheritance tax due upon the transfers in said estate in the sum of \$282,119.60 which was
 30 paid as follows:

July 24, 1918, Paid to the Comptroller	
of the Treasury.....	\$213,933.71
Discount at the rate of	
5% on payment of said	
tax made within six	
months as set forth in	
the statute	11,259.67
November 25, 1919.....	56,926.22
Total.....	\$282,119.60

The said executor in addition to the above amounts made payment of the sum of \$4,427.58 interest due upon the said sum of \$56,926.22 as required by law.

Deponent further says, upon information and belief, that the Comptroller in arriving at the said amount of transfer inheritance tax, failed to allow as a deduction from the gross estate of said decedent, the federal estate tax paid in said estate in the sum of \$1,697,192.56. Thereafter, application 10 was made to the Comptroller for a refund of transfer inheritance tax, based upon the transfer of the net estate reduced by the amount of the federal estate tax, which resulted in a recomputation and reassessment of the New Jersey transfer inheritance tax by the Comptroller under date of August 1, 1929, wherein the said amount of federal estate tax was allowed as a deduction.

Deponent further says, upon information and belief: that in the preparation of the assessment of 20 August 1, 1929, and in the assessment of the New Jersey transfer inheritance tax as of said date, the Comptroller of the Treasury for the first time included in the gross estate of said decedent, and assessed a tax upon the transfer of, the corpus of four identical trusts created by the said Albertina T. Russell during her lifetime and on or about March 10, 1916, for the benefit respectively of her four children, namely, Archibald D. Russell, Jr., Ethelberta P. Eppley, Helen R. Russell (now known 30 as Helen R. Benson) and Constance R. Russell (now known as Constance R. Winant). The tax so assessed on the transfer of the corpus of said trusts amounted to \$17,675. The said trust instruments transferred and conveyed the property and assets composing the said trust to Archibald D. Russell and Albertina T. Russell (the donor) as trustees, in trust, and the trust instrument, a copy of which is hereto attached, marked Exhibit A and made part

hereof, further set forth that the said trustees or the survivor of them

- “are authorized and empowered at any time after the execution of this agreement, by instrument in writing duly signed and acknowledged by said trustees or the survivor of them, to direct the distribution of said trust estate and any part or parts thereof * * * to and among the issue then living of the grantor and the husband and wife’s then living of any issue and to and among any other person or persons or corporations whatsoever.”
- 10

- The said trustees did not at any time exercise the right contained in said trust instrument to direct the distribution of the corpus of said trusts, and the same remained in full force and effect on the date of death of Albertina T. Russell, nor could she at any time during the life of her co-trustee have revoked the said transfers or the trust created, except
- 20 upon and with the consent of the co-trustee.

- Deponent is advised and therefore contends that the action of the Comptroller of the Treasury in including the corpus of the said trusts in the gross estate of the said decedent for taxation, and in assessing a tax upon the transfer thereof, was illegal and erroneous and contrary to well-established principles of law and to the provisions of the statute under which the said transfer was sought to be subjected to the tax. The question as to the tax-
- 30 bility of a transfer in trust by deed for the benefit of another which may be terminated during the lifetime of the grantor under a power reserved jointly to the grantor and a third party, only by the joint action of the two, is *res nova* in the courts of the State of New Jersey. In view of the prevailing tendency of persons with property to create *inter vivos* trusts, and the many questions which arise with reference thereto in connection with transfer inheritance tax legislation, it is important that the

law be definitely established in this State as to the application of such taxes to such a trust. The Courts of the State of New York, whose decisions are given great weight in New Jersey in view of the fact that our transfer tax act is based upon the transfer tax law of that State, have held on many occasions that the mere power to revoke a trust instrument by the grantor, will not render the transfer subject to the tax, and that some additional element must be present—such as the reservation of a life use in the donor—before the transfer properly may be subjected to said tax. This principle has been established by the courts of highest resort in the State of New York and of many other States. The Prerogative Court of New Jersey, in the decision in the *Estate of Wood Fosdick*, 139 Atl. 318 (no New Jersey citation), took a contrary position and held that a power of revocation reserved by a donor in a trust instrument rendered the same taxable as a transfer to take effect in possession or enjoyment at or after his death. However, in that case the donor had the *sole* and unrestricted power to terminate the trust agreement, which is a different circumstance from that that existed in the Albertina T. Russell estate where the consent of another, the trustee, was necessary to terminate the trust, or to revest in the grantor, the corpus of the trust estate.

Deponent is advised and therefore submits, in view of the present indefinite state of the law, it is important that the law as it exists in the State of New Jersey be passed upon by a higher court. For this reason, and for the additional reason that, in deponent's opinion, the Comptroller has interpreted the law with reference to the taxation of the trust herein involved, incorrectly and illegally, this court should review the action of the Comptroller and render a decision on the issues presented.

Deponent therefore respectfully asks this court to grant a writ of certiorari directed to the Comptroller of the Treasury of the State of New Jersey, directing him to certify and send under seal to the Justices of the Supreme Court of Judicature at Trenton the record in this case, and that the said court review the assessment of transfer inheritance tax made therein by the Comptroller of the Treasury under date of August 1, 1929, insofar as he has

10 included in the gross estate of said decedent, and assessed a tax upon the transfer of, the corpus of the said four trusts created by the decedent under date of March 10, 1916, in the sum of \$17,675.00.

H. DOUGLAS DAVIS.

Sworn to before me, this ninth day of September, 1929.

[SEAL]

H. B. SEARLES,

Notary Public of N. J.

My commission expires March 1, 1931.

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NEW JERSEY SUPREME COURT.

WRIT OF CERTIORARI

(Filed October 4, 1929)

NEW JERSEY, ss.

30

[SEAL]

THE STATE OF NEW JERSEY to John McCutcheon, as Comptroller of the Treasury of the State of New Jersey; Albert C. Middleton, as Treasurer of the State of New Jersey,

We, being willing, for certain reasons, to be certified of a certain assessment of transfer inheritance tax made by the Comptroller of the Treasury under date of August 1, 1929, in the Estate of Albertina T. Russell, deceased, to the extent of the sum of \$17,675.00 representing an alleged transfer inheritance tax upon four certain trusts created by the

said Albertina T. Russell under date of March 10, 1916, do command you that you certify and send under your seal to our Justices of our Supreme Court of Judicature at Trenton, on the 4th day of October, 1929, the said assessment of the said Comptroller, together with the record thereon and all things touching and concerning the same as fully and completely as they remain before you, together with this our writ, that we may cause to be done thereupon what of right and justice and according 10 to the laws of the State of New Jersey ought to be done.

WITNESS, Honorable William S. Gummere, Chief Justice of our Supreme Court at Trenton, this 27th day of September, in the year of our Lord one thousand nine hundred and twenty-nine.

FRED L. BLOODGOOD,

Clerk.

WALTER E. COOPER,

Attorney for Prosecutor, 20
Cranford, N. J.

I allow the above writ. Let it be sealed.

CLARENCE E. CASE,

J. S. C.

September 25, 1929.

RETURN TO WRIT

30

(Filed October 4, 1929)

STATE OF NEW JERSEY

DEPARTMENT OF COMPTROLLER OF THE TREASURY

I, JOHN McCUTCHEON, Comptroller of the Treasury of the State of New Jersey, being the officer chargeable by statute with the administration of the Transfer Inheritance Tax Laws of the State of New Jersey, and the custody of the records per-

taining thereto, and the assessment and collection of Transfer Inheritance Taxes, hereby certify that:

Pursuant to the command of the within writ and as a return thereto, I do hereto annex true copies of the files as the same appear of record in my office in the Matter of the assessment of Transfer Inheritance Taxes in the estate of Albertina T. Russell, deceased, late of Mercer County, N. J.

10 WITNESS my hand and Official Seal, at Trenton, this 4th day of October, A. D. 1929.

[SEAL]

JOHN MCCUTCHEON,
Comptroller of Treasury.

STATE OF NEW JERSEY

DEPARTMENT OF COMPTROLLER OF THE TREASURY
TRANSFER INHERITANCE TAX BUREAU

239997 Trenton, August 1, 1929.

20 Plainfield Trust Company, substituted administrator, c. t. a. of the estate of Albertina T. Russell, late of Mercer County.

Taylor, Blanc, Capron & Marsh, 43 Exchange Place, New York, N. Y.

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 \$248,948.82.

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STATEMENT

Payment on account

7/24/1918\$213,933.71

Discount allowed at rate of

5% 11,259.67

Taxes and interest paid

11/21/1919 61,353.80

Total amount of taxes heretofore paid..\$286,547.18

Taxes as per corrected

assessment 248,948.82

Add interest from 2/11/1919

to 11/21/1919 on the sum

of \$6,080.44 representing

balance of direct tax after

crediting payment on ac-

count made 7/24/1918.... 471.66

10

Taxes and interest as per corrected

assessment 249,420.48

Amount to be refunded.....\$37,126.70

(Archibald D. Russell \$231,273.82)

(Archibald D. Russell, Jr. 4,418.75)

(Ethelberta P. Eppley 4,418.75)

(Helen R. Benson 4,418.75)

(Constance R. Winant 4,418.75)

20

CORRECTED ASSESSMENT

JOHN McCUTCHEON,

Comptroller.

Decedent died Feb. 11, 1918.

If paid subsequent to Feb. 11, 1919, add interest at rate of 10% per annum from said date to date of payment.

CORRECTED ASSESSMENT

The State of New Jersey Transfer Inheritance Tax Bureau. 30

To Plainfield Trust Co., Substituted Administrator, c. t. a. of the estate of Albertina T. Russell, late of Mercer County, N. J.

Date August 1, 1929.

For amount of transfer inheritance tax erroneously paid and refunded, pursuant to Section 15, Chapter 228, P. L. 1909, as amended.

REFUND STATEMENT

Payment on account	
7/24/1918	\$213,933.71
Discount allowed at rate of	
5%	11,259.67
Taxes and interest paid	
11/21/1919	61,353.80
10 Total amount of taxes heretofore paid..	\$286,547.18
Taxes as per corrected	
assessment	248,948.82
Add interest from 2/11/1919	
to 11/21/1919 on the sum	
of \$6,080.44 representing	
balance of direct tax after	
crediting payment on ac-	
count made 7/24/1918....	
	471.66
20 Taxes and interest as per corrected	
assessment	249,420.48
Amount to be refunded.....	\$37,126.70

CORRECTED ASSESSMENT
 STATE OF NEW JERSEY
 DEPARTMENT OF COMPTROLLER OF THE TREASURY
 TRANSFER INHERITANCE TAX BUREAU—ASSESSMENT
 Estate of Albertina T. Russell of Mercer County.
 Late resident of Princeton. Date of death, February 11, 1918.

Amount of Estate:		
Personal		\$11,265,952.90
Real		10,204.66
Total		\$11,276,157.56
Debts, Expenses, &c.		2,386,196.76
Net Estate for Distribution, under will and deeds of trust.....		8,889,960.80
Exempt Interests		25,000.00
Taxable Interests		8,864,960.80
Will and Trust Deed, Tax 1-1½-2-3%		\$248,948.82

Corrected Assessment of Tax

BENEFICIARIES AND BEQUESTS	VALUE OF DEVISE OR BEQUEST	RELATIONSHIP	AGE	EXEMPT	TAXABLE
Payment of debts					
1. Archibald D. Russell		Husband		5,000.00	7,822,460.80
					231,273.82
Residue of Estate	7,827,460.80				
<i>Under Deeds of Trust</i>					
T. D. Archibald D. Russell, Jr., Corpus of trust created March 10, 1916, which vested in him March 3, 1920, by exercise of his option to terminate	265,625.00	Son (This tax became due on March 3, 1920. No interest could therefore accrue prior to that date.)		5,000.00	260,625.00 4,418.75
T. D. Ethelberta P. Eppley Corpus of Trust created March 10, 1916, which vested in her March 20, 1920, by exercise of her option to terminate	265,625.00	Daughter (Same note as above except date is March 20, 1920.)		5,000.00	260,625.00 4,418.75

T. D. Helen R. Benson Corpus of Trust created March 10, 1916, which vested in her April 23, 1920, by exercise of her option to termi- nate	265,625.00	5,000.00	260,625.00 4,418.75
		(Same note as above except date is April 23, 1920.)	
Will and Trust Deeds. Constance R. Winant Corpus of trust created March 10, 1916, which vested in her December 15, 1920, by exercise of her option to terminate	265,625.00	Daughter (Same note as above except that date is Dec. 15, 1920.)	5,000.00 260,625.00 4,418.75
			25,000.00
			8,864,960.80
			248,948.82

Corrected Assessment of Tax

*Computation of Tax**Archibald D. Russell—Husband*

Exempt	5,000.00	
1%	45,000.00	450.00
1½%	100,000.00	1,500.00
2%	100,000.00	2,000.00
3%	7,577,460.80	227,323.82
	7,827,460.80	231,273.82

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Archibald D. Russell, Jr.—Son

Exempt	5,000.00	
1%	45,000.00	450.00
1½%	100,000.00	1,500.00
2%	100,000.00	2,000.00
3%	15,625.00	468.75
	265,625.00	4,418.75

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CORRECTED ASSESSMENT

Corrected Assessment made necessary by allowance of Federal Estate Taxes as a deduction and the increase in the value of the real property by additional properties, also the determination that certain transfers by deeds of trust dated March 10, 1916, were taxable.

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TAYLOR, BLANC, CAPRON & MARSH
22 William St.
New York

March 6, 1928
File No. 2713

Comptroller of the Treasury,
State House,
Trenton, N. J.
ATTENTION OF MR. NEELD:
Dear Sir:

Estate of Albertina T. Russell

We acknowledge receipt of your letter of January 31st, regarding the taxability of the trust created by the decedent above named under date of March 10, 1916. In reply thereto we again desire to state most emphatically that we disagree with your contention as therein set out that the decision of the Prerogative Court in the Matter of Fosdick is decisive of the question of the taxability of the trust created by Albertina T. Russell on the above mentioned date. We must also disagree with your statement that the facts in the two cases are quite similar, as, in our opinion, the trusts are totally dissimilar on two very important points, among others, namely, the admeasurement of the respective life estates, and in the extent of the power to revoke reserved by the Donor. 10

We note the request contained in the last paragraph of your said letter that you be furnished with a statement of the corpus of the trust created by Albertina T. Russell and have endeavored to comply therewith. We have prepared and herewith enclose what we believe to be a correct list of the items making up the corpus of said fund on the date of her death. The information therein set forth was obtained from the receipts which the various beneficiaries signed upon the termination of the trusts by the exercise of their respective options. The receipt of Helen R. Benson acknowledges that she has received from the surviving trustee \$87,000 par value of the Woodward Iron Company bonds and 500 shares of the National City Bank of New York. Ethelberta P. Eppley acknowledged receiving \$88,000 par value of the Woodward Iron Company bonds and 500 shares of the National City Bank of New York. Archibald D. Russell acknowledged the receipt of \$87,000 par value of the Woodward Iron Company bonds and 20 30

500 shares of the National City Bank of New York. Constance R. Winant acknowledged the delivery to her of \$88,000 of the Woodward Iron Company bonds and 800 shares of the National City Bank of New York. The first three above named exercised their option to terminate the trust in the spring of 1920, and Constance R. Winant exercised the same right in the latter part of 1920, at which time she became of age.

- 10 Meanwhile, there had been added to the corpus of said trust 300 shares of the National City Bank, purchased on her behalf on October 21, 1920, through her rights of subscription which had been issued to the holders of said stock. There is enclosed herewith a copy of a letter of Constance R. Winant, dated December 15, 1920, in which she states that the said securities comprised her share of the trust of March 10, 1916. It might be well to explain at this point that the Woodward Iron Company bonds were in denominations of \$1,000 and in order that the split-up of certain of the bonds should not be necessary in order to give each of the parties \$87,500 worth, two of the beneficiaries agreed to buy the \$500 share of each of the other two.

- 20 We believe that the above items constituted the total corpus of the trust created by Albertina T. Russell under date of March 10, 1916, on the date of her death and we are frank to say that we know
- 30 of no other method by which we could obtain this information in view of the fact that there is to our knowledge no written record of the acts of the trustees. As the decedent held like property in her personal estate, we assume that you will have no difficulty in valuing the items constituting the corpus of said fund, if you should conclude that the said trust is taxable. This information is furnished to you merely in compliance with your request, and is not to be considered as an admission on our part

or on the part of our clients or others interested that the said property is the subject of the New Jersey Transfer Tax. We furnish it without prejudice to the rights of the former trustee or others interested in said fund, to contend that the same should not be included as a part of the estate of said decedent, and therefore subject to said tax.

In this connection, we desire to call your attention to the fact that an application is now on file with you for the deduction from the gross estate of said decedent of the federal estate tax paid by the representatives of the Albertina T. Russell estate. This tax amounts to the sum of \$1,696,879.23. We enclose herewith a photograph of a cancelled check, payable to the order of the Collector of Internal Revenue in the sum of \$1,584,720.74 and of two receipts of the Collector of Internal Revenue respectively in the sum of \$7,884.30 and \$104,279.19, all of which total the full amount of the federal estate tax paid in said estate. We at this time desire to again assert, on behalf of the estate, its claim for the deduction of this tax in the sum of \$1,696,879.23 as aforesaid.

We trust that with this information before you, you will be in a position to furnish us at an early date with the benefit of your conclusions in this matter and that a final statement in both the Albertina T. Russell Estate and in the Archibald D. Russell Estate will be shortly forthcoming.

Yours very truly,

(Signed) TAYLOR, BLANC, CAPRON AND MARSH.

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WEC-E

Enc.-Check

20 EXCHANGE PLACE,
December 15, 1920.

Mr. Percy R. Pyne,
Substitute Trustee,
20 Exchange Place,
New York City.

Dear Sir:

- 10 Will you kindly deliver to Mr. John Gilbert Winant the following securities which comprise my share of the trust created by my father and mother on March 10, 1916, to wit:

\$88,000 Woodward Iron Company 5% 1st & Consolidated Sinking Fund Bonds; 800 shares of the stock of the National City Bank of New York, and of which you have been appointed Substitute Trustee.

- 20 Of this amount \$87,500 Woodward Iron Company bonds were in the original trust and \$500.00 were bought by me from my brother in order to equalize the amount.

Of the 800 shares of National City Bank of N. Y. stock, 500 were in the original trust and 300 were purchased by me through right of subscription on October 1st, 1920.

Will you kindly give Mr. Winant a power in order that he may transfer the City Bank stock to his own name.

- 30 Also please give Mr. Winant a check for whatever cash balance may stand to my credit in this account, and oblige,

Yours very truly,
(Signed) CONSTANCE R. WINANT.

IN THE MATTER OF THE NEW JERSEY
TRANSFER INHERITANCE TAX PRO-
CEEDING IN THE ESTATE OF ALBER-
TINA T. RUSSELL, LATE OF PRINCE-
TON, NEW JERSEY, DECEASED.

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

H. DOUGLAS DAVIS, being duly sworn, deposes and
says:

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That he is a trust officer of the Plainfield Trust Company, which corporation is the substituted administrator with the will annexed of the estate of Albertina T. Russell, late of Mercer County, New Jersey, deceased.

Deponent further says upon information and belief: That the Federal Estate Tax proceeding in said estate has been terminated and a final assessment made; that the full amount of said tax in the sum of \$1,697,192.56 has been paid in the following 20 sums and on the following respective dates, to wit:

May 23, 1918	\$1,584,720.74
April 29, 1921	513.33
June 1, 1923	104,274.19
Sept. 6, 1923	7,684.30
	\$1,697,192.56

That no appeal is now pending from the said assessment and no application for refund of any part 30 of said tax has been made, nor has any portion of said tax been refunded.

Deponent further says upon information and belief: That the trust created by said Albertina T. Russell, during her lifetime, for the benefit of Archibald D. Russell, Jr., was by the exercise of the option of the said beneficiary, to terminate said trust, on or about the third day of March, 1920; the trust for the benefit of Ethelberta P. Eppley

terminated on or about March 20, 1920; the trust for the benefit of Helen R. Benson terminated on or about April 23, 1920; the trust for the benefit of Constance R. Winant terminated on or about December 15, 1920.

Deponent further says upon information and belief: That the date of birth of each of the children of Albertina T. Russell is as follows: Ethelberta, T. Eppley, April 26, 1887; Archibald D. Russell, Jr., April 4, 1890; Helen R. Benson, July 9, 1897; Constance R. Winant, September 18, 1899; that none of the above-named parties had any issue on February 11, 1918, the date of death of the said Albertina T. Russell.

(Signed) H. DOUGLAS DAVIS.

Sworn to before me this twenty-sixth day of July, 1929.

(Signed) E. N. BRADFORD,
Notary Public of New Jersey.

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My commission expires July 8, 1934.

IN THE MATTER OF THE TRANSFER
INHERITANCE TAX UPON THE
ESTATE OF ALBERTINA T. RUS-
SELL, LATE OF PRINCETON, NEW
JERSEY, DECEASED. }

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

JAMES D. OUCHTERLONEY, being duly sworn, deposes and says that he is a member of the firm of Taylor, Blanc, Capron and Marsh, the attorneys for the Plainfield Trust Company, as administrator with the will annexed of the estate of Albertina T. Russell, deceased. That he has had charge of the Inheritance Tax Proceedings now pending in the said estate and is familiar with the steps taken to

fix the amount of tax due the State of New Jersey and particularly the matters hereinafter set forth.

Deponent further says, on information and belief, that:

The said Albertina T. Russell on or about the 10th day of March, 1916, created four trusts for the benefit of her four children, respectively, namely, Ethelberta Pyne Eppley, Helen Rutherford Benson, Constance R. Winant and Archibald D. Russell, Jr.

10

At the time of the death of Albertina T. Russell, namely, February 11, 1918, each of the children above named was receiving all of the income to which he or she was entitled from the particular trust created for his or her benefit. There was no change made in the trust agreements or in the administration of the said trusts after the death of the said Albertina T. Russell up to and including the date of death of decedent's husband, Archibald D. Russell, who died on or about the 29th day of November, 1919.

20

Each of the trust agreements above referred to contained a provision (Clause Fifth) providing that in the event that the trust was being administered by a substituted trustee or trustees, that is, that neither of the original trustees were acting, the respective trusts could be terminated by the child of the donor for whose benefit the particular trust was created. In or about April, 1920, the said trusts were terminated in accordance with the provisions therein contained by the said Ethelberta Pyne Eppley, Helen Rutherford Benson and Archibald D. Russell, Jr., and in or about December, 1920, the said Constance R. Winant terminated the trust created for her benefit. Accordingly none of the said trusts are now operating.

30

In the proceedings had to fix the amount of Federal Estate Tax due from this estate the Commissioner of Internal Revenue determined that the

said trusts were not subject to Federal Estate Tax and accordingly no such tax was assessed against the estate for or on account of the creation of the deeds of trust in question.

This affidavit is in answer to inquiries made by the Comptroller of the Treasury in connection with the transfer inheritance tax proceedings pending in this estate.

It is contended on behalf of the representatives
10 of the estate that the transfer by the said Albertina T. Russell was a completed transfer not made in contemplation of death; that the beneficiaries therein named, namely the children of the donor, came into possession and enjoyment of the funds at the time of the creation of the respective trusts, namely, March 10, 1916; that the interests acquired by the respective beneficiaries were vested at the date of the creation of the respective trusts and were not at any time divested in whole or in part
20 by any act of the donor or her co-trustee or any other person or persons; and that accordingly none of the said four trusts are subject to any transfer inheritance tax under the laws of the State of New Jersey in force and effect at the time of the death of the said decedent.

Deponent further says that the reason this affidavit is made by him, instead of by an officer of the Plainfield Trust Company is that the facts hereinbefore set forth were not within the knowledge of
30 any officer of the said company and that any affidavit made by such officer would have to be based upon information supplied by deponent or deponent's firm as the records of the estate of Albertina T. Russell, pertinent to the questions here involved, are in the possession of the firm of which deponent is a member.

(Signed) JAMES D. OUCHTERLONEY.

Sworn to before me, this 15th day of April 1927.

(Signed) WM. L. COTE.

Statement purporting to be a list of the corpus of the trust fund created by Albertina T. Russell, under date of March 10, 1916, for the benefit of her four children, namely, Helen R. Benson, Ethelberta P. Eppley, Archibald D. Russell, Jr., and Constance R. Winant, on the date of the death of Albertina T. Russell, to wit, February 11, 1918.

2,000 shares of the capital stock of the National City Bank of New York	10
@ 400	\$800,000.00
\$350,000 par value of the Woodward Iron Company first Mortgage Sink- ing Fund Bonds, due January 1, 1952, interest at 5% 75	262,500.00
	\$1,062,500.00

AGREEMENT made this tenth day of March, 1916, by and between ALBERTINA T. RUSSELL, hereinafter called the Grantor, party of the first part, and ARCHIBALD D. RUSSELL and the said ALBERTINA T. RUSSELL, his wife, residing at Princeton, Mercer County, New Jersey, hereinafter called the Trustees, parties of the second part, in consideration of the sum of ten dollars by each of the parties hereto to the others in hand paid, the receipt whereof is hereby acknowledged, and in consideration of the acceptance by the parties of the second part of the trusts hereinafter set forth, WITNESSETH as follows:

The Grantor has assigned, transferred and paid over and by these presents does assign, transfer and pay over the following securities and properties, viz.:

Eighty-seven thousand five hundred dollars (\$87,500) Woodward Iron Company five per cent sinking fund first and consolidated mortgage bonds, due January 1, 1952:

(The above designated securities and such additional properties as may from time to time be added in accordance with the provisions hereof and all investments and reinvestments made by the trustees in accordance herewith shall constitute the principal of this trust fund and are hereinafter designated as the TRUST ESTATE):

TO HAVE AND TO HOLD the said TRUST ESTATE to the Trustees and their successors duly
10 appointed in accordance herewith, during the lives of ARCHIBALD DOUGLAS RUSSELL, JR., and ETHELBERTA PYNE EPPLEY, and the survivor of them, unless this trust is sooner terminated as hereinafter provided; In TRUST; nevertheless, for the following uses and purposes, that is to say:

FIRST. To take and receive said TRUST ESTATE, to invest and reinvest the same in such securities as the said Trustees shall select, whether
20 or not such securities are recognized by law as proper investments for trustees, and to collect and receive the income and profits arising therefrom and after paying all proper charges and disbursements to pay over the net income thereof during the continuance of this trust (unless they otherwise elect in accordance with the authority contained in paragraph Third hereof) to HELEN RUTHERFORD RUSSELL during her life; on the death of Helen Rutherford Russell during the continuance
30 of this trust, to pay over said income to her children then living and the issue of any deceased child, share and share alike, such issue of any deceased child to take the parent's share per stirpes and in the event that she leave no children or issue of any deceased child her surviving, then to pay over the said income to her brothers and sisters then living and the child or children then living of any deceased brother or sister, such child or children to receive in equal shares the proportion of income that the parent would receive if living.

SECOND. On the termination of this trust to pay over the TRUST ESTATE then in the hands of said Trustees (unless the said Trustees otherwise elect in accordance with the authority contained in paragraph Third hereof) to Helen Rutherford Russell, if she be living, and if she be not then living, to pay over said TRUST ESTATE to the children then living of Helen Rutherford Russell and to the child or children then living of any deceased child of Helen Rutherford Russell, share 10 and share alike, such child or children of any deceased child of said Helen Rutherford Russell to take the parent's share, per stirpes. In the event that Helen Rutherford Russell leaves no children, or child or children of any deceased child, her surviving, then to pay over said TRUST ESTATE to her brothers and sisters then living and the child or children then living of any deceased brother or sister, such child or children to receive in equal shares the proportion of the trust estate that the 20 parent would receive if living.

THIRD. Notwithstanding any of the provisions to the contrary hereinbefore contained, the Trustees herein named or the survivor of them, whether serving alone or otherwise (but not any succeeding trustee appointed as herein authorized) are authorized and empowered at any time after the execution of this agreement, by instrument in writing duly signed and acknowledged by said Trustees or the survivor of them, to direct the distribution of said 30 trust estate and any part or parts thereof (Distributions may be directed from time to time as, when and as often as the Trustees named herein or the survivor of them may determine and direct) to and among the issue then living of the Grantor and the husbands and wives then living of any issue and to and among any other person or persons or corporations whatsoever. Upon receipt of the said instrument or instruments in writing duly signed and

acknowledged by the said Trustees or the survivor of them directing a distribution of the trust estate or of any part or parts thereof, the trustees or trustee then in office shall pay over any such part or parts, or the whole of said trust estate, in accordance with direction or directions, and the trust shall cease and determine as to the whole or any part or parts of the trust estate paid over by the trustees in accordance with such direction, and
10 shall continue as to any balance not directed to be distributed.

Notwithstanding any provision to the contrary hereinbefore contained the Trustees herein named or the survivor of them, whether serving alone or otherwise (but not any succeeding trustee appointed as herein authorized) are further authorized and empowered in their discretion to direct the payment of said net income or any part thereof to and among the issue then living of the Grantor
20 and the husbands and wives then living of any issue, or to and among such of said issue and said husbands and wives as said Trustees and the survivor of them may select, and the said Trustees and the survivor of them are authorized and empowered, if they so determine, to direct that the whole of said net income shall be paid over to any one or more of those designated in this paragraph, in such proportions or shares as such Trustees or the survivor of them may elect, excluding others, and those
30 so excluded shall have no right or claim thereafter to any part of the income of said trust estate; and the Trustees and the survivor of them are authorized and empowered from time to time to change the beneficiaries theretofore by them designated and the proportion of income to be distributed to any one thereof, and may select other or different beneficiaries from among those in this paragraph designated to whom said income or part thereof shall be paid, or may change the proportion of

income payable to any one of them. The direction for the payment of income herein authorized shall be in writing, signed by the said Trustees herein named or the survivor of them and delivered to the trustees or trustee then in office who shall thereupon distribute said net income in accordance with said direction. Upon the death of the sole survivor of the Trustees herein named, however, the trustees or trustee then in office shall from that time pay over said net income in accordance with 10 the directions contained in paragraph First hereof, notwithstanding any written direction to the contrary received theretofore from the Trustees herein named or the survivor of them.

FOURTH. In the event of the death or resignation of a Trustee of this trust at any time during the continuance thereof the surviving trustee is hereby given full power and authority to nominate and appoint a succeeding trustee to fill the vacancy. The appointment so made shall be in writing, duly 20 signed and acknowledged by the remaining trustee to be taken as a part of this instrument, and every successor so nominated, upon executing a written consent duly signed and acknowledged, to be taken as a part of this instrument, shall have all the powers and succeed to all the duties granted, conferred and imposed by this instrument or by law upon the Trustees herein named, including the power of appointing a succeeding trustee in accordance herewith, but excepting, however, the power to 30 terminate this trust and to select the beneficiaries to whom the said TRUST ESTATE and the income thereof shall be paid, set forth in paragraph Third hereof.

FIFTH. If during the continuance of the trust hereby created the sole trustee thereof shall be a substituted trustee, or both trustees thereof shall be substituted trustees then and in either of such contingencies, but not otherwise, the trust hereby

created may be terminated by HELEN RUTHERFORD RUSSELL, who may make, sign, acknowledge and deliver to each of the trustees, or the sole trustee then in office, an instrument in writing declaring that the trust is terminated. On the execution and delivery of such instrument or instruments, the trust shall thereupon cease and determine and the said substituted trustee or trustees are directed thereupon to assign, transfer and

- 10 pay over the corpus of said trust and any accumulations of interest thereon in accordance with the provisions of paragraph Second hereof.

SIXTH. The Trustees are authorized and empowered to sell at public or private sale, upon such terms and conditions as they may deem proper, any of the securities at any time constituting a part of the said trust fund, and to reinvest the proceeds thereof in accordance with the terms of this agreement. No trustees shall be held accountable for

- 20 any loss or depreciation in value of any bond or other investment or security made or held by the trustees in accordance with the terms of this indenture, or by reason of any loss or depreciation in value of any of the securities hereby conveyed to said Trustees, which securities said trustees are hereby authorized and empowered to hold, whether or not they be such investments as trustees are authorized by law to make or hold; and said trustees may in their discretion pay over the entire net
- 30 income received from any bond or other security, irrespective of whether or not said bond or other security was purchased at a premium above its par value and in such event, said trustees shall not be held responsible for the wasting away of said premium.

Said trustees are further authorized in their discretion to deposit any bond or other security at any time constituting part of said TRUST ESTATE with any protective or reorganization committee

and to consent to and unite in any plan of reorganization of the corporation issuing any such bond or security, and to pay any assessment expenses or other sums of money and take all such action as they may deem expedient for the protection of their interests as holders of any of the bonds or other securities constituting part of the trust fund, and do such other acts and take such other steps in connection with such plan or reorganization as a private individual might do. No trustee of the trusts hereby created shall be held accountable for any misdeeds or illegal acts of any co-trustee. 10

SEVENTH. The Grantor hereby reserves to herself the right and power at any time hereafter to add other property, real or personal, including moneys and securities, to the TRUST ESTATE hereby granted, such additions to be made by delivery thereof to the Trustees, and to be evidenced by the receipt in writing signed by said Trustees.

EIGHTH. The Trustees hereby accept the trust on the terms herein set forth and covenant and agree to carry out the terms and conditions thereof as herein set forth. 20

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day and year first above written.

ALBERTINA T. RUSSELL (L. S.)

ALBERTINA T. RUSSELL (L. S.)

ARCH. D. RUSSELL (L. S.)

as Trustees.

30

In presence of:

RALPH B. POMEROY

I, Albertina T. Russell, wife of Archibald D. Russell, of Princeton, in the State of New Jersey, Do Make, Publish and Declare this as and for my Last Will and Testament, that is to say:

First: I give, devise and bequeath to my said husband, Archibald D. Russell, all my property, real and personal, of every kind and nature what-

soever, to him and his heirs forever, in fee-simple absolute.

Second: In case my said husband should not survive me, then and in that event, I give, devise and bequeath my said property to my children, to be equally divided between them, share and share alike.

Third: I nominate and appoint my said husband Executor of this my Last Will and Testament, and
10 in the event of his not surviving me, I nominate and appoint my brothers Moses Taylor Pyne, of Princeton, in the State of New Jersey, and Percy R. Pyne, of Bernardsville, in the State of New Jersey, as such Executors. And I do hereby direct that the Executor or Executors of this will be not required to furnish any bond, or other security, as such Executor or Executors, whether by reason of non-residence or otherwise.

20 In Witness Whereof I have hereunto set my hand and seal this thirteenth day of April in the year one thousand nine hundred and one.

ALBERTINA T. RUSSELL. (Seal)

Signed, sealed, published and declared by the testatrix as and for her Last Will and Testament in the presence of us, who, at her request, and in her presence and in the presence of each other, have signed our names as witnesses.

30 Cleveland H. Dodge, 90 Park Avenue, New York City.

Charles A. Peabody, Jr., 13 Park Avenue, N. Y.

NEW JERSEY SUPREME COURT.

THE PLAINFIELD TRUST COMPANY, as substitutionary administra- tor with the will annexed of the estate of ALBERTINA T. RUSSELL, deceased,	}	On Certiorari. 10
<i>Prosecutor,</i>		
<i>against</i>		
JOHN MCCUTCHEON, as Comptrol- ler of the Treasury of the State of New Jersey, and ALBERT C. MIDDLETON, as Treasurer of the State of New Jersey,	}	
<i>Defendants.</i>		

STIPULATION

(Filed October 29, 1929)

It is hereby stipulated and agreed, by and be- 20
tween the parties to the above entitled appeal, that
the following is an agreed statement of certain
facts to be considered in the determination of the
appeal herein, to wit:

(a) That the Comptroller assessed a tax upon
the transfer of the corpus of four certain trusts
executed by the decedent herein under date of
March 10, 1916, for the benefit of her four children,
namely, Ethelberta P. Eppley, Archibald D. Rus- 30
sell, Jr., Helen R. Russell (now known as Helen R.
Benson) and Constance R. Russell (now known as
Constance R. Winant), respectively, on the ground
that the decedent had transferred and conveyed the
same during her lifetime to take effect in posses-
sion and enjoyment and after her death, and not on
the ground that the said transfers were made in
contemplation of death.

(b) That Archibald D. Russell, the co-trustee
named in each of said agreements, survived the

decedent Albertina T. Russell, and died on or about November 29, 1919.

(c) That the four respective trusts so created by the said decedent Albertina T. Russell, under date of March 10, 1916, for the benefit of her four children as aforesaid, are identical as to the amount of corpus thereof, and as to the terms, provisions and conditions thereof.

Dated: October 4, 1929.

10

WALTER E. COOPER,

Attorney for Prosecutor.

WILLIAM A. STEVENS,

Attorney General of New Jersey,

Attorney for Defendants.

By THEO. RURODE,

Special Counsel.

20

NEW JERSEY SUPREME COURT.

THE PLAINFIELD TRUST COMPANY,
as substitutionary administrator with the will annexed of the estate of ALBERTINA T. RUSSELL, deceased,

Prosecutor,

against

JOHN MCCUTCHEON, as Comptroller of the Treasury of the State of New Jersey, and ALBERT C. MIDDLETON, as Treasurer of the State of New Jersey,

Defendants.

On Certiorari.

30

REASONS

(Filed October 10, 1929)

The prosecutor herein, The Plainfield Trust Company, as substitutionary administrator with the will

annexed of the estate of Albertina T. Russell, deceased, by Walter E. Cooper, its attorney, comes and prays that an alleged assessment of Transfer Inheritance Tax made by the Comptroller of the Treasury in the estate of said decedent under date of August 1, 1929, may be set aside and reversed and for nothing holden for the following reasons, to wit:

1. The Comptroller of the Treasury in said assessment, dated August 1, 1929, in arriving at the alleged amount of Transfer Inheritance Tax erroneously and illegally taxed the transfer of \$1,042,500, representing the value of the date of decedent's death of the corpus of four certain trusts created by the said decedent under date of March 10, 1916, for the benefit of her four children, namely, Archibald D. Russell, Jr., Ethelberta P. Eppley, Helen R. Russell (now known as Helen R. Benson) and Constance R. Russell (now known as Constance R. Winant), respectively, on the ground that the transfer of said property by the decedent was not intended by her to take effect in possession or enjoyment until at or after her death. 10 20

2. That the transfers provided for in said trust agreements were not made in contemplation of death, nor were they intended by the donor to take effect in possession or enjoyment or after her death, within the purview of the provisions of "An Act to tax the transfer of property of resident and non-resident decedents by devise, bequest, descent, distribution by statute, gift, deed, grant, bargain and sale in certain cases," approved April 20, 1909, and the amendments and supplements thereto, nor were the securities and property so conveyed by the said trust agreements to the trustees therein mentioned, or the proceeds thereof, the property of the decedent on the date of her death, nor was the transfer thereof subject to, or taxable under, the provisions of said act. 30

3. That the fact that the grantor reserved a limited and qualified power to direct by instrument in writing duly signed and acknowledged during her lifetime the distribution of the corpus of the trust created by said instruments (and therefore a qualified and limited power to terminate the trust during her lifetime) which said power could be exercised by the grantor only with the consent and by the joint action of a third party, did not render the
10 transfers provided for in said conveyance subject to the transfer inheritance tax of the State of New Jersey, upon the ground that the said transfer was one intended by said grantor to take effect in possession or enjoyment at or after her death within the purview of the said law, or upon any other ground.

4. If the said statute be construed to apply to the facts herein then the said statute is unconstitutional in that the same would be a taking of property
20 without due process of law and a taking of private property for public use without just compensation in violation of the Fourteenth Amendment to the Constitution of the United States and in violation of Section 16 of Article 1 of the Constitution of the State of New Jersey.

5. The evidence submitted before the Comptroller of the Treasury in this proceeding does not justify in law the assessment of a tax upon the transfer of the corpus of said trusts.

30 6. That the said action of the Comptroller of the Treasury, in assessing a tax upon the transfer of the corpus of said trusts, is in divers other respects erroneous and illegal, unjust and oppressive and should be set aside for nothing holden.

WALTER E. COOPER,

Attorney for Prosecutor,

Cranford, N. J.

Dated Oct. 10, 1929.

NEW JERSEY SUPREME COURT.

MAY TERM, 1930.

THE PLAINFIELD TRUST COMPANY,
as substitutionary administra-
tor with the will annexed of the
estate of ALBERTINA T. RUSSELL,
Prosecutor,

vs.

JOHN McCUTCHEON, as Comptrol-
ler of the Treasury of the State
of New Jersey, and ALBERT C.
MIDDLETON, as Treasurer of the
State of New Jersey,
Defendants.

On Certiorari.

10

ORDER OF AFFIRMANCE

(*Filed August 18, 1930*)

20

This cause coming on to be heard at the May Term, 1930, of this Court and the Court having inspected the return to the writ of certiorari issued therein and having considered the reasons assigned for the setting aside of the Transfer Inheritance Tax Assessment in the matter of the estate of the above named decedent, and the Court being of the opinion that said assessment should be affirmed,

It is on this 28th day of July 1930, Ordered, that the assessment of Transfer Inheritance Taxes in the matter of the estate of Albertina T. Russell, deceased, late of Mercer County, New Jersey, as removed by the writ of certiorari in this cause, be and the same is hereby affirmed.

30

On motion of

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

Entered July 28th, 1930.

NEW JERSEY SUPREME COURT.

THE PLAINFIELD TRUST COMPANY,
 as substitutionary administrator with the will annexed of the
 estate of ALBERTINA T. RUSSELL,
 deceased,
Prosecutor-Appellant,
 10 *against*
 JOHN McCUTCHEON, as Comptroller of the Treasury of the State
 of New Jersey, and ALBERT C.
 MIDDLETON, as Treasurer of the
 State of New Jersey,
Defendants-Respondents.

} On Certiorari.

NOTICE OF APPEAL FROM ORDER OF AFFIRM-
 ANCE OF THE SUPREME COURT AND
 20 GROUND OF APPEAL

(Filed August 5, 1930)

To William A. Stevens, Attorney General of New
 Jersey, Attorney for defendants-respondents:

SIR:

Please take notice that the prosecutor-appellant
 appeals to the Court of Errors and Appeals from
 the order of affirmance entered in the above-en-
 titled cause on July 28th, 1930, on the following
 30 grounds, to wit:

1. The Supreme Court erred in affirming the
 assessment of New Jersey Transfer Inheritance
 Tax made by the Comptroller of the Treasury of
 the State of New Jersey, under date of August 1,
 1929, upon the transfers in the estate of Albertina
 T. Russell, deceased, in that:

(a) The Comptroller of the Treasury in said
 assessment, dated August 1, 1929, in arriving at the
 alleged amount of Transfer Inheritance Tax erro-

neously and illegally taxed the transfer of the sum of \$1,042,500, representing the value of the date of decedent's death of the corpus of four certain trusts created by the said decedent under date of March 10, 1916, for the benefit of her four children, namely, Archibald D. Russell, Jr., Ethelberta P. Eppley, Helen R. Russell (now known as Helen R. Benson) and Constance R. Russell (now known as Constance R. Winant), respectively, on the ground that the transfer of said property by the decedent was not intended by her to take effect in possession or enjoyment until at or after her death. 10

(b) That the transfers provided for in said trust agreements were not made in contemplation of death, nor were they intended by the donor to take effect in possession or enjoyment or after her death, within the purview of the provisions of "An Act to tax the transfer of property of resident and non-resident decedents by devise, bequest, descent, distribution by statute, gift, deed, grant, bargain and sale in certain cases," approved April 20, 1909, 20 and the amendments and supplements thereto, nor were the securities and property so conveyed by the said trust agreements to the trustees therein mentioned, or the proceeds thereof, the property of the decedent on the date of her death, nor was the transfer thereof subject to, or taxable under, the provisions of said act.

(c) That the fact that the grantor reserved a limited and qualified power to direct by instrument in writing duly signed and acknowledged during her lifetime the distribution of the corpus of the trust created by said instruments (and therefore a qualified and limited power to terminate the trust during her lifetime) which said power could be exercised by the grantor only with the consent and by the joint action of a third party, did not render the transfers provided for in said conveyance subject to the transfer inheritance tax of the State of 30

New Jersey, upon the ground that the said transfer was one intended by said grantor to take effect in possession or enjoyment at or after her death within the purview of said law, or upon any other ground.

(d) If the said statute be construed to apply to the facts herein, then the said statute is unconstitutional in that the same would be a taking of property without due process of law and a taking of
10 private property for public use without just compensation in violation of the Fourteenth Amendment to the Constitution of the United States and in violation of Section 16 of Article 1 of the Constitution of the State of New Jersey.

(e) The evidence submitted before the Comptroller of the Treasury in this proceeding does not justify in law the assessment of a tax upon the transfer of the corpus of said trusts.

(f) That the said action of the Comptroller of
20 the Treasury, in assessing a tax upon the transfer of the corpus of said trusts, is in divers other respects erroneous and illegal, unjust and oppressive and should be set aside for nothing holden.

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

Sat below:

J. PARKER,
J. CAMPBELL,
30 J. BODINE.

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

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

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

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

[SEAL]

FRED L. BLOODGOOD,

Clerk.

10

NEW JERSEY SUPREME COURT.

No. 201, MAY TERM, 1930.

THE PLAINFIELD TRUST COMPANY,
 as substitutionary administrator with the will annexed of the
 estate of ALBERTINA T. RUSSELL,
 deceased,
 10 *Prosecutor,*

vs.

JOHN McCUTCHEON, as Comptroller of the Treasury of the State
 of New Jersey, and ALBERT C.
 MIDDLETON, as Treasurer of the
 State of New Jersey,
Respondents.

On Certiorari

20 OPINION OF SUPREME COURT

(Argued May 7, 1930. Decided 1930.)

For Prosecutor,

WALTER E. COOPER, ESQ.

For Respondents,

WILLIAM A. STEVENS, ESQ.,

WILLIAM A. MOORE, ESQ.

Before Justices Parker, Campbell and Bodine.

30 PER CURIAM: This is a review of a transfer inheritance tax assessment made by the Comptroller. Mrs. Albertina T. Russell, late of Princeton, N. J.; March 10, 1916, created four separate trusts for the benefit of each of her children. From her separate property, she transferred to herself and her husband, the late Archibald D. Russell, as trustees, certain stocks and bonds. Each instrument is in similar form and provides for the payment of the income from securities set apart to each of the

children during the lifetime of two of the other children with remainders over unless sooner terminated. The settlor's thought is apparent. She sought to provide an income for each child, but nevertheless retained the purse strings.

The third paragraph of each of the instruments, so far as pertinent, is as follows: "Notwithstanding any of the provisions to the contrary, * * * the Trustees herein named or the survivor of them (Mrs. Russell and her husband), whether serving 10 alone or otherwise (but not any succeeding trustee appointed as herein authorized) are authorized and empowered at any time after the execution of this agreement, by instrument in writing duly signed and acknowledged by said Trustee or the survivor of them, to direct the distribution of said trust estate and any part or parts thereof * * * to and among the issue then living of the Grantor and the husbands and wives then living of any issue *and to and among any other person or persons or corporations whatsoever.*" 20

It is apparent from this clause that the power of Mrs. Russell and her husband, or the survivor of them, to absolutely defeat the interest of the beneficiaries named existed. True, neither of them could retake in their own hands the funds set apart but both were very rich. The deed enabled the parents, or the survivor, to bring absolute financial pressure upon their children. They, or the survivor, had the same control over the funds as 30 though no settlements whatsoever had been made except in this, that neither could personally absorb the fund. Mrs. Russell died February 11, 1918; her husband November 29, 1919.

The stipulation of facts states that the tax was imposed "on the ground that the decedent had transferred and conveyed the res during her lifetime to take effect in possession and enjoyment after her death, and not on the ground that the said

transfers were made in contemplation of death."

A power reserved to revoke, alter or amend a declaration of trust is sufficient to make the transfer one intended to take effect in possession or enjoyment at or after death within the purview of the transfer inheritance tax law. *In re Fosdick Estate*, 129 Atl. 318.

"An outstanding power residing exclusively in a donor to recall a gift after it is made a limitation
10 on the gift which makes it incomplete as to the donor as well as to the donee, and we think that the termination of such a power at death may also be the appropriate subject of a tax upon transfers." *Chase Natl. Bank v. United States*, 278 U. S. 336.

"So long as the privilege of succession has not been fully exercised it may be reached by the tax. See *Cahen v. Brewster*, 203 U. S. 543; *Orr v. Gilman*, 183 U. S. 278; *Chanler v. Kelsey*, 205 U. S. 466; *Moffitt v. Kelly*, 218 U. S. 400; *Nichel v. Cole*, 256
20 U. S. 222. And in determining whether it has been so exercised technical distinctions between vested remainders and other interests are of little avail, for the shifting of the economic benefits and burdens of property, which is the subject of a succession tax, may even in the case of a vested remainder be restricted or suspended by other legal devices. A power of appointment reserved by the donor leaves the transfer, as to him, incomplete and subject to tax. *Bullen v. Wisconsin*, 240 U. S. 625. The
30 beneficiary's acquisition of the property is equally incomplete whether the power be reserved to the donor or another. *Saltonstall v. Saltonstall*, 276 U. S. 260.

It is urged that no power of revocation being reserved that the power in trust to revoke in the case *sub judice* stands on a different footing and does not operate so as to make the transfer one intended to take effect at death. This seems a distinction without a difference. The settlor was Mrs.

Russell. The trustees were Mr. and Mrs. Russell. The power to strip the life tenant and the remaindermen of all right and to choose a new object of their bounty ran to the trustees, or to the survivor.

Vice Chancellor Buchanan said, with clarity, in *re Fosdick Estate*, 139 Atl. 318, 319: "It is true that there is an actual transfer of the legal title to the trustee, and of some equitable interest to the equitable donee at the time of the delivery of the trust deed. But that equitable interest of the donee 10 is not an absolute interest. It is defeasible at any moment the donor decides to revoke. The situation is perhaps a little clearer—though the principle is of course the same—if we suppose the interest of the equitable donee to be a term for years instead of a life estate. The present value of an interest consisting of the absolute right to the income from a fund for 50 years would be susceptible of fairly easy calculation and ascertainment. But what value (other than the income already accrued) would 20 there be to such an equitable term for years, if it was subject to termination at any moment? Looking at it from the opposite standpoint, the interest of the donor in the trust fund, in view of this right to revoke, is not a mere equitable remainder after the equitable life estate. It is that plus a right to repossess and own and enjoy, absolutely, the entire fund at any moment he chooses. The value of such a right is obviously practically the same as the value of the trust fund; and the value of the de- 30 feasible life estate is little or nothing, until the termination of the right to revoke, by and at the death of the donor. At that time, and not before, does the life tenant come into possession and enjoyment of the absolute right, which is the thing of real value."

Obviously, no permanent right accrued to the life tenant, or the remaindermen, until after the death of the settlor and her husband. The mere fact that

the settlor could not retake made the interest of the beneficiary no more secure. In fact, the beneficiaries had no security until after the death of both parents. The case is obviously different from *Reinecke v. Trust Co.*, 278 U. S. 339, where the beneficiary must consent to the revocation. The mere naming of two trustees did not enlarge the rights of the beneficiaries.

Nothing vested in permanent enjoyment until
10 after the death of Mrs. Russell. True, she could not retake either principal or income for her own benefit, but she could grant both principal and income to any one she chose, if her husband acquiesced, so that in no sense was there a transfer until after her death. *Saltonstall v. Saltonstall*, 276 U. S. 260; *Northeastern Trust Co. v. Abbott*, 205 Mass. 276.

Further, though the transfer of permanent enjoyment was not effected until after the death of Mr.
20 Russell the situation is precisely the same as though the transfer occurred at Mrs. Russell's death. The taxing statute is levied upon transactions to take effect at or after the death of the transferor. No part of Mrs. Russell's property passed to the beneficiaries named in the trusts save the income they were permitted to take until after her death, and that is the test of taxability.

In view of a number of cases in this State, notably *Carter v. Bugbee*, 91 N. J. L. 438; affirmed 92
30 *Id.* 390, and *Farmers Loan & Trust Co. v. Bugbee*, 6 N. J. Misc. 415, we think it unnecessary to consider the prosecutor's arguments that the transfer inheritance tax act contravenes the Constitutions of this State or the United States.

The tax as levied will be affirmed.

TABLE OF AUTHORITIES

CASES CITED

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New Jersey Court of Errors and Appeals

PLAINFIELD TRUST COMPANY, as
Substitutionary Administrator
with the Will Annexed of the
Estate of Albertina T. Russell,
Deceased,

Prosecutor-Appellant,

against

JOHN McCUTCHEON, as Comp-
troller of the Treasury of the
State of New Jersey, and Al-
bert C. Middleton, as Treas-
urer of the State of New Jer-
sey,

Defendants-Respondents.

ON APPEAL.

Points of the Plainfield
Trust Company as
Administrator.

This is an appeal from the judgment of the Supreme Court entered on July 28th, 1930 (State of Case, p. 35), which judgment or order of affirmance affirmed the action of the Comptroller of the Treasury in fixing and assessing a transfer inheritance tax in the estate of Albertina T. Russell under the transfer inheritance tax law of New Jersey, as enacted by Chapter 228 of the Laws of 1909 and the amendments and supplements thereto.

Statute Involved.

The statute involved is Chapter 228 of the Laws of 1909 and the amendments and supplements thereto, the same being the transfer inheritance tax law of New Jersey existing at the time of the

death of Albertina T. Russell on February 11, 1918. The pertinent section of the statute reads as follows:

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

Statement of Facts.

Albertina T. Russell died on February 11, 1918, leaving a large property and leaving a Last Will and Testament wherein she named her husband, Archibald D. Russell, as executor thereof and as sole legatee thereunder. Archibald D. Russell died on November 29th, 1919, and thereupon the Plainfield Trust Company was duly appointed substitutionary administrator with the will annexed. Appropriately the estate instituted a proceeding before the Comptroller of the Treasury to have the transfer inheritance tax in the estate of the said decedent fixed and determined, which resulted in an assessment of tax under date of October 30, 1919, in the sum of \$282,119.60. The said tax has been duly paid in full. Thereafter the said administrator, the prosecutor herein, filed an application with the Comptroller of the Treasury for a re-computation and re-assessment of the transfer inheritance tax requesting the allowance as a deduction from the gross estate, in arriving at the net estate transferred, of the Federal estate tax paid on the said estate. The Comptroller granted the application of the said administrator

and issued a corrected assessment under date of August 1, 1929.

In the said assessment of August 1, 1929, however, the Comptroller of the Treasury, *for the first time*, included in the taxable estate, and assessed a tax on, the transfer of the corpus of four certain identical *inter vivos* trusts created by the said Albertina T. Russell on or about March 10, 1916, which trusts were for the benefit of her four children, namely, Ethelberta Pyne Eppley, Archibald D. Russell, Jr., Helen Rutherford Russell (now Benson), and Constance Rivington Russell (now Winant), respectively. The tax so assessed on the said transfers in trust amounted to the sum of \$17,675.00. The assessment of the tax on the said transfers was made upon the ground that the decedent had transferred and conveyed the same during her lifetime to take effect in possession or enjoyment at or after her death, and was not made upon the ground that the transfers were made in contemplation of death. (See Stipulation, Paragraph 2, p. 31, State of Case.) None of the facts in the case is in dispute, and the sole question before this Court is (1) a construction of the statute, and (2) the constitutionality of the statute.

Provisions of the Trusts.

The trusts were in identical terms and measured by the same lives, that is to say, the period of each trust was the lives of Ethelberta Pyne Eppley and Archibald D. Russell, Jr., and the survivor thereof. (See State of Case, Stipulation, p. 32.) As each trust is identical with the exception of the beneficiary named therein, reference throughout this brief is made only to one of the trusts, that for the benefit of Helen Rutherford

Benson (nee Russell). (State of Case, pp. 23 *et seq.*)

Briefly summarized the purport of this trust is as follows: On March 10, 1916, Mrs. Russell transferred irrevocably certain property to herself and her husband as trustees for the benefit of Helen R. Benson. The income arising from the said fund was payable to the said beneficiary during her life or the term of the trust. On the death of the beneficiary therein named during the term of the trust, the income was to be paid to her issue, if any, and in the event that she left no issue her surviving then the income was to be paid to her brothers or sisters or the child or children of any deceased brother or sister, per stirpes. The trust agreement provided that upon the termination thereof, that is to say, upon the death of the survivor of Archibald D. Russell, Jr., and Ethelberta P. Eppley, the principal of the trust estate was to be turned over to the beneficiary named in the trust instrument, if she be living, and if she be not, then to her children, etc. During the term of the trust the said beneficiary could, if neither of the original trustees was surviving, elect to take the principal and terminate the trust, or have it continue for her benefit in accordance with the terms thereof.

The trust agreement contained the following provision as set out in Clause numbered "Third" thereof:

"Notwithstanding any of the provisions to the contrary hereinbefore contained, *the Trustees herein named or the survivor of them*, whether serving alone or otherwise (but not any succeeding trustee appointed as herein authorized) are authorized and empowered at any time after the execution of this agreement, by instrument in writing duly signed and *acknowledged by said Trustees or the sur-*

vivor of them, to direct the distribution of said trust estate and any part or parts thereof (Distributions may be directed from time to time as, when and as often as the *Trustees named herein or the survivor of them* may determine and direct) to and among the issue then living of the Grantor and the husbands and wives then living of any issue and to and among any other person or persons or corporations whatsoever. * * * (*Italics ours.*)

The trust agreement also provided (State of Case, p. 26,—second part of Clause “Third”) as follows:—

“Notwithstanding any provision to the contrary hereinbefore contained the Trustees herein named or the survivor of them, whether serving alone or otherwise (but not any succeeding trustee appointed as herein authorized) are further authorized and empowered in their discretion to direct the payment of said net income or any part thereof to and among the issue then living of the Grantor and the husbands and wives then living of any issue, or to and among such of said issue and said husbands and wives as said Trustees and the survivor of them may select, and the said Trustees and the survivor of them are authorized and empowered, if they so determine, to direct that the whole of said net income shall be paid over to any one or more of those designated in this paragraph, in such proportions or shares as such Trustees or the survivor of them may elect, excluding others, and those so excluded shall have no right or claim thereafter to any part of the income of said trust estate; and the Trustees and the survivor of them are authorized and empowered from time to time to change the beneficiaries theretofore by them designated and the proportion of income to be distributed to any one thereof, and may select other or different beneficiaries from among those in this paragraph design-

nated to whom said income or part thereof shall be paid, or may change the proportion of income payable to any one of them. The direction for the payment of income herein authorized shall be in writing, signed by the said Trustees herein named or the survivor of them and delivered to the trustees or trustee then in office who shall thereupon distribute said net income in accordance with said direction. Upon the death of the sole survivor of the Trustees herein named, however, the trustees or trustee then in office shall from that time pay over said net income in accordance with the directions contained in paragraph First hereof, notwithstanding any written direction to the contrary received theretofore from the Trustees herein named or the survivor of them."

Clause "Fourth" of the trust instrument in substance provided that upon the death of either of the original trustees, the surviving trustee could appoint a successor trustee, but upon the death of both of the original trustees, the succeeding trustees did not have power to appoint the trust property nor the income therefrom. (State of Case, p. 27).

By Clause "Fifth" of the trust instrument if the trustees were all substituted trustees, then the beneficiary named in the trust had a right to elect to terminate the trust and take the corpus thereof.

During the period of the trust the income was in fact paid to the beneficiary named in the trust instrument (State of Case, p. 21), and no direction was ever made by the trustees in respect of either the distribution of the income or the distribution of the principal of the said trust. In due course after the death of the survivor of the original trustees, the beneficiaries of the trusts, respectively, elected to terminate the trusts and take the principal (State of Case, p. 21).

Questions of Law Involved.

The question presented in this case is whether the provisions of these trust instruments render the transfers thereunder subject to the New Jersey transfer inheritance tax as transfers intended by the donor to take effect in possession or enjoyment at or after her death within the purview of Chapter 228 of the Laws of 1909 and the amendments and supplements thereto. As the donor did not reserve the life use of the property, and as the term of the trust was not measured by the life of the donor, it would appear that the taxability or non-taxability of the transfers in suit revolve around whether or not the powers given to the trustees in Clause "Third" rendered the transfers taxable within the provisions of the transfer inheritance tax Act as intended by the donor not to take effect in possession or enjoyment until at or after her death.

Points of Argument.

- I. The law of New York as interpreted by the decisions of the Courts of New York was the law adopted by the legislature of New Jersey in 1909.
- II. There was no power of revocation in the grantor.
- III. The transfer under the statute in suit as it was interpreted at the time of its adoption is not one intended to take effect in possession or enjoyment at or after death merely because the interest of the *cestuis que* was subject to defeasance by the happening of a condition subsequent.

1. The transfer is not one intended to take effect in possession or enjoyment at or after death.
2. If the statute can be construed as applicable to the transfers in suit then the statute is a violation of the Fourteenth Amendment of the Constitution of the United States.

POINT I.

The law of New York as interpreted by the decisions of the Courts of New York was the law adopted by the Legislature of New Jersey in 1909.

It is a canon of construction, fundamental in our law, that a state adopting a statute from another state adopts with it the judicial construction given thereto.

The New Jersey Transfer Inheritance Tax Law adopted in 1909 is a counterpart of the New York Law as adopted in Chapter 399 of the Laws of 1892. (See *Neilson, et al., v. Russell, et al.*, 76 N. J. L. 655, 71 Atl. 286; *Hopper v. Edwards*, 88 N. J. L. 471, 96 Atl. 667; *Clay v. Edwards*, 84 N. J. L. 221, 86 Atl. 548; *Carter v. Bugbee*, 91 N. J. L. 438 [Supreme Court decision]; *Bugbee v. Van Cleave*, 99 N. J. Eq. 825).

The provisions of the New Jersey Law and the New York Law in 1892 are, so far as here pertinent, as follows:—

New Jersey Law (1909)	New York Law (1892)
(Chap. 228, Sec. 1, Par. 3)	(Chap. 399, Sec. 1, Par. 3)
“When the transfer is of property made by a resident or by a non-	“When the transfer is of property made by a resident or by a non-

resident, when such non-resident's property is within this state, 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."

resident, when such non-resident's property is within this state, 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."

The New York statute was adopted verbatim. The slight change in the 1914 amendment to the law does not change either the meaning of the statute or the purpose of the provision. That New Jersey adopted the New York law, and with it the judicial construction thereof extant at that time, is freely and fully attested by the decisions of the New Jersey Courts. In *Neilson, et al. v. Russell, et al.*, (76 N. J. L. 655), the Court of Errors and Appeals said at page 656:

"Our Act was modelled after the New York Act of 1885; and, if we had made no change in that act, we should be held upon well-settled principles to have adopted with the Act, the construction previously placed thereon by the New York Courts * * *,"

Again in *Hopper v. Edwards* (88 N. J. L. 471) at page 476:

"It is to be observed that the provision in question of our Act of 1909 was taken from the New York Act of 1892, and, upon the well-settled principles, it is presumed that the legislature intended that such provision should be understood and applied in accordance with the construction previously placed thereon by the New York Courts."

The Supreme Court of this State has held that the specific section in suit is governed by the decisions of the New York Courts in interpreting the New York Statute. In *Carter v. Bugbee*, at page 439 the Court said:—

“Our statute [Chapter 228, P. L. 1909] provides for the imposition of a transfer tax on the transfer of goods, wares, and merchandise within this state, or of shares of stock of corporations of this state, or of shares of national banks located here ‘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’. *This statute is a copy of the New York Statute of 1892, in force when ours was adopted, and in such case its construction by the Courts of New York will be held to have been adopted with the act.*” (Italics ours).

So firmly is this rule of law rooted in the jurisprudence of this State the Vice Ordinary in *In re Christie's Estate* (87 N. J. Eq. 303) against his own opinion of what he should decide held his judgment was foreclosed by contrary decisions of the New York Courts, which decisions had been adopted with the adoption of the New York statute, and said at page 304:

“ * * * if I were to follow my own opinion, my judgment would be that they were to be paid out of the estate for whose benefit the services were rendered. But the New York courts have decided otherwise and have held that the commissions of testamentary trustees diminish the inheritance, and are to be taken into consideration and allowed in fixing the value of the succession, and as our Transfer [of] Tax Act was copied from the statute of that state, it will be presumed that the judicial construction there given to the latter was adopted by our legislature.”

Later in the decision the Court said at page 306:

“I am unable to perceive how the difference in methods of arriving at the amount of compensation can influence in the least the application of the established rule of construction that the adoption of a statute of a sister state is presumed to have been had with reference to the previous construction given to such statute by the court of such state, * * *”.

In the absence of a contrary public or declared legislative policy the rule is adamant and inflexible. In *Clay v. Edwards* (84 N. J. L. 221), the Supreme Court, through Justice Kalisch, said at page 223:

“Now, since it is clear also, that the provision in our Act containing the same words is borrowed from the New York Act, unless the construction of the words adopted there is contrary to some declared legislative policy of this state it will be followed.”

Of course if the Courts of the sister state have twisted the natural sense of the language adopted, their decisions are not controlling upon the courts of the state adopting the statute. (Cf. *Torrance v. Edwards* [89 N. J. L. 507]), nor will the Courts be bound by the decisions of another state when the language of its own statute is free from ambiguity and clear and manifest in itself. See *Bugbee v. Van Cleave*, 99 N. J. Eq. 825). In passing it may be noted, though superfluous to point out, that the words “intended to take effect in possession or enjoyment at or after death” in inheritance tax legislation are not free from ambiguity and must necessarily be the subject of judicial construction and interpretation, and similarly it may be said that the New York courts have not twisted nor contorted the natural meaning of this language. In the case of *Bugbee v. Van Cleave*, supra, decided

as late as October, 1926, the Court through Walker, Ordinary, held that the New Jersey Transfer Inheritance Tax Act should be construed as creating a personal liability upon the executor for the payment of the transfer inheritance tax in that the New York statute, from which the New Jersey law was adopted, had been so construed. This was held notwithstanding neither statute in explicit words imposed such a personal liability. The liability was implicit in the New York statute, and as it had been so construed the New Jersey statute patterned after it carried a similar construction. The Court at page 829 said:

“It is true that the act of 1894 does not, *in terms*, impose personal liability upon the executor, while the act of 1909 does. However, there is nothing apparent on the face of the act of 1909 which indicates a legislative purpose to impose a penalty not contained in the earlier act. Besides, the decision of the New York courts both in *Re Vanderbilt's Estate* and in *Re Strang*, *infra*, construing the New York act of 1885, from which our act of 1894 was copied, as imposing personal liability upon executors, when, in terms, that act, like our own, did not visit such penalty, *would indicate that our Legislature, in passing our act of 1909, concluded to write into it a provision arising out of the construction of the New York act by the New York courts.*” (Italics ours.)

The Court after citing *Clay v. Edwards*, *supra*, and *Hopper v. Edwards*, said at page 830 in citing *In re Christie's Estate*, *supra*, that:

“Vice Chancellor Backes observed, at page 304, that, as our Transfer Inheritance Tax Act was copied from the statute of New York, it will be presumed that the judicial construction there given to the latter was adopted by our Legislature.

This rule is subject to the qualification that where the language of a New Jersey statute is clear and unambiguous the courts of this state will not go back of the language of the statute and consider the construction placed upon a similar statute by a foreign jurisdiction, especially when there is a difference in the construction in courts of sister states. *Torrance v. Edwards*, 89 N. J. Law, 507, 510, 99 A. 136. But the language of our statute is not clear and unambiguous as it would be if it said that the executor shall be liable * * *

As the New York Inheritance Tax Act of 1885 was construed in the Surrogate's Court (1890) and in the Supreme Court (1907) as imposing a personal liability upon the executor, instead of a representative one, to the extent of assets for the payment for such tax, and as our act of 1894 does not in clear and unambiguous language provide a representative, instead of personal, liability, *I regard it as my duty to adopt their construction and apply it to our act * * **" (Italics ours).

It fairly may be said then that the New Jersey statute is the New York statute as construed at the time of the adoption of the statute in suit. What other taxing jurisdictions may hold or may have held in respect of the language here in issue is not pertinent. The statute, (and in the absence of the statute, of course, there would be no tax), to be construed is Chapter 228, Laws of 1909, as amended by Chapter 151 of the Laws of 1914. This is the New Jersey statute. What construction was adopted with the adoption of this law? For this the New York law and the New York decisions must be searched, and no other decisions are material to the issue.

New York Decisions.

At the time of the adoption in 1909 of the statute in suit the New York statute from which it was taken had received judicial construction.

At a comparatively early date in the history of the New York law, the courts of New York determined that the reservation of the right to revoke a trust, which would not otherwise have been subjected to a transfer tax, was not thereby rendered taxable. This question was definitely presented and decided in *Matter of Masury*, 28 A. D. 580. This decision was rendered by the Appellate Division of the Supreme Court of New York, Second Department, in 1898. It was affirmed without opinion in the Court of Appeals in 159 N. Y. 532. The pertinent facts, as set out in the opinion of the Appellate Division, are briefly:

“John W. Masury, a resident of New York, created trusts at different times for adopted grandsons. In 1883 the said John W. Masury created a trust for John Miller Masury amounting to \$150,000. This trust was subsequently revoked, and in 1888 a new trust for the same amount was created, which was in turn revoked on the 7th day of September, 1892. On the 14th day of September in the same year the said John W. Masury executed two deeds of trust to the Brooklyn Trust Company in favour of John M. Masury, one of them for \$81,140.63 and the other for \$119,145.00. In December of 1892, the said John W. Masury executed a deed of trust in favour of his other adopted son, Frederick L. Miller Masury, transferring to the Brooklyn Trust Company securities valued at \$62,889.38. Prior to this time and on the 10th day of March, 1890, the said John W. Masury executed and delivered to the Brooklyn Trust Company a deed of trust in favour of John M. Masury, transferring securities valued at

\$102,500.00. The avails of all these trusts, with the exception of the last one, were to go immediately to the beneficiaries of the trusts, the special facts in relation to which will be discussed hereafter."

In the trust of March 10, 1890, it was provided that the avails should go to the grantor, John W. Masury, *or his order*, during his lifetime, and from and after his death the avails were to go to his grandson, John Miller Masury, during his life, and so on as provided in the deed. The Court in presenting the issue said at page 582:—

"The only point at issue in determining this appeal is whether these deeds of trust were gifts among the living, or whether they were in some manner contingent upon the death of the said John W. Masury. It is conceded that if the deeds of trust were gifts made by John W. Masury to John M. and Frederick L. Miller Masury, taking full effect during the lifetime of the parties, the property would be beyond the reach of the statute; but a clause having been inserted in each of such deeds of trust, reserving the right of the grantor 'to revoke and annul the same during my lifetime,' it is urged that the gifts did not become absolute and completed until the death of the grantor, and that the property is, therefore, properly included in the appraisal."

The Court held all of the trusts not subject to tax except that of March 10, 1890, and this trust was held subject to tax because John M. Masury reserved the income to himself or to his order, during his life and notwithstanding the income was made payable to his grandsons, it nevertheless was his income in that a payment to him or upon his order is the same thing as a payment of the income to him.

The Court said at page 582:—

“The statute, in so far as it relates to the question before us, reads as follows: ‘A tax shall be and is hereby imposed upon the transfer of any property, * * * in the following cases: * * *

‘3. When the transfer is of property made by a resident or by a nonresident, when such nonresident’s property is within this State, 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.’ (Laws of 1892, chap. 399, Sec. 1; Tax Law, Sec. 220.)

It is necessary, to bring this property within the scope of the law, that the gift should have been made ‘in contemplation of the death of the grantor,’ or that it was ‘intended to take effect, in possession or enjoyment, at or after such death.’ [Italics the Court’s.] *The property need not have been in the possession of the appellants; if they were in the enjoyment of the property, or the income from the property, prior to the death of the grantor, and if their relations to the property were not changed by the fact of such death, then the order of the Surrogate’s Court confirming the appraisal should be set aside in so far as it affects the rights of these appellants. It will not be contended that the series of trust deeds, beginning back in 1883, were made ‘in contemplation of the death of the grantor,’ in any legal sense; there is no such claim urged, but we are asked to determine that, because of the fact that the grantor might have revoked the trusts at any time during his lifetime, the rights of the appellants in the trust funds did not become absolute until after the death of the grantor, and that, therefore, the property passed into the possession of the appellants, or their rights became absolute, upon the death of the grantor, and it is subject to the tax which*

was ordered by the surrogate to be collected. *This does not, however, follow.* If it should be determined that the gift did not become absolute until the possibility of its annulment ceased, upon the death of the grantor, it would still be necessary to show that the gift was 'intended to take effect, in possession or enjoyment, at or after such death;' and to determine the intention of the donor, we must look, not to the argument of the respondent, but to the language of the deeds of trust, the relations which existed between the parties, and the fact of the beneficial enjoyment of the avails of the trust.'" (Italics ours.)

Again the Court said at page 585:—

"There is nothing to indicate that the grantor had any intention of making use of this right except to protect the beneficiary should such action become necessary during his lifetime; and the fact that he did not make use of it up to the time of his death precludes the presumption that he would have done so at any time. At least the presumption cannot be raised to show an intention directly contrary to that expressed in the deed of trust, and the appellant Frederick L. Miller Masury, having been in the enjoyment of the income from the date of the deed of trust, such payments having been made by the Brooklyn Trust Company as trustee of the fund, we must conclude that the title to the property passed to the trustee, and that it constituted no part of the property of the said John W. Masury at the time of his death, and should not have been included in an appraisal of his estate for the purpose of taxation under the Transfer Tax Act."

We have taken the liberty of quoting at length from this case because it is the earliest case involving the question as to effect of a power of revocation upon the taxability of such a transfer. The *ratio decidendi* of this case make it

particularly pertinent and applicable to the case in suit. In the trust deed for the benefit of Helen R. Russell (now Benson) the title to the fund in trust passed indefeasibly to the trustees; the beneficiary named in the trust had "been in the enjoyment of the income from the date of the deed of trust"; and the detail and particularity with which the grantor provided for the disposal of the property in the event of the death of Helen R. Russell, the beneficiary, prior to the termination of the trust, precludes the idea that she had any other intention than that the trust should take effect from the date of the execution thereof and during her lifetime, and which in fact it did.

In February, 1909, very shortly prior to the adoption of the Transfer Inheritance Tax law by the State of New Jersey, *Matter of Keeney*, 194 N. Y. 281 was decided. This was afterwards affirmed *sub nom Keeney vs. New York*, 222 U. S. 525. In that case it was recognized that, although a power of revocation was reserved, that portion of the property transferred in which the testatrix did not reserve a life interest, was not subject to the transfer tax. The facts concerning the transfer there considered are briefly stated in the U. S. Supreme Court report, page 526. The trust was measured by the life of the grantor, and in the deed she "reserved the right to revoke or alter the whole or any part of the trust conveyance, at any time after six months notice in writing." While the court taxed one-quarter of the property because the grantor had reserved the right to receive during her life one-quarter of the income, no tax was assessed upon three-fourths of the fund, the income from which was given to her children from the date of the inception of the trust.

The *Masury* case represented the interpretation of the law of New York in 1909 at the time

of the adoption by the State of New Jersey of its transfer inheritance tax act. That the *Masury* case correctly interpreted the law in New York, and that the New York statute meant exactly what the *Masury* case said it meant, is indicated by the subsequent decisions of the Courts of New York rendered after the adoption of the New Jersey statute. (See *Matter of Bowers*, 195 App. Div. 548 [1921], affirmed 231 N. Y. 613, 132 N. E. 910; *Matter of Carnegie*, 203 App. Div. 91 [1922], affirmed without opinion 236 N. Y. 517, 142 N. E. 266; *Matter of Voorhees*, 200 App. Div. 259 [1922]; *Matter of Miller*, 204 App. Div. 418, affirmed 236 N. Y. 290 [1923], 140 N. E. 701; *Matter of Cochrane*, 117 Misc. 18 [1921], affirmed without opinion 202 App. Div. 751 [1921]; *Matter of Isaac Wing's Estate*, 190 N. Y. Supp. 908).

The reasoning in the *Matter of Schmidlapp* (236 N. Y. 278, 140 N. E. 697), and which case was decided the very same day as that of *Matter of Miller*, *supra*, clearly indicates the criterion upon which taxability is predicated under the language of the statute here in suit. If there be income reserved to the grantor, or the enjoyment of the usufruct of the transfer is withheld from the beneficiary named in the trust or the remaindermen during the period of the life of the grantor, then the transfer has been determined in New York to be one intended to take effect in possession or enjoyment at or after death. The element of revocation or non-revocation has no bearing upon the taxability at all. As hereinbefore stated this is clearly indicated in the decision of Chief Justice Cardozo in the *Matter of Schmidlapp* which was a case wherein there was a reservation of all the income to the grantor as well as a full power to revoke and in addition to that certain powers in respect of the property transferred

were reserved to the said grantor. This transfer was held subject to the death duty as of the date of the death of the grantor, and we submit quite properly. Chief Justice Cardozo points out the distinction between the case where there is a reservation of the income or the usufruct of the transfer and a power to revoke, and a case where there is no reservation of such income, but a reserved power to revoke the transfer. He says, at page 284:—

“The distinction is between a gift which clothes the donee with the right of present enjoyment, though subject to revocation at the will of the donor, and one where the donor reserves to himself not only the power to revoke, but also enjoyment during life, so that no beneficial right enforceable against him exists until his death. In the one class of cases, the law in force at the delivery of the deed, and in the other the law in force at death, is the measure of the right to tax.”

It will be noted that in each of the cases above cited there was a power in the grantor to revoke the trust either alone (as in the *Carnegie, Miller, Cochrane* and *Wing* cases) or conjointly with someone else (as in the *Bowers* case) but in none of these cases was there a reservation of the income or any right to the enjoyment thereof in the grantor. It will be noted that in each of these cases the Court held the transfer not subject to tax as one intended to take effect in possession or enjoyment at or after death within the purview of the New York Tax Law. “It is significant”, as pointed out by Surrogate Slater in *Matter of Cochrane, supra*, at page 29:—

“ * * * that in every reported case in the Court of Appeals where the gift was taxed, the enjoyment of the income was retained by the donor.” (Italics ours.)

In *Matter of Green*, 153 N. Y. 223, and decided in 1897, interpreting the language of the New York Law of 1892, taxing transfers "intended to take effect in possession or enjoyment at or after death" of the grantor, the Court held the transfer subject to tax upon the following facts, which also indicate the line of demarcation running prominently through all of the new York cases: The grantor, Sarah Greene, reserved to herself all of the income of the trust during the term of her life, and also a power to revoke the trust with the consent of the trustee. *The basis of the tax was the reservation of the income and not the power to revoke.* This is indicated quite definitely when we consider the case of *Matter of Keeney*, supra, hereinbefore referred to wherein there was a power to revoke the whole trust but a reservation of only one-quarter of the income, and in which case only one-quarter of the property transferred was held subject to the tax. It is indicated also by the decision, after, it is true, the adoption by the State of New Jersey of its Act of 1909, in the *Matter of Bowers*, where there was no income reserved but where there was a power to revoke with the consent of the trustee, and in which case the Court of Appeals held that the transfer was not one intended to take effect in possession or enjoyment at or after death.

In *Matter of Brandreth*, 169 N. Y. 437, and decided in 1902, the Court of Appeals held subject to tax a gift of corporate stock given upon the condition that all of the dividends declared upon it for the term of the donor's life should be received by him and that he should have the right to vote upon the same as though no transfer had been made. The gift under these conditions was, of course, and properly, held subject to tax as one intended to take effect in possession or

enjoyment at or after death. Three of the seven Judges in the Court of Appeals dissented in this case. The *Brandreth* case differed from the *Greene* case in that in the *Greene* case there was in addition to the reservation of the enjoyment of the avails of the property transferred a power to revoke the trust with the consent of the trustee, but the result of the decision was the same. The *Brandreth* case also is different from the *Masury* case and from *Matter of Keeney* (in respect of three quarters), in that in these cases while there was no reservation of the income there was a power to revoke, and the transfers were held not subject to tax.

In the case of *Matter of Bostwick*, decided in 1899 (160 N. Y. 489), while the Court decided under the facts in that case that the transfers were subject to tax because of the numerous broad powers reserved to the grantor, it nevertheless recognized the propriety of the decision of the Court in the *Matter of Masury* and the fact that the *Masury* decision properly reflected the law. The Court said at p. 492:

“But, as to the transfers for the daughters, it is argued that the *Masury* case (28 Appellate Division 580; affirmed in this Court, without opinion 159 N. Y. 532) controls. In the *Masury* case, the deeds of trust, which were made in favor of the donor's adopted sons, and as to which it was held that the Transfer Tax Act did not apply, provided, each, for the payment of the income of the trust to the beneficiary during his minority and for the delivery to him of the securities, when he should attain his majority. The powers reserved in these deeds to revoke, or to annul, the trust during the donor's lifetime were considered, of themselves, not to affect the present vesting of the property, or to make its beneficial enjoyment contingent

upon the death of the donor. There appeared to be nothing in the transaction, which pointed to the existence of an intention on the part of the donor that his transfer should not be absolute, or that the beneficial enjoyment of his gift should be postponed until his death. The reserved power to revoke would enable him, of course, to put an end to the trust; *but that was not enough to affect the possession of the trustee, or the beneficial enjoyment of the object of the donor's bounty, while the trust was in force,* and such a power carried with it no control over the property or its management.

In the present case, however, the donor has reserved, during his life, such numerous and extensive powers over the properties transferred by his deeds, as to preclude the legitimate inference of an intention on his part that they were to take effect in absolute possession or enjoyment before his death."

In the *Bostwick* case the powers, among others, were as the Court stated, to alter or to amend the trust whenever the grantor desired, to withdraw any portion of the trust properties, or exchange any portion of the same by substituting any other securities as he might in writing direct, to add to the trust, to control any sale or other disposition by the trustee of the securities, and to terminate the trust at any time during the grantor's life upon written notice to the trustee.

The mere power to revoke a trust unaccompanied by other indicia of ownership or control does not render the transfer under the New York law subject to tax (See *Matter of Miller*, 236 N. Y. 290). In that case the donor gave to the United States Trust Company stocks and bonds of the value of \$700,000 to hold and pay the income thereof to his daughter during her life and upon her death to distribute the principal among her

surviving issue. The donor reserved to himself "a power of revocation similar to that in the other trust deed, but made no provision for the payment to himself of any part of the income during his life."

The New York Court of Appeals, through Crain, J., in holding that the said transfer was not subject to tax, said at page 293:—

"The surrogate was of the opinion that the transfers of these trust deeds were made to take effect in possession and enjoyment at the death of the grantor, and, therefore, subject to the transfer tax as provided by section 220, article X, of the Tax Law (Cons. Laws ch. 60). With this conclusion the Appellate Division disagreed, *holding that the mere reservation of the power to revoke did not render the transfer taxable*, citing *Matter of Carnegie*, (203 App. Div. 91) since affirmed by this Court (236 N. Y. 517). *We think in this the Appellate Division was right, and we affirm this part of the order appealed from.*" (Italics ours).

We therefore fairly may say that the New York Law as it was adopted in New Jersey in 1909 had received definite judicial construction, rendering it free from any doubt as to the meaning of the language of the New York Law. The meaning of the language in suit here, under the provisions of the New York Law, is that if there be income from or enjoyment of the uses of the property transferred reserved to the grantor, the transfer is within the ambit of the statute, and if it be not reserved, the transfer is without the statutory ambit notwithstanding the fact that the estates or beneficial interests in the property granted to other persons may be defeated by the exercise of a power of revocation or other power reserved to the grantor.

The application of the Above Decisions to the facts in suit.

The transfer to the trustees was absolute and unsusceptible of revocation or alteration by any act of the grantor. The beneficiary named in the trust became and was entitled at once to the enjoyment of the property transferred, and continued to enjoy the same unbrokenly from the date of the deed until its termination when she received from the trustees the principal thereof which had been held by the trustees for her benefit. Did Mrs. Russell intend any other result?

In the while from March 10th, 1916, to April 23rd, 1920 (the date of the termination of the trust) the wholly unaffected and unbroken enjoyment of the property was had, as has been said, by the beneficiary and remainderman named in the trust. The acts of the grantor point her intention as clearly and definitely as the instrument, both of which show she intended her daughter to enjoy and have the avails of the property whether she, the grantor, lived or died. (It will be noted that the term of the trust was the lives of Archibald D. Russell, Jr., and Ethelberta Pyne Eppley—see State of Case, p. 24). Indeed, the grantor to make assurance doubly sure, if that were necessary, reserved no right to alter, amend or revoke the trust, and those powers which she gave to the trustees (one of which she was), were bridled and circumscribed by the necessity for joint action—knowing no doubt that whatever her caprice or whim the father of the children (also a trustee) would not permit or consent to a different disposition of either the income or the principal, unless it were for the actual good and benefit of the children. This seems so natural, so evident and obvious, that counsel is puzzled that it can be seriously questioned.

That the grantor intended her daughter (or in the case of the daughter's death before the termination of the trust the daughter's issue, or in the absence of issue her husband, brother and sisters) to have and enjoy at once the property is made manifest by the particularity with which provision was made for such contingency in case of the death of the daughter-beneficiary before the termination of the trust period. In fact the trust was to continue nevertheless for the benefit of others. Again, as above indicated, the term of the trust estate was not measured by the life of the grantor but by the lives of two others. (In this differing from *Coolidge v. Commissioner Mass.*, 167 N. E. 757). In other words the transfer and trust were to take effect *eo instanti*, and to continue or terminate irrespective of the life or death of the grantor (see also Paragraphs "First" and "Second"—State of Case, pp. 24-25).

Nor does the "Third" and "Fourth" clauses negative the intention of the grantor to make a present *inter vivos* absolute transfer in trust, in good faith, for the benefit of her children or their issue. Clause "Third" having to do with the power vested conjointly in the trustees *qua* trustees (or the survivor) to terminate the trust by appointing it carries necessarily the implication that it might have appeared desirable to the trustees to appoint to the beneficiary named without awaiting the termination of the trust, or circumstances of illness, mental or otherwise, might have prompted an appointment to the brother or sisters or to a guardian, or such an appointment might have been dictated by the importunity or acts of creditors (if any—as in the case of a spendthrift trust) of the beneficiary, (see *Jones v. Clifton*, 101 U. S. 225, p. 229). But to believe, to

think, that a trust or transfer drawn with the particularity with which this was drawn, taking into account every possible reasonable contingency and providing that the trust should continue in the case of the death of the specifically named beneficiary for the benefit of her issue or her brother or sisters, was intended to be for the benefit of any other than the beneficiary, or her issue, tests credulity, and smacks of the insinuation that the trust instrument was a gesture and not something real and actual. Such a suggestion denies the fact of the trust instrument and its full legal force.

“ * * * to determine the intention of the donor, we must look, not to the argument of the respondent, but to the language of the deeds of trust, the relations which existed between the parties, *and the fact* of the beneficial enjoyment of the avails of the trust” (*Matter of Masury* at p. 583).

The grantor denied to herself as a grantor any rights in respect of this property whatsoever. It belonged to the trustees for the benefit of the beneficiaries named in the trust instrument. That Mrs. Russell intended beyond peradventure to denude herself of every property interest in the assets transferred is indicated definitely by Paragraph “Seventh” (State of Case, p. 29) wherein she reserved the right to add other property to the trust estate, but never to take anything therefrom. In other words when she desired to reserve a right in herself that right was reserved in explicit terms.

True, as trustees the two trustees during their lives conjointly could have appointed the principal of the property to someone other than the beneficiary named in the trust instrument. But so too could Mr. Masury in the *Masury* case, and so too could Sarah Keeney in *Matter of Keeney*, supra. Nevertheless the New York Courts held

that the trusts in those cases were not subject to the New York tax under the statute that was adopted by New Jersey in 1909.

We think with propriety it may be said that the legislature in adopting the Act of 1909 in April of that year must have had in mind and knew of the decision of the Court of Appeals of New York in the *Matter of Keeney* decided in February, 1909, just two months prior thereto and that this decision then fresh must have been considered by the legislature. The legislature under canons of construction, now too much a part of our jurisprudence to be questioned, must have had in mind the construction given to the statute in the *Matter of Masury*, supra, and the construction given to the statute in the *Matter of Greene*, and in the *Matter of Brandreth*. Mrs. Russell in the creation of this trust had a right to believe that the trust instrument she drew in 1916 by which she conveyed property indefeasibly to trustees for the benefit of others was free of the New Jersey tax. In all probability she was so advised by counsel. Certainly the decisions of the Courts of New York had clearly indicated the nontaxability of this transfer. Equally clearly the Courts of New Jersey had proclaimed that the legislature of New Jersey had adopted the law of New York and with it the construction given to that law by the New York Courts. Whether that construction is a correct or an incorrect construction may not at this time be mooted in the Courts. Whether right or wrong the legislature had adopted that particular law and no other law, and under this particular law Mrs. Russell had transferred her property to trustees.

POINT II.

There was no power of revocation in the grantor.

The language of the trust instrument points clearly to the fact (see Clause "Seventh"—State of Case, p. 29) that the grantor reserved nothing in respect of the property transferred or the trust other than a power to add to the corpus of the trust. True she gave powers in trust or a power to the trustees to appoint the property before the termination of the trust upon their joint action (or to the survivor) but not otherwise. But this power was not a power reserved to her but a power in trust. Whether a power be granted to another or be reserved by a grantor its exercise is valid only if exercised with the most minute observance of the instrument creating the power (See *Oak Investment Corp. v. Martin et al.*, 107 N. J. Eq. 123, Oct., 1930). This principle is laid down clearly in *Slifer v. Beates*, 9 Serg. & R. 166, 181 (an early case in Pennsylvania), where the Court said:

"It is conceded, that if the power be defectively executed the parties being all volunteers, and standing in equal equity, chancery could grant no relief, nor remedy the defect. Nor does it make any difference, whether it is a restraint by the owner, on his own right, or a power to be executed by him on the property of others. The owner is his own legislator. He may impose on himself what terms he pleases. The province of the judge is, not to inquire whether the circumstances required are important or significant, essential or ceremonial, reasonable or unreasonable, but what they are. Whatever disposition Thomas Fromberger is empowered to make, whether

by deed, will, or other writing, must be with the consent and approbation of the trustees, or the survivor of them, or the heirs of such survivor, by some deed, under their hands and seals, duly executed and acknowledged, and with such consent and approbation, he is empowered to grant and convey all or any part of the premises for such uses and estates, as he, with such consent, may limit and appoint. *Where forms are imposed on the execution of a power, the circumstances must be strictly adhered to; and where a man imposes them on himself, the court cannot dispense with the forms and solemnities he has required. To do so, would be to deprive a man of the bridle he has thought proper to impose on his weakness or frailty of mind, to take from his friends the reins he has put into their hands, to restrain him in his moments of intemperance, folly, and thoughtlessness, from making beggars of his children, and stripping his heirs of that which came to him from their common ancestor. The circumstances may be perfectly arbitrary, unessential in point of effect, to the validity of the instrument by which the power may be exercised; but being required by the creator of the power, they can only be satisfied by a strictly literal and precise performance, and without recapitulating the cases in which it has been decided, there must be this literal adherence, it may be said, that in every case the ingenuity of man can devise, the terms of the power must be strictly complied with. Sugden's Powers, 211, 218."* (Italics ours).

While a general power of appointment may be exercised by the donee of the power to and for his own benefit or to or for the benefit of anyone, if it carries such a definite implication, a power in trust or a power given to trustees never may be exercised to or for the benefit of the trustee. This proposition of law lies at the very root of

fiduciary relationship and is as fundamental as honesty in the observance of trust relationship is fundamental. The requirement is inexorable and adamant. It is not susceptible to any exception. Perry on Trusts and Trustees, 7th Ed., Vol. 1, p. 453, lays down the rule in the following words:—

“The donee of the power cannot execute it in favor of himself or his family, unless the terms of the power specifically authorize him so to do.”

So long as the power is in the trustee it can never be exercised for his or her own benefit. The provision in the trust deed that the power could be exercised in favour of the issue of the grantor or the husbands or wives of the issue or “to and among any other person or persons, corporation or corporations whatsoever” precluded automatically the settlor or her husband from ever being the appointees of either the income or the principal, directly or indirectly. They could have been made the appointees only if the instrument in definite and unequivocal terms expressly included them by *specific* reference in the penumbra.

A trustee may not even sell to himself or buy from himself, unless the trust instrument in specific terms grants the privilege. *A fortiori* the trustee may not give to himself. The powers in the trust in suit were not beneficial powers to the trustees. The provisions of the instrument preclude this possibility even in fancy.

The Court below recognized the principles above indicated and held that the property could never be re-taken by Mrs. Russell or be had or enjoyed by either of the trustees, Mr. or Mrs. Russell.

The Statute imposes no tax upon the exercise or the failure to exercise a power of appointment.

The trustees did not exercise the powers of appointment given them, and the transfers would not have been subject to tax even if they had exercised the powers. The statute in suit imposes no tax upon the exercise nor upon the failure to exercise a power of appointment. Therefore, the case of *Saltonstall v. Saltonstall* (276 U. S. 260 [1928]) has no application to the question here presented. The single question decided by the United States Supreme Court in that case was whether the statute imposing a tax upon the exercise or non-exercise of powers of appointment enacted after a transfer in trust had been made was a taking of property without due process of law in violation of the Federal Constitution. The Court at pages 271-2, through Mr. Justice Stone, said:—

“Without considering the other statutes involved, we need not go further than to say that the statute of 1909 [the Massachusetts statute imposing a tax upon the nonexercise of powers of appointment] imposing the tax because of the failure to exercise the power of appointment, does not deprive plaintiffs in error of their property without due process of law.”

The Massachusetts statute involved in the *Saltonstall* case is not the statute involved here.

POINT III.

The transfer under the statute in suit, as it was interpreted at the time of its adoption, is not one intended to take effect in possession or enjoyment at or after death merely because the interest of the cestui que was subject to defeasance by the happening of a condition subsequent.

This point as stated divides itself naturally into two inquiries: (a) Is such a transfer one intended to take effect in possession or enjoyment at or after death within the meaning of the particular statute in suit; and (b) If construed so as to be applicable to the transaction in suit is the statute constitutional within the meaning of the Fourteenth Amendment of the Constitution of the United States.

Any argument as to the power of the state to impose the tax, or as to its right by subsequent legislation to reach for taxation a transfer not indefeasibly vested in an ultimate remainderman, is addressed to the second of the above two propositions, and has no bearing whatever upon the first. Much of the argument in the lower court of the Attorney General was addressed to the second of the two propositions, but so developed as to seem to be applied to the first. The two propositions are unconnected and exclusive of each other and to discuss them as though they were one point of law is confusing and can lead only to foggy results.

- a. *The mere fact that the remainder is subject to a conditional limitation or defeasance, or that the physical manucaption of the corpus may not occur until at or after the death of the grantor is immaterial.*

The New York Courts had decided at the time of the adoption of the New Jersey statute that

a transfer in trust was not amenable to its Inheritance tax act merely because the instrument provided that in case the beneficiary died before the expiration of the period of the trust, which was at or after the death of the grantor, the property and/or its avails should go to someone else. (*Matter of Keeney*, 194 N. Y. 281.) In respect of the three-quarters of the property transferred which were not taxed, the deed in the *Keeney* case had provided that in the case of the death of one of the three beneficiaries named "before the death of the" grantor leaving no issue, husband or wife, then "the share of the income payable under this instrument to such deceased person shall be paid to the party of the first part and the survivors or survivor" of the three beneficiaries "share and share alike". (See Papers on Appeal in New York Court of Appeals, p. 22). Also the deed provided that the property should be held by the trustees "during the lifetime of the said party of the first part upon the following trusts, and shall dispose of the same, after the death of the said party of the first part * * *".

Again, in the *Matter of Masury*, *supra*, by reason of the uncontrolled power of revocation in the grantor the interests of the beneficiaries or remaindermen were always during the life of the grantor and during the term of the trust subject to possible defeasance. Nevertheless the Court held the transfers not subject to tax to the beneficiaries.

It was the above construction of the statute that was adopted in 1909 and no change had been made in the statute at the date of the death of Mrs. Russell that altered or modified the law and the construction thereof so adopted in 1909. Nor is there anything of surprise or oddity that this is so because practically every *inter vivos* trust

drawn has elements of uncertainty as to who ultimately will take. The interests of the remainderman are virtually always subject to possible defeasance by some subsequent event or happening. The lawyer who did not so draw a deed of trust, under normal circumstances, would be subject to proper criticism. A contingent remainder is no less a remainder, or no less a property right, than a vested or absolute remainder. (*Frew v. Bowers*, 12 Fed. (2d) 625, p. 627—1926.) Both are alienable, descendable and both may be willed. (*Moore v. Littel*, 41 N. Y. 66—1869.) The incongruity of holding taxable a transfer otherwise complete to the trustees merely because the remaindermen will take the principal of the trust at or after the death of the grantor was apparent to the United States Supreme Court. That Court said through Mr. Justice Stone in *Reinecke v. Northern Trust Company*, 278 U. S. 339 (1929) at pp. 347-348:—

“One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos*, equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death. *It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute.*” (Italics ours.)

It is idle to contend that a gift by “A” to “B” with the provision that “B” may give the property to anyone “B” desires other than himself, and may create such estates therein as he pleases, would be subject to tax upon the death of “A” under the statute in suit. “A’s” rights, inter-

est, and attributes in and of property are gone. He transfers nothing thereby at or because of his death, or in respect of his death. And death must be the "generating source" of the tax upon a transfer under death duty legislation. (*Knowlton v. Moore*, 178 U. S. 41 at p. 56). The transaction is no less free from tax if the transfer be to "B" as trustee to appoint as he sees fit, and if he do not appoint then the avails to "C", etc. "A's" death does not occasion the passing of anything to "C", or to the appointee of "B". That "A" should make the same gift to himself as trustee absolute in all its possibilities does not, cannot, change either the status of the irrevocability of the transfer or affect the taxability thereof. Suppose that the surviving trustee, Archibald D. Russell, had appointed after the death of his co-trustee, the property to someone other than the beneficiaries named in the trust. Clearly there would be no tax. Is the mere fact that he does not appoint a basis for tax in the absence of a statute imposing a tax upon the non-exercise of powers of appointment, as in the Massachusetts law?

Can the statute possibly be construed to hold that if a person makes himself the trustee the transfer is taxable but if he make another it is not taxable? So impractical a distinction shocks. It is based upon no sound reason either in fact or in law. "Taxation is an intensely practical matter and laws in respect of it should be construed and applied with a view of avoiding, so far as is possible, unjust and oppressive consequences." (*The Farmers' Loan and Trust Company v. Minnesota*, 280 U. S. 204 at p. 212.) "Taxes are very real things and statutes imposing them are estimated by practical results." (*Nichols v. Coolidge*, 274 U. S. 531, at p. 542). That a gran-

tor makes himself the trustee does not affect either the validity of the transfer or the completeness thereof. In *Reinecke v. Northern Trust Company*, supra, Mr. Justice Stone said at p. 346:—

“Nor did the reserved powers of management of the trusts save to decedent any control over the economic benefits or the enjoyment of the property. He would equally have reserved all these powers and others *had he made himself the trustee, but the transfer would not for that reason have been incomplete.*” (Italics ours.)

The New York Courts have decided that a transfer was not subject to tax by subsequent legislation solely because the remainder interest was contingent. (*Matter of Craig*, 97 App. Div. 289 [1904], affirmed 181 N. Y. 551). See also *Matter of Kirby*, 133 Misc. [N. Y.] 152, affirmed 228 App. Div. 640, affirmed without opinion 254 N. Y. 122 (advance sheets) October 22, 1930; *Matter of Barstow*, 230 App. Div. 371 [N. Y.] October 5, 1930, in which case there was a reservation of income to the grantor but the trust was held subject to tax as of the date of the transfer in trust and not as of the date of the death of the grantor; *Matter of Schweinert*, 133 Misc. [N. Y.] 762, March, 1929, where the grantor was himself the trustee.

The test of taxability is whether at the time of the death of the grantor a property right owned or enjoyed by the grantor is transferred to the living by reason of such death. (Cf. *Matter of Schmidlapp*, 236 N. Y. 278 and *Matter of Miller*, 236 N. Y. 290, decided the same day). The fact that the remainderman who eventually will take may not be determined definitely until at or after the death of the grantor can have no bearing upon

whether a transfer is one intended to take effect in possession or enjoyment at or after death where there is nothing of the enjoyment of the avails of the property transferred reserved to the grantor. This we have thought was inherent in the construction of this language, and that it lay at the root of the fundamentals of the law. (*Matter of Masury*, supra; *Matter of Miller*, supra; *Matter of Keeney*, supra; *Farmers' Loan and Trust Company (Astor Trusts) v. Bowers*, 29 Fed. [2d] 14 [1928—C. C. A. 2nd]; *Reinecke v. Northern Trust Company*, 278 U. S. 339 [1929]; *May v. Heiner*, 281 U. S. 238 [1930]; *Shukert v. Allen*, 273 U. S. 545 [1927]; *Dexter v. Jackson, Treasurer and Receiver*, 243 Mass. 523, 137 N. E. 877 [1923]; *In re Dolan's Estate*, 279 Pa. St. 582, 124 Atl. 176 [1924]; *People v. Northern Trust Company*, 289 Ill. 475, 124 N. E. 662 [1919] p. 663 and see p. 665).

The cases everywhere and from practically all jurisdictions speak too plainly and directly in respect of the immateriality of whether the remainder is contingent or vested to leave any doubt about this proposition. As stated above the vast majority of living trusts provide some date in the future for the termination thereof, usually long after the death of the grantor, and sometimes at or upon his death, as the above cited cases will illustrate. The tax does not depend upon whether a remainder is a vested or a contingent one. The tax is not upon the coming into possession or enjoyment of property. "The tax is a charge upon the *creation of the right*. It is *not* a charge upon *fruition in enjoyment or possession*. We must fix the point of time at which creation was effective." Cardozo, J., in *Matter of Schmidlapp*, supra, at p. 283.

In *Matter of Smith*, 150 A. D. 805, the Court significantly to the case at bar said at p. 809:

"I am, however, unable to see that the fact that the remainder interests are contingent rather than vested is important or controlling on the question of liability to the transfer tax. The beneficiaries' right to the succession to such interests, whether the interests be vested or contingent, accrued when testator's will became effective, prior to the first Transfer Tax Act, and those interests have subsequently vested in the possession and enjoyment of the remaindermen without the intervention of any subsequent testamentary act. At the instant such right of succession accrued it became immune, as a property right, from subsequent legislative impairment." (Italics ours.)

Even the cases where the remainders are so far contingent that the right to take depends upon default of the exercise of a power of appointment, or where the power is exercised the result would be the same if not exercised, the Courts have held that the rights are so sufficiently vested as to be immune from encroachment by subsequent legislative burden. *Matter of Haight*, 152 App. Div. 228; see also *Matter of Lansing*, 182 N. Y. 238.

The corollary to the above proposition is—does the fact that the instrument provides that the intervening life estate shall not fall in until at or after the death of the grantor bring such a transfer in trust within the purview and meaning of the statute in suit, if no enjoyment of the property or uses thereof be reserved for the benefit of the grantor.

The Supreme Court of the United States suggests that such a construction of the law is ridiculous. (*Reinecke v. Northern Trust Company*, supra, at p. 348). "It would require plain and

compelling language to justify so incongruous a result" says Mr. Justice Stone speaking for a unanimous court. The recent decisions of the New York Courts in *Matter of Kirby*, supra, *Matter of Barstow*, supra, and *Matter of Schweinert*, supra, have indicated that the taxability of an *inter vivos* transfer is not dependent upon whether the ultimate remaindermen will come into actual physical possession of the property only at or after the death of the grantor.

- b. *In respect of the power constitutionally of the State to impose a transfer inheritance tax so long as the possibility of defeasance obtains.*

This inquiry is directed to the constitutional powers of the State and not to the appropriate and already settled construction of the statute. It has its pertinency only if the statute may be or is construed so as to tax a transfer wholly irrevocable and in which the grantor reserved no rights, interest or beneficial control, merely because the ultimate remainderman or remaindermen may not be identified until at or after the death of the grantor.

The Supreme Court of the United States has held that a succession tax or probate duty constitutionally may be applied at any time up to the completion of the succession or administration. See *Saltonstall v. Saltonstall*, 276 U. S. 260; *Orr v. Gilman*, 183 U. S. 278; *Chandler v. Kelsey*, 205 U. S. 466; *Cahen v. Brewster*, 203 U. S. 543.

The *Saltonstall* case had to do with the right of the State of Massachusetts to impose a tax upon the nonexercise of a power of appointment under a statute enacted after the date of the gift of the power taxing the exercise or nonexercise of pow-

ers of appointment. The Court held a tax so imposed did not violate the "due process of law" clause of the Fourteenth Amendment. This in view of the fact that the Massachusetts courts had construed the Massachusetts tax statute as imposing the tax upon succession and that the succession was not complete until the death of the owner of the power of appointment who in that case was the grantor. This construction of the statute by the Massachusetts court was, of course, binding upon the Federal Court.

The case of *Orr v. Gilman* involved the question of whether the exercise of a power may be taxed under a statute enacted after the power was given but before the exercise of the power by the donee thereof, and the Court held that the tax upon the exercise of such power was not a violation of the Fourteenth Amendment of the Constitution of the United States.

The Court of Appeals of New York in construing the New York statute, in *Orr v. Gilman, supra*, had held that the tax was on the exercise of the power and not upon the succession, in the following language:

"When David Dows, Sr., devised this property to the appointees under the will of his son, he necessarily subjected it to the charge that the state might impose on the privilege accorded to the son of making a will." *Matter of Dows*, 167 N. Y. 227, at p. 232.

In *Chandler v. Kelsey* relatively the same facts were presented except that the original transfer in the *Chandler v. Kelsey* case was by deed, whereas in the *Orr v. Gilman* case it was by will. In each case, however, the exercise of the power was made after the enactment of the Act, although the donation of the power was made prior thereto.

The decisions of these cases represent the law and present no novel proposition. The *Saltonstall* case naturally followed from the decisions in the *Orr v. Gilman* and *Chandler v. Kelsey* cases. In the latter two cases the tax was upon the exercise of a power of appointment under a statute imposing a tax upon such exercise. The *Saltonstall* case was a tax upheld as constitutional upon the nonexercise of a power of appointment under a statute imposing the tax upon such nonexercise, upon the theory that the nonexercise is equivalent to the exercise thereof in favour of those who would have received the property in default of the exercise.

But these cases have nothing to do with the matter at bar. They do not hold nor attempt to hold that the transfers are ones intended to take effect in possession or enjoyment at or after death nor do they point the constitutional powers of the states. They merely say that if an act is done after the enactment of the statute within the purview of that statute, the statute is constitutional. None of the above three cases was upheld by the United States Supreme Court upon the ground that the transfers involved therein were transfers intended to take effect in possession at or after death, notwithstanding the irrevocability thereof, or because of the fact that there was a power of appointment or the equivalent thereof obtaining in each of the three. It was the power exercised or nonexercised that was the subject of the tax.

Cahen v. Brewster, supra, was a case arising under the tax laws applicable to succession under the civil laws of Louisiana. The Supreme Court of the United States merely held there that so long as the succession was not complete it was within the power of the state to control the succession, and consequently to impose a tax thereon.

Again this case is wholly inapplicable to the questions presented in the case in suit. It has to do with the power of the legislature of a state to reach for taxation property in the hands of an executor or administrator after the death of its prior owner at the time of the enactment of the law.

Nor is the case of *Carter v. Bugbee* (91 N. J. L. 438, affirmed 92 N. J. L. 390) pertinent. That case had to do with a transfer by deed wherein there was a reservation of the income, and this Court decided that the transfer was one intended to take effect in possession or enjoyment at or after death, and being so, notwithstanding its irrevocability, was amenable to the New Jersey Transfer Inheritance tax law enacted after the date of the trust instrument. Whether this decision, in view of the decisions of the United States Supreme Court in *Union Trust Company of San Francisco v. Wardell*, (258 U. S. 537), *Levy v. Wardell*, (258 U. S. 542), *Shwab v. Doyle* (258 U. S. 529), *Nichols v. Coolidge* (274 U. S. 531) and *Untermeyer v. Anderson* (276 U. S. 440), and of the decisions of the Court of Appeals of New York in *Matter of Pell*, 171 N. Y. 48 (1902) and *Matter of Craig* (97 App. Div. 289—1904, affirmed 181 N. Y. 551) is a correct construction of the constitutional limitations upon retroactive excises is not material herein. This is so because there the transfer was one intended to take effect in possession or enjoyment at or after death and was within the letter of the law. No such state of facts or circumstances is present in the case in suit.

We think it fairly may be said that no case has ever been decided by the Supreme Court of the United States, so far as our researches have discovered, in which a tax has been upheld upon a transfer sought to be subjected to tax upon the ground that it was a transfer intended to take ef-

fect in possession or enjoyment at or after death except in those cases wherein there has in fact been a reservation of the uses or avails of the property transferred during the period of the life of the grantor, or where there was a power in the grantor himself by some act of his own (whether conditioned upon the consent of others or not) to re-take the property by the exercise of such a power of revocation. This doctrine must not be confused with the decisions of the Courts wherein the exercise of powers of appointment have been subjected to tax, because there the amenability of the transaction to the taxing statute is predicated in each instance solely upon the act of exercising the power of appointment, or (as in the *Saltonstall v. Saltonstall* case) the nonexercise thereof under a statute specifically imposing the tax on the non-exercise thereof.

True the Supreme Judicial Court of Massachusetts in *Coolidge v. Commissioner* (167 N. E. 757) has held that the transfer therein involved was subject to the Massachusetts succession tax. There, however, it may be observed the original trust instrument reserved to the grantors the uses and avails of the property during the period of their lives. True subsequently and before the death of the grantors they gave up the right to the use or enjoyment of the income from the said trust and assigned the same to the remaindermen named in the trust. This case is now pending in the United States Supreme Court upon appeal.

If no property be transferred at death it may not be said that death was the "generating source" of the shifting of economic benefits. Certainly in the case in suit the death of Mrs. Russell, the grantor herein, did not occasion the transfer to the beneficiaries named in the trust instruments of any more or larger property right than that

with which they were already seized. From the commencement of the trusts the beneficiaries have enjoyed all the uses and benefits of the property transferred. Nothing was reserved to the grantor either of property or property interest, nor had she *as grantor or as an individual* any control or right in respect of the enjoyment either of the income or the principal of the funds of which she had irrevocably divested herself by the transfer in 1916.

If the power be out of the grantor ever to use or enjoy the property transferred by her then under the doctrine applicable to such a transaction, as laid down by the United States Supreme Court in the interpretation of similar language under the Federal estate tax law, the transfer is not subject to the death tax.

In *May v. Heiner* (281 U. S. 238), the United States Supreme Court held a transfer not subject to the tax in a case where the transfer was to trustees upon trust to pay the income to the grantor's husband during his life and upon his death to pay the income to the grantor during her life, and upon the death of the survivor the principal to be paid over as set out in the trust instrument. The Supreme Court said at p. 243:—

“The record fails clearly to disclose whether or no Mrs. May survived her husband. Apparently she did not. *But this is not of special importance since the refund should have been allowed in either event.*” (Italics ours).

The Court said at p. 243 in reference to the said transfer in trust:—

“It was not testamentary in character and was beyond recall by the decedent. *At the death of Mrs. May no interest in the property*

held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event." (Italics ours).

This case therefore held flatfootedly, as we construe it, and as it has been construed by the United States Board of Tax Appeals and by Circuit Courts of Appeals of the United States, that as the tax is upon the transfer of the principal of the property, and as the tax is measured by the value of the principal transferred, if that had been irrevocably transferred to trustees before death the transfer was not within the ambit of the taxing statute in that there was no transfer of property, and no shifting of economic benefits occasioned by or at the time of the death of the grantor.

The United States Circuit Court of Appeals for the Seventh Circuit in *Commissioner v. Northern Trust Co.*, 41 Fed. (2d) 732, held that a transfer was not one intended to take effect in possession or enjoyment at or after death where the transfer was upon trust to pay the income to the grantor during his life and upon his death the remainders to those of his children living at the time of his death. A similar position was taken by the same Court in *Hodgkins v. Commissioner*, 44 Fed. (2d) 43, in which the facts were substantially the same as those in the *Northern Trust Company* case. See also decision of the United States Circuit Court of Appeals for the Third Circuit in *McCaughn v. Carnill*, 43 Fed. (2d) 69, in which that Court held a transfer not subject to tax as one intended to take effect in possession or enjoyment at or after death where the transfer was upon trust to pay the income to the grantor during his life and after his death the income to be paid to

his wife, and after her death the income to be paid to the children during their lives, with the remainders over upon the death of the children.

The United States Circuit Court of Appeals for the Eighth Circuit took a contrary position in the case of *Morsman v. Commissioner*, decided by the Eighth Circuit on November 8th, 1930. (Commerce Clearing House, Vol. III, p. 9228.) These cases are now pending in the United States Supreme Court upon certiorari.

The decision of the United States Supreme Court in *May v. Heiner*, supra, was construed by the United States Board of Tax Appeals to hold that if the transfer was irrevocable, that is to say, if there was no possibility of the property coming back to the grantor by any act of the grantor's, the transfer was not one intended to take effect in possession or enjoyment at or after death, notwithstanding the reservation of income. (See *Ullmann v. Commissioner*, 20 B. T. A. 782; *Wheeler v. Commissioner*, 20 B. T. A. 695; *Hilton v. Commissioner*, 21 B. T. A. 3).

The United States Circuit Court of Appeals for the First Circuit held in *Brady v. Ham* (reversing the United States District Court for the State of Maine) which case is as yet unreported (see Commerce Clearing House Inheritance Service 1930-1932, Vol. 4, p. 1139) that a transfer was not subject to tax as one intended to take effect in possession or enjoyment where the transfer was to trustees without the reservation of any income but subject to the right reserved to the grantor to change the beneficiary and to appoint to such other beneficiary as the grantor desired, excluding always the possibility of appointment to the grantor, and excluding always any possibility of enjoyment by the grantor. There is here a striking similarity to the facts in the case at bar. If

anything the case at bar is an *a fortiori* case because the grantor, Mrs. Russell, as such, had no power to change the beneficiary, and even in her capacity as trustee she could not, during the life of her co-trustee, act alone. In other words during the life of Mr. Russell no power rested in Mrs. Russell even as trustee to change the beneficiary of the trusts she had created. Even as trustee her power was bridled by and subordinated to the necessity for the consent to such action by the co-trustee.

The United States District Court for Massachusetts in *Erskine v. White*, 43 Fed. (2d) 765, has decided that a transfer in which there was no reservation of income but which was subject to a power of revocation with the consent of the trustee was not subject to the Federal estate tax, notwithstanding the Federal estate tax law (Sec. 302 (d) Rev. Act. 1926) provided that if the transfer was subject to revocation by the grantor alone or in conjunction with anyone else, the property transferred should be subjected to tax. This decision is a counterpart of the decision of the United States Circuit Court of Appeals for the Second Circuit in *The Farmers' Loan and Trust Company v. Bowers*, 29 Fed. (2d) 14, under an earlier statute. In the case of *The Farmers' Loan and Trust Company v. Bowers* the transfer was one upon trust to pay the income among certain beneficiaries as the grantor directed or appointed during his life, and in the absence of appointment by him to charities, and also the remainder was subject to appointment by the Will of the grantor to and among the beneficiaries. In addition to these powers, the grantor reserved the power to revoke the trust with the consent of the trustee. The Court held this transfer not taxable. Notwithstanding the time within which to appeal from the

decision in this case, which involved several millions of dollars, had not expired at the time the United States Supreme Court decided the cases of *Reinecke v. Northern Trust Co.*, 278 U. S. 339, and *Chase National Bank v. United States*, 278 U. S. 327, the Government did not apply for a writ of certiorari. On the contrary the Government recognized the correctness of the decision in *The Farmers' Loan and Trust Company v. Bowers* case, based upon the decisions of the United States Supreme Court in the *Chase National Bank* case and the case of *Reinecke v. Northern Trust Company*.

Counsel for the Comptroller in the Court below, ignoring the fact that the statute adopted in New Jersey was the New York statute as interpreted at the time of its adoption, argued that the United States Supreme Court had laid down new doctrines affecting the interpretation of inheritance tax legislation, and predicated the theory of the state's position upon the decisions of the Supreme Court of the United States in *Saltonstall v. Saltonstall*, supra, and in *Chase National Bank v. United States*, supra, and in *Reinecke v. Northern Trust Co.*, supra.

We have pointed out heretofore in this brief that the United States Supreme Court decided only one point in the *Saltonstall* case and that was that a statute imposing a tax upon the non-exercise of a power of appointment was not a taking of property without due process of law in violation of the Fourteenth Amendment of the Federal Constitution. The Court was specific in not considering the other questions raised in that case, for it said at p. 271 that it was rendering its decision "without considering the other statutes involved. * * *".

The *Chase National Bank* case has no pertinency and may not be relied upon as an authority for the case in suit. That case had to do with the taxability of life insurance policies, the beneficiaries of which policies were subject to change by the grantor in his undisputed discretion at any time. In other words there was a complete power of revocation in the grantor. But where the power to revoke, or change, or alter, or modify is circumscribed and bridled by the necessity for the consent of someone else, the transfer is not within the taxing statute. This was decided in *Reinecke v. Northern Trust Co.*, 278 U. S. 339, in respect of the five trusts.

Prior to those decisions the United States Supreme Court had held in *Nichols v. Coolidge*, 274 U. S. 531, that a transfer that could not take effect in actual manucaption into the hands of the ultimate remaindermen until at or after the death of the grantor was not subject to the Federal estate tax. This was held notwithstanding in the original trust the grantor reserved to herself the income from the trust, though subsequently and before her death she had relinquished the right to the use of the income. The Court said at p. 540:

“But the conveyance by Mrs. Coolidge to trustees was in no proper sense testamentary, and it bears no substantial relationship to the transfer by death.”

In *Shukert v. Allen*, 273 U. S. 545, the Supreme Court had previously held that a transfer that could not possibly take effect in actual physical possession until at or after the death of the grantor was not subject to the Federal estate tax as one intended to take effect in possession or enjoyment at or after death. That the Court so held

is indicated by the opinion of the United States Supreme Court in *Reinecke v. Northern Trust Co.*, where the Court said at p. 347:

“But the question much pressed upon us remains, whether, the donor having parted both with the possession and his entire beneficial interest in the property when the trust was created, the mere passing of possession or enjoyment of the trust fund from the life tenants to the remaindermen after the testator’s death, as directed, and after the enactment of the statute, is included within its taxing provisions. That question, not necessarily involved, was left unanswered in *Shukert v. Allen*, 273 U. S. 545.”

The Court then proceeds to answer the question left unanswered in *Shukert v. Allen*, *supra*, for it says:

“There the gift of a remainder interest, having been made without reference to the donor’s death, although it did in fact vest in possession and enjoyment after his death, was held not to be a transfer intended to take effect in possession or enjoyment at or after the donor’s death, and for that reason not to be subject to the tax.”

Such a condition obtains here. The remainderman could take possession of the actual property, the possession of which was held for her by the trustees, whether the grantor lived or died, although in fact she did not come into the physical possession of the property, other than through the trustees, prior to the death of the grantor. No property rights changed upon the death of Mrs. Russell. There was no shifting of economic benefits at or by reason of her death. (*Saltonstall v. Saltonstall*, *supra*; *Reinecke v. Northern Trust*

Company, supra). Nor did any property rights or economic benefits ripen into the remaindermen, or shift to them at or by reason of the death of Mrs. Russell. (*Tyler v. United States*, 281 U. S. 497).

We submit that if no income was reserved to the grantor, and no power to revoke or regain possession of the property transferred rested in the grantor, and if the measure of the period of the trust was not her life, and if her death did not occasion the shifting of any economic benefits, or bring into being or ripen for the remaindermen property rights of a character different from those already possessed, the transfer is not one intended to take effect in possession or enjoyment at or after death.

A tax sought to be imposed as an inheritance tax upon property irrevocably transferred out of the decedent during her life, is a violation of the Fourteenth Amendment of the Constitution of the United States. Death must be the generating source of the tax. If property be not transferred at death or by reason of death, or death does not occasion the shifting of economic benefits, the transfer is not subject to death duties. Mr. Chief Justice White said in *Knowlton v. Moore*, 178 U. S. 41, at p. 78, in speaking of the imposition of inheritance taxes generally:

“Of course, they concern the passing of property by death, *for if there was no property to transmit, there would be nothing upon which the tax levied on the occasion of death could be computed.*” (Italics ours.)

The death of Mrs. Albertina T. Russell neither increased nor diminished the property rights and interests of the *cestuis que* of the trusts she had created in March 1916. A death duty or inheri-

tance tax imposed upon the trusts so created upon the occasion of her death violates the Fourteenth Amendment of the Constitution of the United States.

POINT IV.

The judgment of the Court below should be reversed.

Respectfully submitted,

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Of Counsel.

New Jersey Court of Errors and Appeals

PLAINFIELD TRUST COMPANY, as Sub-
stitutionary Administrator with the
Will Annexed of the Estate of Al-
bertina T. Russell, Deceased,
Prosecutor-Appellant,

against

JOHN McCUTCHEON, as Comptroller of
the Treasury of the State of New
Jersey, and Albert C. Middleton, as
Treasurer of the State of New Jer-
sey,

Defendants-Respondents.

ON APPEAL.

REPLY OF PROSECUTOR-APPELLANT.

The primary question to be determined is whether the particular transfers in question are embraced within the transfer tax statutes of New Jersey.

While various other questions have been argued, in the thought that this discussion might help the court in reaching a conclusion, in the final analysis, the question which must be determined is the construction to be placed upon the statute imposing a tax upon transfers "intended to take effect in possession or enjoyment at or after the death of the transferror."

The purport of the Respondents' argument is that, during Mrs. Russell's life, she, with the assent of the other trustee, had the power to appoint the trust funds

to other persons, and that, therefore, the rights of the beneficiaries named in the deed of trust did not and could not indefeasibly vest until after the death of Mrs. Russell. The Respondents then urged the consideration of authorities, which seem to hold that a state has the authority to impose a succession tax, that is, a tax upon the right to succeed to property, at any time before such property indefeasibly vests in the recipient.

With these two premises as a basis, the respondents then argue that the words in the statute above quoted should be construed as imposing such a succession tax. The fact that the state may have power to impose such a tax, does not support the proposition that the state has exercised that power.

Replying to these arguments of the respondents, we submit:

1. The authorities will not support a construction of the statute as imposing a tax upon the transfers here considered, whether the statute be construed as imposing either a transfer or succession tax.

2. The statute imposes a transfer tax, as distinguished from a succession tax.

The authorities will not support a construction of the statute as imposing a tax upon the transfers here considered, whether the statute be construed as imposing either a transfer or succession tax.

In our main brief we urge that the construction of the New York statute, extant at the time of the adoption of the New Jersey statute, was controlling. Respondents claim that the law of New York upon this subject was uncertain, that there were conflicting decisions. They assert that in *Matter of Bostwick* the court adopted a conclusion contrary to that of the *Masury* case. An examination of the opinion in the Bostwick case will not support this conclusion. The court there recognized the

force of the *Masury* case, but pointed out that the doctrine of that case would not be extended to include such cases as *Matter of Bostwick*, where the settlor reserved not only full powers to change, alter, or amend the trust instrument, but also full control over the trust property while held by the trustee, including the power to withdraw securities, substitute others, change the investments, and, during the settlor's life, deprived the trustee of any actual control over the securities, excepting only the custody and the collection of the proceeds thereof. There, during his life, the trustee could not take any action with respect to the sale or changing of the securities without the assent of the settlor, and was required to act upon the instructions and directors of the settlor. The effect of the trust deed, therefore, was to create little more than an agency. Nevertheless, the effect of the reservation of a mere power of revocation was regarded in New York as having been definitely determined by *Matter of Masury*, as is clearly shown by the action of the state in *Matter of Keeney* (page 18 of our main brief), where the state did not assert any right to tax the property which had been transferred in trust, with directions to pay the income and principal to others than the settlor, although the settlor did reserve a power of revocation. Numerous subsequent authorities in New York State recognize the binding effect of the *Matter of Masury*. (See page 19 of our main brief.)

Quite apart, however, from the binding effect of the New York decisions concerning transfers subject to the absolute power of revocation of the transferror, the New Jersey statute should be construed in accordance with the construction placed upon similar statutes.

The Federal estate tax law, in so far as it imposes a tax, is phrased in substantially the same manner as the New York and the New Jersey transfer tax statutes. Section 1 of chapter 228, of the New Jersey Laws of 1909, provides: "A tax shall be and is hereby imposed upon the transfer of any property * * * in the following

cases: * * * When *the transfer* is of property made by a resident * * * by deed, grant, bargain, sale or gift * * * intended to take effect in possession or enjoyment at or after such death." (Italics ours.)

The United States Revenue Act of 1918, Sec. 401, provides that:

"A tax equal to the sum of the following percentages of the value of the net estate * * * is hereby imposed upon *the transfer* of the net estate of every decedent dying after the passage of this Act * * *." (Italics ours.)

Sec. 402 provides that:

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated— * * *

"(c) To the extent of any interest therein of which the decedent has at any time made a *transfer* * * * intended to take effect in possession or enjoyment at or after his death." (Italics ours.)

Substantially the same language was found in the Revenue Acts of 1921, 1924, 1926 and 1928. The similarity of these provisions, imposing a Federal estate tax, and the New Jersey transfer tax act is at once apparent. The decisions, therefore, of the Federal courts in construing the Federal act are of particular significance in the construction of the New Jersey act.

In *Reinecke v. Northern Trust Company*, 278 U. S. 339, the Court held that a transfer by deed of trust which was subject to revocation by the transferor with the consent of the beneficiary, or with the consent of a majority of the beneficiaries, was not embraced within the terms of the Federal act.

In *Farmers' Loan and Trust Co. v. Bowers*, 29 Fed. (2d) 14, the Court held that a transfer by a deed of trust which reserved to the grantor the right to revoke the trust with the consent of the *trustee* was not subject to the Federal estate tax.

In *Erskine v. White*, 43 Fed. (2d) 765, the U. S. District Court for Massachusetts, also decided that a mere transfer in trust which was subject to revocation by the grantor with the consent of the trustees was not subject to the Federal estate tax.

It follows that if a power of revocation of a transfer in trust is not to be construed as one intended to take effect in possession or enjoyment at or after death, a transfer which is merely subject to the power on the part of the trustees to designate different beneficiaries is not to be deemed such a transfer.

In the *Estate of Lispenard Stewart*, New York Law Journal, January 9, 1931, one of the Surrogates of New York County, following the decisions in *Reinecke v. Northern Trust Company* and *Erskine v. White*, held a similar transfer subject to power of revocation by the grantor on the consent of the trustees free from the New York transfer tax, on the ground that the trustees who were also parents of the beneficiaries had adverse interests to the settlor. The Surrogate said:

“The interests of the parent-trustees are most certainly adverse to the settlor both by reason of their blood relationship to the beneficiaries and again by reason of their status as fiduciaries; and in the fourth trust where the trustee is not related to the beneficiary the same reasoning applies.”

Let us examine the cases which the respondents cite in support of the proposition that the reservation by the grantor of the power to amend or revoke a trust, although subject to the consent or concurrence of another person, nevertheless renders the transfer taxable, as one intended to take effect in possession or enjoyment at or after death. On page 18 or 19 of respondents' brief are listed those cases in which the respondents say this question has received judicial consideration.

As we shall show, these authorities do not support the respondents' claim that the transfers here considered were taxable, but of all the authorities cited by them, these are most favorable to their contention.

We have already referred to the *Reinecke v. Northern Trust Company*, *Farmers' Loan and Trust Company v. Bowers* and *Erskine v. White*. As above indicated, they do not lend support to the respondents' contention.

In re Bowers' estate, the respondents rely upon the expressions of opinion of the Surrogate, whose decision was overruled by the Appellate courts.

The cases of *Saltonstall v. Saltonstall*, *Boston Safe Deposit & Trust Co. v. Commissioner of Corporations*, etc., involved the Massachusetts succession tax law. This Massachusetts law does not tax the transfer of the property but provides as follows:

"All property within the jurisdiction of the Commonwealth * * * which shall pass by will, or by the laws regulating an intestate succession, or by deed, grant or gift * * * made in contemplation of the death of the grantor or donor or made or intended to take effect in possession or enjoyment after his death * * * ."

The Massachusetts courts have definitely determined that this law imposes a tax upon the right to succeed to the property. They are, therefore, of little significance in the construction of the New Jersey tax law.

In *Saltonstall v. Saltonstall*, 276 U. S. 260, the court simply passed upon the right of the State of Massachusetts to assess a succession tax upon the extinguishment of a power of appointment reserved to the donor and another. The donor did not exercise this power, and upon his death it became extinguished. The Massachusetts tax law specifically assesses a tax upon the exercise or non-exercise of a power of appointment, the statute providing that "whenever any person possessing such a power of appointment so derived, (i. e. from any disposition of property made prior to September 1st, 1907), shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a disposition of property taxable under the provisions of Chapter five hundred and sixty-three of the acts of the year nineteen

hundred and seven and all acts in amendment thereof and in addition thereto shall be deemed to take place to the extent of such omission or failure * * * ”

Judge Stone concluded the opinion of the court with the following statement, page 271:

“Without considering the other statutes involved, we need not go further than to say that the statute of 1909, imposing the tax because of the failure to exercise the power of appointment, does not deprive plaintiffs in error of their property without due process of law.”

Obviously this case does not support the proposition that the transfer was one intended to take effect in possession or enjoyment at or after the death of the donor. The New Jersey transfer tax act contains no similar provision relating to powers of appointment.

The case of *Boston Safe Deposit & Trust Company v. Commissioner of Corporations, etc.*, 166 N. E. 729, is discussed at page 25 of the respondents' brief. As there stated, it appears that the transfer was made in consideration of the agreement of the beneficiary to devote her time and services to the care of the grantor and his wife during their respective lives. In effect, therefore, the grantor acquired a beneficial interest during his life. The trust agreement also provided that it might be modified or terminated by an agreement of the four parties involved; also for arbitration in case of a dispute upon this subject. It was thus possible that the grantor might prior to the termination of the trust re-possess the property.

We shall hereafter further discuss another decision of the Massachusetts courts in regard to a trust such as that which is here considered, where it was held that the trust was not taxable.

The Respondents claim that in *Hill v. Nichols*, 18 Fed. (2d) 139, the Court held that the transfer there in question was intended to take effect in possession or enjoyment at or after death.

An analysis of Judge Brewster's opinion in that case will show that his conclusions were in no way based upon the provision in the trust there created, that the settlor should have the right to amend or alter the indenture, or terminate the trust with the consent of one or more of the trustees. It was entirely based upon the conclusion which he had reached in *Coolidge vs. Nichols*, 4 Fed. (2d) 112, to the effect that where a person transfers property in trust, to be held *during the life of the transferor*, it is a transfer intended to take effect in possession or enjoyment at or after death, although the transferor divorces himself from all interest in the property. That was the situation presented in *Coolidge vs. Nichols*. No power of revocation or amendment is found in the trust there considered, but Judge Brewster expressed the opinion, purely obiter, that the transfer was one which was embraced within the language of the Federal Estate Tax law, but he held that, as the transfers had taken effect prior to the passage of that law, the transfer was not affected by that law.

In writing the opinion in *Hill vs. Nichols*, he expressly stated that he was following his decision in *Coolidge vs. Nichols*. While the Supreme Court (274 U. S. 531) affirmed Judge Brewster's final conclusion, that the Estate Tax law should not retroactively affect a trust of this character, created prior to its passage, it did not discuss the other views of Judge Brewster. However, the views so expressed by Judge Brewster in *Coolidge vs. Nichols*, and *Hill vs. Nichols*, concerning the taxability of a trust simply by reason of its being measured by the grantor's life, were definitely disapproved by the Supreme Court in *Reinecke vs. The Northern Trust Company*, *supra*, pp. 347, 348, where the court stated:

"One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos*,

equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death. *It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute.*" (Italics ours.)

It will thus be seen that *Hill v. Nichols* is no authority for the proposition that a transfer of property in trust must be deemed a transfer intended to take effect in possession or enjoyment at or after death, because the settlor had reserved the power to revoke it with the consent of the trustee.

In *People v. McCormick*, 327 Ill. 547, the donor reserved the power to draw on the income from the trust estate in the event that the income from her other property might be less than \$250,000. The remaining net income was to be distributed for charitable purposes in such sums as the donor might designate. The same trust was considered in *Commissioner v. McCormick*, 43 Fed. (2d) 277. In view of the provisions as to the income, these cases have no particular significance in the determination of the present controversy.

In *Safe Deposit and Trust Co. v. Tait*, 295 Fed. 429, the husband and wife created a trust in which they provided that the income should be paid to them during their respective lives in the proportions in which they had contributed towards the principal of the trust. Upon the death of either, the entire income was to be paid to the survivor, with provision for the disposition of the property upon the death of the survivor. The retention of the right to receive the income from the property renders this case of no significance.

In *Sargent v. White*, not yet officially reported, referred to on pages 19 and 39 of respondents' brief, the trust was to endure during the joint lives of Mr. Remick, the settlor, and his wife. During the continuance of the trust the income was to be paid to Mr. Remick or ac-

cumulated and added to the trust fund as the trustees in their discretion might determine. There was no power of revocation contained in the trust instrument. The tax was imposed because of the reservation of the right to receive the income if the trustees so determined.

In *Brady v. Ham*, not yet officially reported, referred to on pages 19 and 41 of respondents' brief, it appears that although the donor reserved the power to alter or amend the terms of the trust except that she could not direct it to her own use. The Court held that it was not subject to the Federal estate tax.

These are the authorities which are most favorable to the respondents' claim that the transfer in question was subject to the New Jersey transfer tax. It will be seen that they do not support the respondents' claim that that Act may be construed, as embracing within the terms thereof, as a transfer intended to take effect in possession or enjoyment at or after death, the trusts created by Mrs. Russell merely because of the power conferred upon the trustees, of which she was one, to designate another or other beneficiaries. Instead they lead to the contrary conclusion.

Moreover, it will be seen that the authorities most favorable to the view expressed by the respondents are based upon the Massachusetts succession tax law. But even under that law, the courts of that state held that a trust involving precisely the same question which is here presented was not subject to the tax thereby imposed. The decision we refer to is that of *Dexter v. Jackson, Treasurer & Receiver*, 243 Mass. 523, 137 N. E. 877 (our main brief p. 38). As stated by the Court, by the deed of trust, the settlor divested himself of all his title to the securities conveyed. He reserved the right to appoint other persons than those named as beneficiaries and to declare new uses or trusts, but it was expressly stipulated that no change could be made so as to vest in the donor the trust property, or any beneficial interest therein. By paragraph 5 the trust was to terminate, not upon the

death of the donor but upon the death of the last surviving of those of his children, grandchildren and great-grandchildren living at the donor's death, or upon the attainment of fifty years by the youngest grandchild living at his death."

The court held that this trust was not subject to tax, saying (137 N. E. at p. 878):

"Unless the enjoyment or possession of the property conveyed was contingent upon the donor's death, its passing was not taxable, and if it vested in the beneficiaries during the lifetime of the grantor, it did not pass by deed intended to take effect in possession or enjoyment after his death."

Excepting only the differences in the law, the question there passed upon was precisely the question which is here presented, and the conclusion reached by the court in that case should be followed here.

The New Jersey statute imposes a transfer tax as distinguished from a succession tax.

The respondents assert that the New Jersey transfer act imposes a succession tax, as they apparently recognize that if it is a tax on the right to transfer the property rather than on the right to receive it, the tax in question cannot be sustained.

While the Supreme Court of the United States has recognized the right of the state to impose a succession tax at any time before the succession has been completed, (*Cahen vs. Brewster*, 203 U. S. 543) it has taken a very different view with respect to transfer taxes. Recognizing as it does that death is the generating source of all death duties, and inheritance and transfer taxes, the Supreme Court has held that there is no estate or transfer tax assessable unless, at the time of death, there is some shifting of economic benefits from the decedent to some other person. *Reinecke vs. Northern Trust Company*, *supra*; *Tyler vs. The United States*, 281 U. S. 497; *May vs. Heiner*, 281 U. S. 238.

In the instant case it is obvious that, at the time of the death of Mrs. Russell, no property or beneficial interest in any property, embraced within these trusts, passed from her. She had parted with the possession of the property when she created the trusts. At the same time she had parted with all her beneficial interest therein, and had precluded herself from ever recapturing any of such property. Nor, at her death, did any interest of her children, or issue of her children, ripen into possession or enjoyment. The children were then enjoying the income. Upon her death no further or higher right or interest in the property was transferred to them. All that happened upon her death was the extinguishment of her right as one of the trustees to join with her co-trustee in the designation of other beneficiaries. After her death this right continued in the surviving trustee, her husband. Before her death the beneficial interests could not be in any way changed unless Archibald D. Russell, as trustee, joined in the execution of an instrument effecting such change. After her death no change in the beneficial interest could be made unless Archibald D. Russell, as trustee, executed such an instrument. The right to make that change existed both before and after her death, therefore her death did not add to the rights, interests, and estates enjoyed by the beneficiaries designated in the deeds of trust.

The title of Chapter 228 of the Laws of 1909 reads as follows: "An Act to tax the transfer of property, of resident and non-resident decedents, by devise, bequest, descent, distribution by statute, gift, deed, grant, bargain and sale, in certain cases, approved April 29th, 1909."

We have already referred to the express provisions of the statute imposing a tax upon the transfer of the property. In view of this express language of the Act, it is difficult to see how there can be any dispute concerning the fact that the tax is upon the transfer of the property and not upon the right to succeed to it.

The New Jersey, New York and Federal statutes require the executor to pay the taxes. See Chapter 228, Laws of 1908, as amended by Chapter 151 of the Laws of 1914, which provides in the second paragraph of subdivision Fourth of Section 1:

“* * * all administrators, executors, trustees, grantees, donees or vendees, shall be personally liable for any and all such taxes until the same shall have been paid as hereinafter directed.
* * *”

Section 7 of said Act provides: “Any administrator, executor or trustee having in charge or trust any legacy or property for distribution, subject to said tax, shall deduct the tax therefrom, or if the legacy or property be not money he shall collect the tax thereon upon the appraised value thereof from the legatee or person entitled to such property, and he shall not deliver or be compelled to deliver any specific legacy or property subject to tax to any person until he shall have collected the tax thereon * * *.”

Section 8 confers upon the executor power to sell so much of the property of the decedent, as will enable him to pay the tax.

The provisions in the New Jersey act above referred to are similar to those which were included in the New York Transfer Tax Law.

The New Jersey and the New York statutes differ from the Federal Estate Tax Act, in that the amount of the Federal estate tax is computed with reference to the total estate of the decedent, and is deducted from the general estate in the same manner as an expense of administration, whereas under the New York and New Jersey transfer tax acts, the taxes are computed with reference to the respective sums passing to different persons, and the amount of such tax, unless otherwise declared by the will or other instrument, is deductible from the property passing to said persons respectively.

We submit, however, that the difference in the manner in which the taxes are computed, or the persons, upon whom the burden is imposed, is of no particular significance.

In many instances, it is not of great importance to determine the precise character of such taxes, as being either a transfer or succession tax, and it appears that the courts, in discussing these taxes, have not always been careful to discriminate between significance of these words. In recent years, however, a sharp differentiation between such taxes has been recognized by the United States Supreme Court. At a comparatively early date the New York courts, while sometimes speaking of the New York law as imposing a succession tax, definitely recognized that the tax was assessed upon the transfer of the property from the decedent, and that it was carved out of any legacy or interest passing by intestate succession, before that property reached the hands of the legatee or distributee.

One of the rare cases, which seem to have required a definite determination of this subject, is that of *Matter of Merriam* (1894), 141 N. Y. 479. In that case the decedent, William W. Merriam, devised and bequeathed all his estate to the United States government. A tax was imposed upon the transfer of the personal property, the transfer of real property not being then taxable. The United States and the executor both asserted that the tax was improperly imposed. The New York Court of Appeals held that the tax was properly collectible, that it was not a tax imposed upon the property of the United States, that the property which passed to the United States was that which was bequeathed less the tax. This decision was reviewed in the United States Supreme Court in *United States vs. Perkins*, 163 U. S. 625, in which the court said at p. 629:

“That the tax is not a tax upon the property itself, but upon its transmission by will or by descent, is also held both in New York and in several

other States, *Matter of the Estate of Swift*, 137 N. Y. 77, in which it is said, p. 85, that 'the effect of this special tax is to take from the property a portion, or a percentage of it, for the use of the State, and I think it quite immaterial whether the tax can be precisely classified with a taxation of property or not. It is not a tax upon persons.' "

It is obvious that the State of New York could not lay a tax upon the United States government, nor could it tax the property of the United States. However, the State of New York could and did assess a tax on the transfer of the property from the decedent before that property ever reached the United States. So construed, the tax imposed was not one upon the United States, nor upon the property of the United States.

That the New Jersey Transfer Tax Law does assess a tax upon the transfer of the property from the decedent has also been recognized by the Prerogative Court in *Re Bottomley's Estate* (1920) 92 N. J. Equity, 202, where the court said:

"The design of this so-called inheritance tax legislation was not to interfere with a man's own enjoyment of the property he acquired, during the time he could and did desire to own and enjoy it himself—prima facie his lifetime—but to take a toll out of such property after the owner had finished with it, on its way to those to whom, under and by virtue of the laws and the governmental machinery of the state, it should then pass. The natural and logical time for the fastening of such a tax was therefore at the death of the owner, and the statutes at first taxed the property passing by will or intestate succession."

It is not essential that the court should now determine whether the New Jersey act imposes a transfer or a succession tax, as the language in the act, without regard to the exact theory of taxation, will not support the assessment of the tax in suit. However, if the court should conclude with us that the tax imposed by the statute is

upon the transfer of the property from the decedent, this leads to the further conclusion, that there being no transfer of the possession or enjoyment of the property from Mrs. Russell, at or after her death, the transfer was not one intended to take effect in possession or enjoyment at or after her death, and was not subject to the tax assessed. The argument of the Respondents seems to recognize this.

In conclusion, we submit that, if the legislature deems it appropriate to impose a tax upon transfers in trust where the power to revoke the trust or to change the beneficiaries, is reserved in the donor, either alone or in conjunction with any other person or persons, it may and should amend the tax laws to specifically cover such transfers. Changes along this line have been made in the Federal Estate Tax law, the New York law, and the laws of Connecticut, Indiana and Tennessee. In effect, the respondents are asking this court to rewrite the New Jersey tax law so as to embrace such transfers. We submit that these arguments should be addressed to the legislature and not to this court.

The judgment of the Court below should be reversed.

Respectfully submitted,

WALTER E. COOPER and
TAYLOR, BLANC, CAPRON & MARSH
(of the New York Bar),
Attorneys for Prosecutor-Appellant

Counsel desires to correct the statement made in reply to the question asked by Mr. Justice Case at the time of the oral argument, as to who was required to pay the New Jersey Transfer Tax. As stated on page 13 of reply, the tax is payable by the executor but charged against the legatee, unless otherwise directed by the will or trust instrument.

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NEW JERSEY

Court of Errors and Appeals

PLAINFIELD TRUST COMPANY, as
substitutionary administrator with
the will annexed of ALBERTINA T.
RUSSELL, deceased,
Prosecutor-Appellant,

vs.

JOHN MCCUTCHEON, as Comptroller
of the Treasury of the State of
New Jersey, and ALBERT C. MID-
DLETON, as Treasurer of the State
of New Jersey,
Defendants-Respondents.

On Certiorari.

On Appeal.

REPLY BRIEF OF DEFENDANTS- RESPONDENTS.

Respondents regret the necessity for this further reply brief, but the position taken by prosecutor-appellant for the first time in its reply brief relative to the nature of the New Jersey inheritance tax makes it absolutely necessary that the New Jersey cases upon this subject be called to the Court's attention.

It was pointed out in the main brief of respondents that this tax is a *succession* and not a *transfer* tax, and the decisions therein referred to pointed out the distinction between the two types of excise taxes. It was not conceived that there was the slightest doubt but that

the New Jersey tax was a *succession* and not a *transfer* tax. Appellant seems to think, and so urges, that the New Jersey tax is a *transfer* and not a *succession* tax. That the excise here under consideration is a tax on the right of succession will be evident from a reading of the decisions of our Courts, as well as the United States Supreme Court, in the following cases:

Maxwell vs. Bugbee, 250 U. S. 525, 541;

In re Roebling's Estate, 89 N. J. Eq. 163, 168;

Baker vs. East Orange, 95 N. J. L. 365, 368;

Security Trust Co. (Morse) vs. Edwards, 90 N. J. L. 558, 568;

Archibald vs. Maurath, 92 N. J. Eq. 357, 360.

For the convenience of the Court, a few brief excerpts from the opinions of the courts in the foregoing cases will be set forth.

"The tax is not upon property, but upon the privilege of succession, which the State may grant or withhold."

Maxwell vs. Bugbee, 250 U. S. 525, 541.

"The settled construction of the act is that it imposes a tax upon the right of succession to the property of the testator or intestate which vested in the successors severally and in their respective shares or proportions, and not upon the property or estate of the decedent. *Matter of Hoffman*, 143 N. Y. 327; *Matter of Westwin*, 152 N. Y. 93; *Matter of Gihon*, 169 N. Y. 443; *In re Sherman Estate*, 166 N. Y. Supp. 19; affirmed, 222 N. Y. 540; *Dixon vs. Russell*, 79 N. J. Law 490; *Carr vs. Edwards*, 84 N. J. Law 667; *Christies Estate*, 87 N. J. Eq. 303." (Italics respondents'.)

In re Roebling's Estate, 89 N. J. Eq. 163, 168.

"* * * the State transfer inheritance tax of New Jersey is levied not as a property tax, but it imposes a succession tax. * * * It is levied not

against the estate, but the individual shares or legacies." (Italics respondents'.)

Baker vs. East Orange, 95 N. J. L. 365, 368.

"The tax is on the succession, which occurs at death, * * *"

Security Trust Co. (Morse) vs. Edwards, 90 N. J. L. 558, 568.

"The phraseology of Sec. 1 that 'All property which shall pass by will or by the intestate laws of this State * * * shall be subject to a tax,' does not import an impost upon the property, for our courts have construed the act as not a tax on property, but an exaction from persons taking, for the privilege of taking, by testament or statute, and as such sustained the constitutionality of the tax * * *." (Italics respondents'.)

Archibald vs. Maurath, 92 N. J. Eq. 357, 360.

Surely, these cases can leave no doubt about the fact that the tax with which we are here concerned is a succession and not a transfer tax, and must therefore be subject to the rules applicable to an excise tax levied on the right to succeed and not on the right to transmit.

WILLIAM A. STEVENS,

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

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NEW JERSEY

Court of Errors and Appeals

Plainfield Trust Company, as substitutionary administrator with the will annexed of the estate of ALBERTINA T. RUSSELL, deceased, <i>Prosecutor-Appellant,</i>	}	On Certiorari.
against		
JOHN McCUTCHEON, as Comptroller of the Treasury of the State of New Jersey, and Albert C. Middleton, as Treasurer of the State of New Jersey, <i>Defendants-Respondents.</i>	}	On Appeal.

BRIEF OF THE ATTORNEY-GENERAL FOR DEFENDANTS-RESPONDENTS

This is an appeal from a judgment of the Supreme Court (Filed August 18, 1930, S. C. 35) affirming, on certiorari, a certain transfer inheritance tax assessment by the Comptroller of the Treasury in the matter of the estate of Albertina T. Russell, deceased, late of Mercer County, New Jersey.

The issue is two-fold, viz.: (a) whether certain transfers by the decedent, pursuant to the provisions of four trust deeds, were intended by her to take effect in possession and enjoyment at or after her death within the meaning of the transfer inheritance tax statute of this State, and (b) if said transfers are within the purview of the statute, whether said statute, as so construed, is unconstitutional in that, (1) it results in the taking of transferees' property without due process of law in viola-

tion of the Fourteenth Amendment to the Federal Constitution, and, (2) it results in the taking of transferees' property without just compensation contrary to Art. 1, section 16, of the Constitution of the State of New Jersey.

STATEMENT OF FACTS

The Comptroller of the Treasury, being the officer chargeable by statute with the administration of the transfer inheritance tax statutes of the State of New Jersey and the assessment of transfer inheritance taxes thereunder, on August 1, 1929, levied a corrected transfer inheritance tax in the matter of the estate of Albertina T. Russell, deceased, late of Mercer County, New Jersey, in the sum of \$248,948.82 (S. C., p. 8). Appellant objects to said assessment insofar as it includes a tax of \$17,675 chargeable upon the transfer of personal property, under four certain deeds of trust created by the decedent during her lifetime, to her four children. While there was a previous assessment in this case it is unnecessary to recite the circumstances thereof since it does not in any way affect the present controversy.

Albertina T. Russell died, February 11, 1918, leaving a last will and testament under the terms of which her entire estate, real and personal, was bequeathed and devised to her husband, Archibald D. Russell (S. C., pp. 29, 30). Mr. Russell was also appointed executor of said will and on or about February 28, 1918, duly probated the same in the Orphans' Court of Mercer County and letters testamentary thereon were issued to him. Mr. Russell died, November 29, 1919, before fully administering the duties of his office and the Plainfield Trust Company, a corporation of the State of New Jersey, qualified as substituted administrator, with the will annexed, on or about March 10, 1920 (S. C., p. 2).

Mr. Russell in the course of his administration of the affairs of the estate filed the usual transfer inheritance

tax return disclosing the nature and value of the property, real and personal, of said decedent for transfer inheritance tax purposes (S. C., p. 2). Upon the basis of this report and the subsequent investigations of the Comptroller, the net taxable estate of the decedent subject to the inheritance tax laws of the State of New Jersey was ascertained to be \$8,889,960.80 (S. C., p. 11). This figure includes the sum of \$1,062,500, representing the value of the corpus of four trusts created by Mrs. Russell during her lifetime and which are the subject of this litigation. It is understood that there is no dispute between the parties hereto as to the amount of the tax chargeable on the transfer of the main estate under the will, or the amount of the tax chargeable on the transfers by these trust deeds, if they be taxable. The only controversy is whether said transfers are taxable at all.

On March 10, 1916, Albertina T. Russell, the decedent, created four trusts for the benefit of her four children, whose names and ages as of said date were as follows (S. C., p. 20) :

Ethelberta Pyne Eppley, 29 years.
 Archibald D. Russell, Jr., 26 years.
 Helen Rutherford Russell, 19 years.
 Constance R. Russell, 16 years.

The two last mentioned children have since married and their names are, respectively; Helen R. Benson and Constance R. Winant.

The corpus of the four trusts, as of February 11, 1918, the date of death of Albertina T. Russell, consisted of the following personal property (S. C., p. 18) :

2,000 shares of capital stock of the National City Bank of New York, @ \$400.	\$800,000.00
\$350,000 par value of the Woodward Iron Company, first mortgage, sinking fund, bonds, due January 1, 1952, interest 5%, @ \$75.....	262,500.00
Total	\$1,062,500.00

It has been stipulated between counsel that the four trusts for the benefit of the decedent's four children, all executed under date of March 10, 1916, are identical as to amount of corpus, terms, provisions and conditions (S. C., pp. 34, 35). Accordingly, the State of the Case includes a copy of only one of the trust agreements executed on March 10, 1916, viz: the one for the benefit of Helen Rutherford Russell (S. C., pp. 24-29). In the argument of the issue, therefore, the trust for the benefit of Helen R. Russell will be used exclusively, it being understood that the remaining three trusts for the benefit of the other children are, *mutatis mutandis*, the same. For uniformity she will be referred to as Helen R. Russell, and not as Helen R. Benson, her name by marriage.

The trust agreement of March 10, 1916, created by Albertina T. Russell with her property for the benefit of Helen R. Russell, designates Albertina T. Russell, the decedent, and Archibald Russell, her husband, as co-trustees. The term of the trust estate is for the lives of Archibald D. Russell, Jr., and Ethelberta Pyne Eppley, the two oldest children of the donor, and during the life of the survivor of them, unless earlier terminated under the other provisions of the agreement.

Paragraphs "First", "Second", "Third", "Fourth" and "Fifth" cover the material provisions of the agreement and in view of their direct bearing upon the controversy are set forth in detail at this point (S. C. pp. 24, 28).

FIRST. To take and receive said TRUST ESTATE, to invest and reinvest the same in such securities as the said Trustees shall select, whether or not such securities are recognized by law as proper investments for trustees, and to collect and receive the income and profits arising therefrom and after paying all proper charges and disbursements to pay over the net income thereof during the continuance of this trust (unless they otherwise elect in accordance with the authority contained in paragraph Third hereof) to HELEN RUTHERFORD RUSSELL during her life; on the death of Helen

Rutherford Russell during the continuance of this trust, to pay over said income to her children then living and the issue of any deceased child, share and share alike, such issue of any deceased child to take the parent's share per stirpes and in the event that she leave no children or issue of any deceased child her surviving, then to pay over the said income to her brothers and sisters then living and the child or children then living of any deceased brother or sister, such child or children to receive in equal shares the proportion of income that the parent would receive if living.

SECOND. On the termination of this trust to pay over the TRUST ESTATE then in the hands of said Trustees (unless the said Trustees otherwise elect in accordance with the authority contained in paragraph Third hereof) to Helen Rutherford Russell, if she be living, and if she be not then living, to pay over said TRUST ESTATE to the children then living of Helen Rutherford Russell and to the child or children then living of any deceased child of Helen Rutherford Russell, share and share alike, such child or children of any deceased child of said Helen Rutherford Russell to take the parent's share, per stirpes. In the event that Helen Rutherford Russell leaves no children, or child or children of any deceased child, her surviving, then to pay over said TRUST ESTATE to her brothers and sisters then living and the child or children then living of any deceased brother or sister, such child or children to receive in equal shares the proportion of the trust estate that the parent would receive if living.

THIRD. Notwithstanding any of the provisions to the contrary hereinbefore contained, the Trustees herein named or the survivor of them, whether serving alone or otherwise (but not any succeeding trustee appointed as herein authorized) are authorized and empowered at any time after the execution of this agreement, by instrument in writing duly signed and acknowledged by said Trustees or the survivor of them, to direct the distribution of said trust estate and any part or parts thereof (Distributions may be directed from time to time as, when and as often as the Trustees named herein or the survivor of them may determine and

direct) to and among the issue then living of the Grantor and the husbands and wives then living of any issue and to and among any other person or persons or corporations whatsoever. Upon receipt of the said instrument or instruments in writing duly signed and acknowledged by the said Trustees or the survivor of them directing a distribution of the trust estate or of any part or parts thereof, the trustees or trustee then in office shall pay over any such part or parts, or the whole of said trust estate, in accordance with such direction or directions, and the trust shall cease and determine as to the whole or any part or parts of the trust estate paid over by the trustees in accordance with such direction, and shall continue as to any balance not directed to be distributed.

Notwithstanding any provision to the contrary hereinbefore contained the Trustees herein named or the survivor of them, whether serving alone or otherwise (but not any succeeding trustee appointed as herein authorized) are further authorized and empowered in their discretion to direct the payment of said net income or any part thereof to and among the issue then living of the Grantor and the husbands and wives then living of any issue, or to and among such of said issue and said husbands and wives of said Trustees and the survivor of them may select, and the said Trustees and the survivor of them are authorized and empowered, if they so determine, to direct that the whole of said net income shall be paid over to any one or more of those designated in this paragraph, in such proportions or shares as such Trustees or the survivor of them may elect, excluding others, and those so excluded shall have no right or claim thereafter to any part of the income of said trust estate; and the Trustees and the survivor of them are authorized and empowered from time to time to change the beneficiaries theretofore by them designated and the proportion of income to be distributed to any one thereof, and may select other or different beneficiaries from among those in this paragraph designated to whom said income or part thereof shall be paid, or may change the proportion of income payable to any one of them. The direction for the payment of income herein authorized shall be in writing, signed by the said Trustees

herein named or the survivor of them and delivered to the trustees or trustee then in office who shall thereupon distribute said net income in accordance with said direction. Upon the death of the sole survivor of the Trustees herein named, however, the trustees or trustee then in office shall from that time pay over said net income in accordance with the directions contained in paragraph First hereof, notwithstanding any written direction to the contrary received theretofore from the Trustees herein named or the survivor of them.

FOURTH. In the event of the death or resignation of a trustee of this trust at any time during the continuance thereof the surviving trustee is hereby given full power and authority to nominate and appoint a succeeding trustee to fill the vacancy. The appointment so made shall be in writing, duly signed and acknowledged by the remaining trustee to be taken as a part of this instrument, and every successor so nominated, upon executing a written consent duly signed and acknowledged, to be taken as a part of this instrument, shall have all the powers and succeed to all the duties granted, conferred and imposed by this instrument or by law upon the Trustees herein named, including the power of appointing a succeeding trustee in accordance herewith, but excepting, however, the power to terminate this trust and to select the beneficiaries to whom the said TRUST ESTATE and the income thereof shall be paid, set forth in paragraph Third hereof.

FIFTH. If during the continuance of the trust hereby created the sole trustee thereof shall be a substituted trustee, or both trustees thereof shall be substituted trustees, then and in either of such contingencies, but not otherwise, the trust hereby created may be terminated by HELEN RUTHERFORD RUSSELL, who may make, sign, acknowledge and deliver to each of the trustees, or the sole trustee then in office, an instrument in writing declaring that the trust is terminated. On the execution and delivery of such instrument or instruments, the trust shall thereupon cease and determine and the said substituted trustee or trustees are directed thereupon to assign, transfer and pay over the corpus of said trust and any accumulations of

interest thereon in accordance with the provisions of paragraph Second hereof.

Following the deaths of Albertina T. Russell and Archibald D. Russell, her husband, Percy R. Pyne qualified as substituted trustee, and the record discloses that, pursuant to the provisions of paragraph "Fifth" of the trust, Helen Rutherford Russell terminated the same on April 23, 1920, and at that time took over all rights to the title, possession and enjoyment of the corpus of the trust created for her benefit freed and discharged of the trust. The three remaining trusts, created for the benefit of the other children, were terminated by them under the same provision of the trusts, as follows (S. C., p. 20):

Archibald D. Russell, March 3, 1920.

Ethelberta Pyne Eppley, March 20, 1920.

Constance R. Winant, December 15, 1920.

Upon the termination of the four trusts each child actually received \$265,625, representing one-fourth of the total corpus, so that the tax chargeable on each transfer amounted to \$4,418.75, or a total tax on the four transfers of \$17,675 (S. C., pp. 12, 13). This is the amount of tax in controversy.

POINTS AT ISSUE

Appellant, in its Reasons for the reversal of the assessment before the Supreme Court, alleged that the transfers were not intended to take effect at or after the death of the decedent; that the securities forming the corpus of the four trusts constituted no part of the property of the decedent at the time of her death; that the reservation by the donor of a limited and qualified power to alter, amend or revoke the several trusts as to principal and income did not make it a transfer intended to take effect at or after death; and, further, that if said transfers are within the provisions of the inheritance tax statute of the State of New Jersey, the statute as so construed is unconstitutional because it deprives the transferees of their property without due process of law

and without just compensation in violation of the Fourteenth Amendment to the Federal Constitution and the 16th Section of Article 1 of the State Constitution.

These several objections to the assessment may be reduced to two principal grounds and concisely stated as follows:

1. The transfers by the four trust agreements, dated March 10, 1916, for the benefit of the decedent's four children were not transfers intended to take effect in possession or enjoyment at or after the death of the grantor within the meaning of the transfer inheritance tax act of the State of New Jersey.
2. Said statute, if so applied, is unconstitutional in that it deprives the transferees of their property contrary to the guarantees of the Federal and State constitutions.

Appellees' defense to these contentions may be concisely stated under five general points, as follows:

I. Transfers Intended to Take Effect in Possession and Enjoyment at or After the Death of the Donor Are, by Statute, Made Taxable.

II. A Power to Revoke, Alter or Amend a Trust Is a Sufficient Reservation in the Donor to Constitute a Transfer Intended to Take Effect in Possession or Enjoyment at or After Death Within the Purview of the Statute.

III. The Fact That the Exercise of a Power to Alter, Amend or Revoke Requires the Concurrence of a Co-Trustee Does Not Alter the Rule Urged in the Preceding Point.

IV. The Vesting of All Right, Title, Interest, Possession and Enjoyment of the Corpus of the Trusts Sub Judice Could, Under No Circumstances, Take Place in the Beneficiaries Until at or After the Death of the Donor.

V. The Transfer Inheritance Tax Statute of this State, Construed so as to Apply to the Case Sub Judice, Does Not Contravene the Provisions of Either the Federal or State Constitutions.

These points will be considered in their order.

ARGUMENT

POINT I.

Transfers Intended to Take Effect in Possession and Enjoyment at or After the Death of the Donor Are by Statute Made Taxable.

It is one of the fundamentals of inheritance taxation that the law in effect at the time of the death of the decedent must determine the taxable status of the transfer.

American Board, etc., v. Bugbee, 98 N. J. Law, 84;

Farmers Loan and Trust Company, executors of Muller v. Bugbee, 6 N. J. Misc. Rep. 415; 141 Atl. Rep. 579;

In re Dupignac, 96 N. J. Eq. 284;

Price v. Edwards, 88 N. J. Law, 582;

Hartman's Estate, 70 N. J. Eq. 664;

In re Strong's Estate, 17 N. J. L. J. 234;

Randolph on Inheritance Tax Laws, p. 19.

Albertina T. Russell died February 11, 1918, and the taxable status of her estate, therefore, must be determined under the provisions of Chapter 228, Laws of 1909, as amended by Chapter 151, Laws of 1914. The pertinent part of Section 1, sub-section 3, of said act, as amended, provides as follows:

- "1. A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations, except as hereinafter provided, in the following cases:

* * * * *

Third. When the transfer is of property made by a 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.*" (Italics, Appellees.)

As a matter of fact, provision for the taxation of transfers intended to take effect in possession or enjoyment at or after death are to be found in every inheritance tax act of this State from the passage of the first (Chapter 122, Laws of 1892) right down to the statute as presently amended, and such provision has been held by the courts of this State in many cases to reach all transfers which take effect in beneficial possession and enjoyment at or after the death of the donor.

Carter v. Bugbee, 91 N. J. L. 438; *aff'd*, 92 N. J. L. 390;

American Board, etc., v. Bugbee, *supra*;

Farmers Loan & Trust Co., executors of Muller v. Bugbee, *supra*;

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

In re Harvey, 129 Atl. Rep. 393; 2 N. J. Misc. Rep. 247; *aff'd sub nom. Moore v. Bugbee*, 128 Atl. Rep. 679; 3 N. J. Misc. Rep. 435; 102 N. J. Law 720; writ of error dismissed, 278 U. S. 565;

MacClurkan v. Bugbee, 6 N. J. Adv. Rep. 1891; 143 Atl. Rep. 757;

Fagan v. Bugbee, 6 N. J. Adv. Rep. 1895.

In fact, this provision of the law is common to the inheritance tax statutes of all states. The State of Pennsylvania, by act of April 7, 1826, was the first to provide for the taxation of collateral inheritances in certain cases. Section 1 of the statute of that State directed that transfers "by deed, grant, bargain or sale made, or intended to take effect in possession or enjoyment at or after the death of the grantor or bargainor" should be subject to tax. (*Reish Adm. v. Commonwealth*, 106 Pa. State Reports, 521.)

Substantially, the same provision which is found in our early statutes was copied from the laws of the State of New York.

Clay v. Edwards, 84 N. J. L. 221;

Hopper v. Edwards, 88 N. J. L. 471;

In re Christie's Estate, 87 N. J. Eq. 303.

And numerous decisions of the courts of that State uphold the right to tax such transfers:

Matter of Keeney, 194 N. Y. 281;

Matter of Green, 153 N. Y. 223;

Matter of Bostwick, 160 N. Y. 489;

Matter of Dana, 215 N. Y. 461.

The United States Supreme Court has many times very definitely established the rule that it is within the power of the states to levy a tax upon transfers intended to take effect in possession and enjoyment at or after the death of the donor:

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

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

Chanler v. Kelsey, 205 U. S. 466;

Bullen v. Wisconsin, 240 U. S. 625;

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

Transfers by trust deed wherein the donor retains the income, or a portion thereof, or reserves the right to alter, amend or revoke the trust are clearly within the statute. So also where the trust property passes with all the attributes of ownership, including the rights of beneficial possession and enjoyment, only at or after the death of the donor to the ultimate beneficiaries the transfer is taxable, even though there may be no reservation of income or power of revocation in the donor. Citation of authorities in support of these broad principles of inheritance taxation will be set forth in the argument to follow.

The fundamental principle supporting the right of the State to tax transfers by deed or gift intended to take effect at or after the death of the donor is that "So long as the privilege of succession has not been fully exercised it may be reached by the tax" (*Saltonstall v.*

Saltonstall, 276 U. S. 260, 271). Whether it be the right (a) to enjoy the income from the trust property at the death of the donor or (b) the right of the donee to succeed the absolute ownership of the corpus of the Trust, the transfer is taxable as one intended to take effect in beneficial possession and enjoyment at or after the death of the donor since the privilege of succession in either event has not been fully exercised.

POINT II.

A Power to Alter, Amend or Revoke a Trust Is Such a Reservation in the Donor as to Constitute a Transfer Intended to Take Effect in Possession or Enjoyment at or After Death Within the Purview of the Statute.

The reservation by the donor of a power to revoke, alter or amend a trust, whereby the actual vesting of an indefeasible interest in the corpus of the trust in the ultimate beneficiaries is delayed until the termination of that power, constitutes a transfer, the beneficial possession and enjoyment of which is intended to pass at or after death, and, therefore, taxable.

In re Fosdick's Estate, 139 Atl. Rep. 318.

Vice Ordinary Buchanan, who wrote the opinion for the Prerogative Court in the *Fosdick case*, says (p. 319):

"The reservation of a right to revoke—or the reservation of any other right by the exercise of which the donor may regain beneficial interest in the trust fund—it would seem places such a deed of trust in the category of gifts intended to take effect in possession or enjoyment at or after the death of the donor. It is true that there is an actual transfer of the legal title to the trustee, and of some equitable interest to the equitable donee at the time of the delivery of the trust deed. But that equitable interest of the donee is not an absolute interest. It is defeasible at any moment the donor decides to revoke. * * *"

The U. S. Supreme Court in *Chase Nat'l Bank v. U. S.*, 278 U. S. 327, 338, says:

"* * * Termination of the power of control at the time of death inures to the benefit of him who owns the property subject to the power and thus brings about, at death, the completion of that shifting of the economic benefits of property which is the real subject of the tax, just as effectively as would its exercise which latter may be subject to a privilege tax, * * *"

While at the time of the determination of the issue in the *Fosdick case* a contrary view prevailed in the State of New York:

Matter of Masury, 28 App. Div. 580; aff'd, 159 N. Y. 532;

Matter of Carnegie, 203 App. Div. 91; aff'd, 236 N. Y. 517;

Matter of Miller, 204 App. Div. 418; aff'd, 236 N. Y. 290;

also in the State of Pennsylvania:

In re Dolan, 279 Penna. 582;

and in Massachusetts:

Dexter v. Treas. & Rec. Gen'l., 243 Mass. 523; nevertheless, the Prerogative Court specifically refused to follow the rule established in those jurisdictions and established as the law in New Jersey that a bare power of revocation is sufficient to constitute a taxable transfer.

The wisdom and farsightedness of the Court in the *Fosdick case* is apparent when it is observed that the United States Supreme Court has since held that the reservation of such an outstanding power in a donor to recall a gift after it is made is a limitation on the gift which makes it incomplete as to the donor as well as to the donee, and that termination of such a power at or after death may well be the appropriate subject of a transfer tax and upon identical reasoning, a succession tax.

Chase National Bank v. U. S., 278 U. S. 327;
Reinecke v. The Northern Trust Company,
278 U. S. 339.

The effect of these decisions of the United States Supreme Court is to uphold the conclusion reached in the *Fosdick* matter and to overrule the decisions of the State courts to the contrary.

As a matter of fact, the same deed of trust that was involved in *Matter of Carnegie, supra*, and determined by the Courts of New York to be exempt from succession tax, was involved in the case of *Home Trust Co. v. Edwards*, 30 Fed. (2d) 976, and the Federal District Court for the Southern District of New York on the authority of *Reinecke v. The Northern Trust Company, supra*, upheld the right of the Government to an estate or transfer tax on the ground that the reservation of a power to alter, amend or revoke brought the transfer within the taxable class as having been made to take effect in possession and enjoyment at or after the death of the donor. And in the case of *McCaughn v. Fidelity Trust Co.*, 34 F. (2d) 443, reversing 17 F. (2d) 605, the same deed of trust as involved in *In re Dolan's Estate, supra*, was held, on the authority of *Chase National Bank v. U. S.* and *Reinecke v. The Northern Trust Co., supra*, to constitute a transfer intended to take effect at or after the death of the donor and, therefore, subject to estate tax.

It is perhaps well at this point to note the fact that it is immaterial to the question of the taxability of the transfer whether the donor did or did not intend to exercise the power of revocation reserved to him.

In re Fosdick's Estate, supra,

The question must be confined solely to whether the deed contains a reservation of a power to revoke. Evidence to the effect that he did not intend to exercise that power or proof to the effect that he did not in fact exercise the same has no place in the determination of the issue.

Vice Ordinary Buchanan in *In re Fosdick, supra*, germane to this question, lays down the rule very specifically (p. 319):

"That the donor had such intent seems incontrovertible. He must needs be deemed to intend that which he has expressly provided in and by the terms of his trust deed. It is fallacious to argue that there is no evidence that the donor intended to exercise the power to revoke; or, that his failure to exercise it before he died proves that he intended never to exercise it. He intended to have the power to revoke if he chose—otherwise he would not have had the clause in the deed. That circumstances did not in fact arise to lead him to decide to exercise the power does not in any wise prove that he would not have exercised it under any circumstances; such, for instance, as the entire loss of his own remaining assets, or in the event of seriously displeasing conduct by the life tenant."

Nor is it material to the disposition of the issue, if the donor reserves a power of revocation, that he did not retain the income or any portion thereof arising from the trust property during his lifetime.

In re Fosdick's Estate, supra;

Chase National Bank v. U. S., supra;

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

Coolidge v. Commissioner, 167 N. E. 757;

McCaughn v. Fidelity Trust Co., 34 F. (2d) 443.

In the light of the decision of the Prerogative Court in the *Fosdick* case and the United States Supreme Court in the matter of *Chase National Bank v. United States*, it is respectfully submitted that there cannot be the slightest ground for any contention, at this late date, that the reservation of a power of revocation by the donor does not result in a transfer intended to take effect in beneficial possession or enjoyment at or after death, and, therefore, not taxable under the statute.

POINT III.

The Fact That the Exercise of a Power to Alter, Amend or Revoke a Trust Requires the Concurrence of a Co-Trustee Does Not Alter the Rule as Urged in the Preceding Point.

From the preceding argument it would seem to be definitely established that transfers intended to take effect in beneficial possession or enjoyment at or after death are by statute taxable, and that the reservation of the power to alter, amend or revoke by the creator is a retention of such control over the trust property as to constitute the transfer one intended to take effect at or after his death. This brings us, in appellees' opinion, to the only arguable phase of the case, viz.: whether or not the fact that the exercise of the power of alteration, amendment or revocation by the donor required the consent of another, other than the beneficiaries of the trusts, affects the taxable status of the transfers.

The third paragraph of each of the four trust agreements contains the following provision (S. C., pp. 25, 26):

"Third. Notwithstanding any of the provisions to the contrary hereinbefore contained, *the trustees herein named or the survivor of them, whether serving alone or otherwise* (but not any succeeding trustee appointed as herein authorized) *are authorized and empowered at any time after the execution of this agreement, by instrument in writing, duly signed and acknowledged by said trustees or the survivor of them to direct the distribution of said trust estate and any part or parts thereof* (Distribution may be directed from time to time as, when and as often as the trustees named herein or the survivor of them may determine and direct) *to and among the issue then living of the Grantor and the husbands and wives then living of any issue and to*

and among any other person or persons or corporations whatsoever."

(Italics, Appellees'.)

This paragraph further reserves the power to alter the distribution of income arising from the corpus of the trust.

In appellees' opinion the third paragraph of the trust agreements reserved to Mrs. Russell, the creator, with the consent of her husband and co-trustee, the absolute right to alter, amend or entirely revoke the several trusts if she saw fit, and that the reservation of such a power constitutes the transfer one intended to take effect in beneficial possession and enjoyment at or after the donor's death within the intendment of the act.

The question as to whether or not a qualified power of revocation constitutes a taxable transfer is *res nova* in this State. While the *Fosdick Case* and *Chase National Bank v. U. S.*, *supra*, definitely lay down the rule that a power of revocation is sufficient to bring the transfer within the statute as one intended to pass property in beneficial possession and enjoyment at or after death, neither of these cases establishes a rule applicable to qualified powers, since the facts did not require any such determination.

The matter has, however, received judicial consideration elsewhere and the following is a table of the leading cases upon the subject which have come to the attention of appellees.

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

Reinecke v. The Northern Trust Co., 278 U. S. 339;

Boston Safe Deposit and Trust Company v. Comm'r of Corporations, etc., 166 N. E. 729;

Hill v. Nichols, 18 Fed. (2d) 139;

People v. McCormick, 327 Ill. 547;

Safe Deposit and Trust Co. v. Tait, 295 Fed. 429;

In re Bowers' Estate, 183 N. Y. Supp. 137,
Reversed 186 N. Y. Supp. 912, 231 N. Y. 613;

Farmers Loan and Trust Company v. Bowers,
15 F. (2d) 706, Reversed 29 F. (2d) 14;

Commissioner v. McCormick, 43 F. (2d) 277;

Sargent v. White, (decided, Dec. 16, 1930, U. S.
Dist. Ct. (Dist. Mass.), not yet officially re-
ported);

Brady v. Ham, (decided, Nov. 26, 1930, U. S.
C. C. A. (1st Cir.), not yet officially re-
ported);

Ersine v. White, 43 F. (2d) 765.

Before considering the circumstances of each of the foregoing cases and entering into a discussion of the effect of said cases upon the present issue, it is important to point out the fact that there are a variety of means of qualifying powers of revocation. The exercise of the power by the donor may depend upon the consent of a trustee, or of a co-trustee, or of a beneficiary. The matter may also be further complicated in the case of the first and second classes by an additional power reserved to the donor to change trustees without anyone's consent. All of these factors have more or less of a bearing upon the solution of the problem and it is very important to carry in mind the exact manner in which the power in each case is qualified.

In the case of *Saltonstall v. Saltonstall*, *supra*, the State of Massachusetts levied an inheritance tax upon the transfer of certain property by trust deed on the ground that the transfer was one intended to take effect in possession or enjoyment at or after the death of the donor. While the trust, as originally created, provided for the payment of income to the donor, Peter C. Brooks, or at his option to allow it to accumulate, he did, however, sometime before his death, direct that the income from the trust should be accumulated and added to principal. So, from that period, down to the time of his death, he had no interest in the trust, except for the power to revoke which could be exercised by the donor, however, only with the consent of one of the trustees.

The Supreme Court of Massachusetts upheld the right of the State to a tax and the judgment was removed to the United States Supreme Court on writ of error because of constitutional objections to the statute as so construed by the State courts. The judgment of the Supreme Court of Massachusetts was sustained and the right of the State to an inheritance tax upheld. This conclusion was reached notwithstanding the fact that the donor reserved no income from the trust property at the time of his death and the power of revocation reserved to him was a qualified one, exercisable only with the consent of one of the trustees. The circumstances of this case appear to parallel those of the matter *sub judice*, and it is submitted that the decision of the United States Supreme Court is dispositive of the present issue. It was very particularly pointed out that "so long as the privilege of succession had not been fully exercised it may be reached by the tax." The court further rules that so long as the donor reserved the power to revoke, alter or amend the trust until the time of his death there could be no vesting in absolute possession or enjoyment of said corpus in the ultimate beneficiaries until that time, and, further, that it was immaterial insofar as the beneficiaries' acquisition of the property was concerned "*whether the power be reserved to the donor or another.*" (p. 271.)

The last statement is very broad and, in appellees' opinion, whether taken literally or otherwise, brings within the taxable class all transfers wherein a power of revocation is reserved, whether it be absolute or qualified. As will be pointed out immediately following, there is only one exception to this rule and that is where the exercise of the power is dependent upon the consent of the *beneficiary* of the trust.

In *Reinecke v. The Northern Trust Company*, *supra*, the donor created seven separate deeds of trust. The income from two of these trusts was reserved to the settlor for life and upon his death to be paid to desig-

nated beneficiaries until the termination of the trusts, with provisions for remainders over not here important. By the terms of these two trusts there was reserved to the settlor a power of revocation. In the remaining five trusts the income from the corpus was payable to certain designated life beneficiaries with remainders over. The settlor reserved to himself the power to supervise the investment of the trust funds; vote the stock; appoint successor trustees; and, "to alter, change or modify the trust" with the consent of the *single beneficiary* in the case of four of the trusts and the *majority of the beneficiaries* in the case of the fifth trust. As to the two trusts in which the decedent reserved the income for life and in which he had an unqualified power of revocation the tax on the transfers was sustained. As to the five trusts under which he reserved no beneficial possession or enjoyment and under which the power to alter, change or modify was only with the consent of the *beneficiary* of the trust, the court set aside the tax.

It is respectfully submitted that the decision of the United States Supreme Court in the case of *Reinecke v. The Northern Trust Company* has no direct bearing upon the disposition of the present matter for the obvious reason that there the power to revoke was dependent upon the consent of the *beneficiary* of the trust; whereas in the instant case it is upon the consent of the *trustee*. The Supreme Court in the case *sub judice* had no difficulty in discerning the difference between *Reinecke v. Northern Trust Co.* and the present one, and the court very clearly stated that the *Reinecke* case had no bearing upon the issue as will appear from the following excerpt: (S. C. p. 44).

"* * * The case is obviously different from *Reinecke v. Trust Co.*, 278 U. S. 339, where the beneficiary must consent to the revocation. The mere naming of two trustees did not enlarge the rights of the beneficiaries."

That there is a marked distinction between such cases must be clear. Where the beneficiary's interest in the income and corpus of the trust can only be altered with his consent, it is apparent that the donor has placed practically beyond his control any power to deprive him of his interest in the property. The beneficiary's interest is naturally opposed to that of the settlor of the trust and where the settlor can deprive him of such interest only upon his consent there is little room for argument that the settlor's control over the trust property is such as to place the transfers in the taxable class. That great stress was laid by the United States Supreme Court upon the fact that the beneficiary's interest under the trust could only be affected with his consent is evidenced by the following excerpt taken from the opinion; (p. 346):

"* * * If it is assumed that the power to modify the trust was broad enough to authorize disposition of the trust property among new beneficiaries or to revoke the trust, still it was not one vested in the settlor alone as were the reserved powers in the case of the two trusts. He could not affect any change in the beneficial interest in the trust without the consent in the case of four of the trusts, *of the person entitled to that interest* and in the case of one trust without the consent of the *majority of those so entitled*. Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, *and consequently adverse interest*, the trust for all practical purposes had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute."

(Italics Appellees'.)

This circumstance, of course, is not present in the instant matter, since here the power of the settlor to alter, amend or revoke the trust was not in any way dependent upon the consent of the ultimate beneficiary,

but merely upon the consent of a co-trustee, who, incidentally, was the husband of the donor and who made no contributions whatever to the corpus of the four trusts, and whose interest therein was, of course, not adverse to that of the donor. In appellees' view, the United States Supreme Court has fully recognized the distinction between a case requiring the consent of a *trustee* and one requiring the consent of the *beneficiary* when it sustained an inheritance tax in the case of *Saltonstall v. Saltonstall*, which required the consent of one of the *trustees* and denied the right of the Federal Government to an estate tax in *Reinecke v. The Northern Trust Company* where the power to alter the trust was only with the consent of the *beneficiary*.

After a reading of the opinions in the case of *Saltonstall v. Saltonstall*, and *Reinecke v. Northern Trust Company*, it must be apparent that there are features which distinguish these two cases or else the United State Supreme Court has within a very brief period rendered conflicting and necessarily repugnant decisions. As above pointed out, it is *appellees'* contention that the distinguishing feature of the two cases is that the former, although involving a qualified power of revocation, required only the consent of the *trustee*, while the latter necessitated the consent of the *beneficiary*, whose interest was to be directly affected and which was consequently adverse; or, if this is not a logical ground upon which to rest the distinction between the two cases, then it must follow that they are distinguishable on the ground that the former involves the right of the State to an inheritance tax, viz.: a tax on the right of the beneficiary to receive, whereas the latter involves an estate tax; a tax on the right of the decedent to transmit.

That there is a marked distinction in the nature of the two taxes and that rules applicable to one are not always dispositive of similar issues arising under the other, is clearly recognized.

Saltonstall v. Saltonstall, 276 U. S. 260, 271;
Hill v. Nichols, 18 F. (2d) 139;

Coolidge v. Comm'r., etc., 167 N. E. 757;
Minnesota v. Brooks, 232 N. W. 331;
Boston Safe Deposit & Trust Co. v. Comm'r.,
supra.

We are here concerned with an inheritance tax (succession tax) such as involved in *Saltonstall v. Saltonstall*, viz.: one on the power to receive, and not one on the right to transmit, and the decision in that case must, therefore, be adopted as the rule applicable to the present matter.

Surely, it cannot be urged that the *Saltonstall* decision is to be disregarded as of no great weight based on the principle that the issue there involved was not confined to the question of the taxability of a qualified power of revocation. It is submitted that the United States Supreme Court in that case did not lightly treat, much less overlook, the fact that the power of revocation reserved to the donor and which, incidentally, was the only basis for sustaining the tax in that case, was exercisable only with the consent of one of the trustees. There appears in the opinion of the Court in that case the very significant statement that "*the beneficiaries' acquisition of the property is equally incomplete whether the power be reserved to the donor or another.*" (p. 271) And, there is further evidence that this phase of *Saltonstall v. Saltonstall* was not considered inconsequential as may be gathered from an examination of the opinion of that Court in *Chase National Bank v. United States*, 278 U. S. 327. Speaking of the effect of its decision in *Saltonstall v. Saltonstall* and the fact that the power there involved was exercisable only with the consent of another, the Court, at p. 336, says:

"That, it is true, was said of a succession tax, and we are here concerned with a transfer tax. The distinction was there important for it was at least doubtful whether upon the death of the settler there was any such termination, as to him, of a power of control over the remainder such as would have

been subject to a tax levied exclusively on transfers, *since the power was not vested in him alone, but in him and another*. See *Reinecke v. Northern Trust Company*, decided this day, post p. 339. But we think that the rule applied in *Saltonstall v. Saltonstall*, *supra*, to a succession tax is equally applicable to a transfer tax, where, as here, the power of disposition is reserved exclusively to the transferor for his own benefit."

(Italics, Appellees'.)

Certainly, it must be that if a power of revocation vested by the donor in "another" can constitute the transfer a taxable one insofar as the beneficiary's interests are concerned, then it must necessarily follow that a power to alter, amend or revoke reserved to the donor requiring only the *consent* of "another" to its exercise must present a taxable transfer. The only exception being in the case where the other person is a *beneficiary* and, therefore, *of an adverse interest*. In view of all of these circumstances, it would seem clearly fallacious to argue that the United States Supreme Court in the case of *Saltonstall v. Saltonstall* either lightly treated the qualified power of revocation or entirely overlooked it as an important element in the disposition of the question there involved.

In *Boston Safe Deposit and Trust Company v. Commissioner of Corporations, etc.*, *supra*, the trust provided for the payment of income to M. for life and upon her death to pay over the corpus of the trust to the donor and his wife, or the survivor of them, if living, or if neither be living, then to two grandchildren of the settlor, or their issue. M. agreed in consideration of the trust to devote her time and services to the care of the donor and his wife during their respective lives. It was further provided that if she should be unwilling or unable to render such services to the entire satisfaction of the donor or his wife, *the indenture might be modified or terminated by an agreement of the four parties with pro-*

vision for arbitration on this point in the case of disagreement; otherwise the trust was irrevocable. M. performed her covenants and the trust was neither modified nor terminated. Upon the death of M. who survived both the donor and his wife, the trust estate passed to the grandchildren. Massachusetts laid an inheritance tax upon the transfer of the corpus of the trust as a transfer of property intended to take effect in beneficial possession or enjoyment at or after death. *It is to be particularly noted that the trust was terminable by the donor only with the consent of his wife, M., the life tenant, and the trust company, the trustee.* Notwithstanding this fact and the further very important fact that the decedent reserved no income whatever in the trust property, the Supreme Court of Massachusetts sustained the right of the Commonwealth to an inheritance tax. The Court as one of the reasons for affirming the assessment said that so long as the donor or his wife might survive there was always the possibility that the four parties to the trust agreement might, by mutual consent, terminate the same, so that there never could be, so long as the donor and his wife survived, an absolute vesting in the remainder beneficiaries of the full possession and enjoyment of the trust property. Here again, we have the case of a qualified power depending for its exercise by the donor upon the consent of others.

The case of *Hill v. Nichols* involves the same estate as that in *Saltonstall v. Saltonstall*, namely, the estate of Peter C. Brooks. The issue there was whether or not the United States Government was entitled to a Federal Estate Tax. *Saltonstall v. Saltonstall*, as hereinbefore pointed out, raised the question as to whether or not the State of Massachusetts was entitled to an inheritance tax. Notwithstanding the fact that the donor at the time of his death had no right to the income from the trust property and could only revoke the same with the consent of one of the trustees, the United States District Court determined, following the conclusions

reached by the Supreme Court of Massachusetts in *Saltonstall v. Saltonstall*, that the transfers under consideration were in fact intended to take effect in beneficial possession and enjoyment at or after the death of the donor, although the right of the Federal Government to an estate tax on such transfer was denied on the ground that the Federal Act could not be held to operate retrospectively. Again, we find that the Courts refused to exempt the transfer merely because the power of revocation was a qualified one exercisable only with the consent of a trustee.

In the case of *People v. McCormick*, *supra*, the income from the trust property was to be accumulated and added to principle so long as the donor lived with the further provision that she might draw on said income in the event that in any one year the net income from her other estate might be less than \$250,000. There was also provision for the distribution of the remaining net income of the trust property for charitable purposes in such sums as the donor might designate. On the death of the donor the net income from the estate was to be paid over, one-third to each of the three children of the decedent who might survive her for their lives, with power of appointment in each child upon his death over the corpus. There was a provision in the trust agreement that the donor might revoke the same in whole or in part by written instrument to that effect delivered to the trustees, *signed by her and by one or more of her three children*. Upon the death of the donor the trust might be terminated in whole or in part by a written instrument signed by a majority of the beneficiaries in interest. Notwithstanding the fact that the exercise of the power of revocation was contingent upon the consent of one or more of the *beneficiaries* of the trust and that there was very little likelihood that the donor would ever call upon income for her own use, the Supreme Court of Illinois sustained the right of the state to an inheritance tax on the transfer as one intended to take effect in beneficial

possession or enjoyment at or after the death of the decedent.

Although not the next case in order we will take up *Commissioner v. McCormick, supra*, at this point, since it involves the same estate (Nettie Fowler McCormick) as involved in *People v. McCormick, supra*. The United States Circuit Court of Appeals, reversing the Board of Tax Appeals, held that the same trust deed which had theretofore been held taxable by the Supreme Court of Illinois, was, for substantially the same reasons, subject to Federal Estate Taxes. It is not necessary to restate the facts of the case since they have been set forth in sufficient detail above. The important factor is that the court sustained the right of the Federal Government to an estate tax notwithstanding that the donor's right to income was conditional and the exercise of the power to revoke was dependent upon the consent of at least one of three *beneficiaries*. The following excerpt, taken from the opinion of the Court (7th Cir.) is directly in point with the present issue and in harmony with appellees' claim: (pp. 278, 279)

"* * * While much might be written in an attempt to define, for purposes of taxation, a revocable trust, it is hardly necessary to go into an extended discussion in this opinion. The two broad classifications—revocable and irrevocable—are hardly sufficient to test the application of the statute involved. For a trust may be revocable upon conditions. These conditions may make settlor's power to revoke dependent upon the consent of outside parties whose interests are adverse to those of settlor. Such was the case of *Farmer's Loan & Trust Co. v. Bowers*, 29 F. (2d) 14, where the trust agreement provided that the settlor could revoke only in case the trustee consented. Likewise it has been held that a provision of the trust agreement which gave settlor the right to revoke in case the majority of the beneficiaries con-

sent is an irrevocable one. *Reinecke v. Northern Trust Co.*, 278 U. S. 339. Generally speaking, it would seem that a trust agreement is revocable only when the settlor's power is absolute and unconditional.

But we are here dealing with a most practical problem, taxation, (*Tyler v. U. S.*, 281 U. S. 497) and the irrevocable character of the trust is not the determinative issue of the controversy, but is important only as it helps illuminate the settlor's intention. So, approaching the question of irrevocability, a case can be easily conceived where a trust agreement might be defined as legally irrevocable, and yet the estate thus conveyed be subject to the Federal inheritance tax. To illustrate, A., the settlor, transfers a large sum to B., trustee, for the benefit of C., V., W., X., Y., and Z., reserving the use of the income during the life of A. to A. The trust agreement provides that the trust might be revoked by A. at any time, provided C., the beneficiary, consents. The beneficiaries other than C. are the recipients of the corpus after A.'s death, save \$1 to C. *The case becomes stronger if it appears that C. was one who occupied an intimate relation to A., such as banker or lawyer. Under such circumstances a court would have little difficulty in finding that the estate was subject to a tax."*

Attention is particularly called to the illustration which the Court says would be taxable beyond peradventure. This hypothetical case is not distinguishable from the facts of the case *sub judice*. Here the creator had the power to alter, amend or revoke with only the consent of her husband, who had contributed no portion of the trust estate and whose interest could hardly be said to be adverse; at least not nearly so much so as the interest of "C." in the illustration. The real test of a taxable transfer is clearly pointed out by the Circuit Court of Appeals in the McCormick case. Taxability

does not depend alone upon whether a trust is or is not revocable. The criterion is whether the trust property was intended by donor to be transferred in beneficial possession and enjoyment at or after death, and this intention must be gathered from a consideration of all of the provisions of the trust deed, somewhat after the fashion of construing a will. If it appears that the trust estate could only pass at or after death with all of the attributes of ownership and that the transmission was incomplete so long as the donor lived the transfer is taxable notwithstanding that donor may or may not have reserved income and that the power to revoke was a qualified rather than an absolute one.

These cases are somewhat along the lines of *Boston Safe Deposit and Trust Company v. Comm'r. of Corporations, etc., supra*, and it is respectfully submitted that the Courts in each of these cases went much further than we are required to go in the present matter in order to sustain the assessment. The exercise of the power of revocation in the present matter was not at all dependent upon the consent of persons possessing adverse interests such as was the circumstance in those three cases.

In *Safe Deposit and Trust Company v. Tait, supra*, the trust was created by the donor and his wife, each making contributions to the corpus. The net income therefrom was to be paid to the donor and his wife during their respective lives in the proportion of the contributions of each and the income from the entire trust property upon the death of one was to be paid to the survivor, with provision for disposition of corpus upon the death of the survivor, which is not here important. The trust was irrevocable except by joint consent of the two donors. The United States District Court held that the Federal Government was entitled to an estate tax and that the transfer was one intended to take effect in beneficial possession and enjoyment at or after death. In that case the power was a qualified one, but again the Courts refused to accept that fact as a basis for exempting the transfer.

In re Bowers Estate, supra, the decedent created several trusts, the income from which was to be paid to the cestui que trusts named in the respective deeds. The donor reserved to himself the right to alter, amend or extend the terms of the trust, but, only with the consent of one of the trustees. Surrogate Foley who wrote the opinion of the lower Court in the *Bowers Case* held that the transfer was one intended to take effect in beneficial possession or enjoyment at or after death, notwithstanding that the power of revocation was a qualified one. The Surrogate, dealing specifically with the question of the qualified power of revocation and the possibilities of the trustee not consenting to its exercise, says (pp. 137, 138) :

"The decedent, in the deeds of trust transferring the property which appellants claim is not taxable, reserved to himself, subject to the separate consent of the trustees, the power of amendment and revocation. Under these conditions the gifts must be considered as transfers which did not become absolute until his death.

It is logical to infer that the trustees under this reservation, might have consented to the revocation or alteration of the trust at the request of the donor, and the Court cannot assume that they would have absolutely refused his request to revoke. The possibility existed.

The fear expressed by the Court of Appeals in the *Bostwick Case*, 160 N. Y. 489, at p. 494, 55 N. E. 208, at p. 2100, that 'if the trust transfers now in question were held to be without the operation of the act too dangerous a latitude of action would be permitted to persons who desired to evade its provisions by some technical transfer, which would still leave the substantial rights of ownership in the donor,' would be well founded if the donor, to escape taxation of the transfer, could provide for the additional consent of someone who might

be entirely subject to his control, * * *"

This is a very explicit statement by the Surrogate upon the exact point at issue, and it does not need any lengthy argument to show that the fear of wholesale tax evasion there referred to would be well founded if a donor may escape the provisions of the statute simply by requiring the consent of a friendly trustee in order to exercise the power to alter, amend or revoke a trust.

True it is that the Appellate Division of the Supreme Court reversed the Surrogate in the *Bowers Case* and held the transfer not taxable, but, it is respectfully submitted, this reversal was not at all based upon the premise that the Surrogate was wrong in his conclusion regarding the qualifying features of the power, but on the broad proposition that a power of revocation was not sufficient to constitute a taxable transfer.

The Court's attention is respectfully directed to the fact that the decision of the Surrogate was rendered in June, 1920, and that of the Appellate Division in March, 1921, at which time the rule prevailing in New York was that a bare power of revocation reserved to the donor did not make the transfer taxable.

See:

Matter of Masury, 28 App. Div. 580; 159 New York 532;

Matter of Carnegie, 203 App. Div. 91; 236 N. Y. 517;

Matter of Miller, 204 App. Div. 418; 236 N. Y. 290;

As hereinbefore pointed out, this principle has not been accepted as the law in New Jersey and has since been repudiated by the United States Supreme Court in the case of *Chase National Bank v. United States*, and the many cases following it.

The point that is important in the *Bowers Case* is that the Supreme Court did not specifically disagree with the Surrogate on his ruling that the mere consent of the trustee to the exercise of the power did not take the

transfer beyond the statute. There is nothing whatever to indicate that if the rule had prevailed in New York at that time to the effect that a bare power of revocation was sufficient to constitute a taxable transfer, that the Supreme Court would have reversed the Surrogate insofar as his reasoning regarding the exercise of a qualified power of revocation was concerned.

The case of *Farmers Loan and Trust Company v. Bowers, supra*, involved the right of the Federal Government to an estate tax upon the transfer of the estate of William Waldorf Astor. Three years before Mr. Astor died he created a trust constituting a very substantial portion of his estate. The Farmers Loan and Trust Company was named as trustee. The income from the corpus of the trust was to be distributed to one or more of the issue of the settlor and the husbands and wives of such issue and also such charities as the settlor might in writing direct. No income whatever was reserved to Mr. Astor. Upon the death of the settlor the principal then in the hands of the trustees was distributable among his issue in such shares as he might by will or codicil direct, and in default of such appointment to divide the estate among his issue then surviving in equal shares per stirpes. *There was reserved to the donor, however, a power to modify or revoke the trust, but only with the written consent of the trustee.* The Government levied an estate tax upon the transfer of the corpus of the trust as representing a passing of property in beneficial possession and enjoyment at or after the death of the decedent. The only basis for the assessment of the tax was that there was reserved to the donor a qualified power to alter or revoke the trust, since there was no provision in the agreement reserving income to him. Speaking of the effect of this qualified power to revoke and the fact that the transfer was intended to take effect only at or after death, Judge Knox, who wrote the opinion of the United States District Court for the Southern District of New York, says (p. 709) :

"In the first place, the beneficiaries of the remainders created by the trusts set up by Mr. Astor, whatever their technical status, had, until the occurrence of his death, nothing more than an expectancy of the possession and enjoyment of his bounty. The reason was that the founder, subject only to the possibility, probably more apparent than real, that the trustee might not assent to such change in the trusts, or a revocation thereof, as he might wish to make, retained complete power over the disposition of the property and its usufruct. *In suggesting that the likelihood of the trustee withholding its consent to a proposed change or revocation of the trust was more apparent than real, there is no intention to asperse or criticise the plaintiff. But it is so hard to conceive of any reason that would have impelled the trustee to withhold consent, had it been requested, that I regard the provision which predicated a right of change or revocation of the trusts upon the exercise of the trustee's discretion as of no present legal effect.*

It is noteworthy that the trustee did give its consent to changes in the trusts whenever and as often as they were suggested; and there was no good cause why it should not do so then and at any time. *Aside from acting faithfully in its stewardship so long as the same should continue for the benefit of particular persons and institutions, the trustee owed no duty to those beneficiaries to see to it that they should remain in Mr. Astor's favor; and, granting full performance by the trustee of any obligations that might from time to time be dischargeable, its chief concern was to satisfy and meet the wishes of the man who had intrusted it with the management of securities of large value. Had it failed to do so, there is slight doubt that Mr. Astor would have had recourse to the fifth paragraph of the indenture of May 25, 1916, wherein he reserved the right at any time to remove the trustee therein named, and*

to appoint a successor, which presumably would be amenable to his suggestions and directions. This right of removal, it will be observed, was not contingent upon the consent and willingness of plaintiff to be removed. It was absolute and complete. Thereby a consent to a change or revocation of the trusts upon the part of the trustee, if refused, might very effectively be compelled. Consequently it may be concluded that Mr. Astor, from every reasonable and practical standpoint, was in position, at all times prior to his death, to direct and control the disposition to be made of the trust property."

(Italics Appellees').

It is clear from a reading of the entire opinion that the United States District Court held the transfer taxable upon the bald proposition that a power to revoke reserved to the donor is a sufficient reservation and retention of control over the subject matter of the gift as to prevent the corpus of the trust from passing in title, possession and enjoyment until the time of the donor's death when that power terminates. The mere fact that the exercise of the power to alter or revoke required the concurrence of the trustee did not prevent the District Court from reaching the same conclusion as it would in the case of an unqualified power.

While the United States Circuit Court of Appeals reversed the decision of the District Court in *Farmers Loan and Trust Company v. Bowers*, it is respectfully submitted that the law as subsequently established by the United States Supreme Court in *Chase National Bank v. United States* regarding the taxability of a bare power of revocation is as originally laid down by the District Court in the *Farmers Loan and Trust Company* case and not as announced by the United States Circuit Court of Appeals.

Both the decisions of the District Court and the Circuit Court of Appeals in that case were rendered before the decision of the United States Supreme Court in *Chase National Bank v. United States* and, therefore, the

reversal by the Circuit Court of Appeals in the *Bowers Case* must be read in the light of the law established by this subsequent decision. The fact would clearly appear to be that the Circuit Court of Appeals, insofar as it determined that a power to revoke a trust did not constitute a taxable transfer, has been overruled by the United States Supreme Court in the case of *Chase National Bank v. United States*, and it is respectfully submitted that if we take this prop from the opinion of the Circuit Court of Appeals there is little left to sustain its reversal of the lower branch.

In its consideration of *Farmers Loan and Trust Company v. Bowers*, the United States Circuit Court of Appeals was confronted with the decision of the United States Supreme Court in *Saltonstall v. Saltonstall*, wherein, it will be recalled, the power of revocation was exercisable only with the *consent of one of the trustees*. The Circuit Court makes the following rather startling statement respecting the findings of the United States Supreme Court in the *Saltonstall v. Saltonstall case*:

"but nothing in the *Saltonstall case* indicates that the transfer would be incomplete as to the settlor, who reserves a power of revocation conditional on a consent, and beyond his legal power to control."

As will be recalled, that is just exactly what the United States Supreme Court did hold in the *Saltonstall Case*. The following excerpt from the *Saltonstall Case* should allay any doubt about the nature of the issue the Court was there dealing with (p. 268):

"The trust instrument provided that its terms might be changed and the trust terminated in whole or in part by Peter C. Brooks, *with the concurrence of one trustee*."

(Italics Appellees'.)

Not only did the Supreme Court in the *Saltonstall Case* hold that a qualified power of revocation would be taxable, but it went further and said that the transfer would be taxable whether the power to revoke be reserved to the donor or "another." In view of these cir-

cumstances it is not at all clear how the Circuit Court of Appeals was able to satisfy itself that the United States Supreme Court in *Saltonstall v. Saltonstall* did not deal specifically with the question of a qualified power of revocation. That the fact that the power in the *Saltonstall Case* was a qualified one was not treated lightly by the U. S. Supreme Court, much less overlooked, is evidenced by its decision in *Chase National Bank v. U. S.* where, in speaking of the rule laid down in the former case, it said (p. 336):

"That, it is true, was said of a succession tax, and we are here concerned with a transfer tax. The distinction was there important for it was at least doubtful whether upon the death of the settlor there was any such termination as to him, of a power of control over the remainder such as would have been subject to a tax levied exclusively on transfers, *since the power was not vested in him alone, but in him and another.*"

So also in *Minnesota v. Brooks, supra*, the Supreme Court of Minnesota pointed out the fact that the power in *Saltonstall v. Saltonstall* was a qualified one. To assume that the United States Supreme Court overlooked this feature would be an insult to the powers of observation of that august tribunal.

The Circuit Court was wrong as to the rule pertaining to the taxability of transfers wherein a bare power of revocation is involved, as definitely established by the subsequent decision in *Chase National Bank v. United States*, and it is respectfully submitted that there is every reason to believe it is in error respecting the taxability of a qualified power. One thing quite certain is that it improperly interpreted the decision of the United States Supreme Court in *Saltonstall v. Saltonstall* regarding the effect of a qualified power to revoke upon the right of a State to collect an inheritance tax, whatever may be its view regarding the right of the Federal Government to an estate tax.

It is necessary at this point that the Court's attention be called to the fact that the statements of the United States Circuit Court of Appeals, (*Farmers L. & T. v. Bowers*) as found in the last two paragraphs of its opinion reported on page 18 of 29 Fed. (2d), deal entirely with the question of whether or not the transfer there under consideration was taxable because the donor reserved a "general power of appointment." With that phase of the case we are, of course, not at all concerned. The Federal statute in that respect is different from the New Jersey Inheritance Tax Act. No attempt is made by the statute of this State to tax the exercise of a general power of appointment in the same manner as is done by the Federal Government and several of the States. The Circuit Court at that point in its opinion determined that a qualified power of revocation is not equivalent to a "general power of appointment." There is no quarrel with this principle of law since a general power of appointment implies the right to exercise the power without restriction or limitation, but, *non sequitur*, that a qualified power of revocation such as we are here concerned with is not such a property right and such a reservation of an interest in the corpus of the trust property as to constitute a transfer intended to take effect at or after the death of the donor.

As appellees view the decision of the United States Circuit Court of Appeals in *Farmers Loan and Trust Company v. Bowers*, it has established no law applicable to the present matter for two very cogent reasons. The first is that its determination that a power of revocation does not constitute a taxable transfer has since been overruled by the United States Supreme Court in *Chase National Bank v. United States*, and the second is that it is clearly in error in determining that the United States Supreme Court in *Saltonstall v. Saltonstall* was not dealing with a qualified power of revocation such as it then had under review in the Astor trust, and that having reached a conclusion contrary to that established

in *Saltonstall v. Saltonstall* it must also be held to be overruled in that respect.

In *Sargent v. White, Collector, supra*, (decided Dec. 16, 1930, by Morton, D. J., and not as yet officially reported) Mr. Remick, the donor, created a trust to endure for the joint lives of himself and his wife. On the death of either, the trust was to terminate and the survivor was to take all. The income during the continuance of the trust was either to be paid to Mr. Remick, or accumulated and added to the fund, as the trustees in their absolute discretion might determine. Mr. Remick died October 16, 1926. His wife survived and took the fund. The donor reserved no power of revocation and even his right to receive income was limited upon the discretion of the trustees. Judge Morton, who rendered the opinion of the United States District Court for the district of Massachusetts, held the transfer taxable notwithstanding the very recent decision of the United States Supreme Court in *May v. Heimer*, 281 U. S. 238 and the case of *Brady v. Ham, Collector*, which will be discussed below. While the case did not involve a qualified power of alteration or amendment it is identical in that the right to income was conditional. In speaking of the legal and practical effect of a conditional interest in matters such as this, the court said:

"The difficulty in the present case arises from the fact that the trustees had discretion not to pay the income to Mr. Remick, but to withhold and accumulate it. *That Mr. Remick had no right to insist on the income is clear. But he left it within the power of the trustees to pay the income to him if they chose to do so. The likelihood that trustees selected by the settlor of a voluntary trust like this would exercise their discretion in his favor if he so requested is so great as to constitute, in fact, a substantial beneficial interest in the fund—although not of strictly legal or equitable character.* This interest was terminated by his death, just as his life estate was terminated; and the termination freed the

property for the benefit of the remainderman * * *

(Italics appellees'.)

The well recognized axiom of inheritance taxation, that substance and practical effect and not legal form controls, was applied by the Court.

In *Erskine v. White, supra* (decided Oct. 1, 1930, by Morton, D. J.), Abbie S. Day, the donor, created a voluntary trust in 1908 for the benefit of her children, reserving to herself the right to alter and amend its provisions as to the disposition of both income or principal after her death, conditioned, however, upon the assent of the Trustee. The Court held the transfer free from Estate Taxes on the basis, substantially, that the trustee represented an "adverse interest" and, therefore, the donor had parted with all interest in the trust property, citing, *Reinecke v. Northern Trust Company, supra*. Appellees claim that this case has little bearing upon the present issue, (a) because it is a Federal Estate Tax case, which, of course, is distinguishable from an inheritance tax matter, as will be more fully pointed out in the argument to follow, and, (b) because the logic thereof is irreconcilable with that used by the same Judge in *Sargent v. White, supra*, which was decided approximately two months later. In *Sargent v. White, supra*, District Judge Morton held the transfer taxable notwithstanding that the right to income was dependent upon the discretion of the trustee, while in *Erskine v. White*, he says that the transfer cannot be taxed because the power to exercise the reserved right to alter or amend the trust was subject to the discretion of the trustee. With all due respect and deference to the Court in those cases it does seem clear that it has blown both hot and cold on the same issue. It is not readily understood how there can be a substantial difference, for tax purposes, between a trust reserving income on a condition, and one reserving

a power to alter, amend or revoke on a similar condition. It would seem that the Massachusetts District Court is right in *Sargent v. White* and wrong in *Erskine v. White*, or vice versa. Both decisions can hardly prevail.

This brings us to the last of the long line of cases cited above, viz.; *Brady v. Ham*. In that case Elizabeth S. Haynes, the decedent, created a trust in 1911 for the benefit of her two daughters. The income was payable to her daughters, equally, with provision for payment of income otherwise in the event of certain contingencies, not here important. The corpus was distributable 21 years after the death of the survivor of the two daughters and a stranger named in the deed, to such persons as would be entitled to the decedent's estate under the intestate laws of the State of Maine. The donor reserved the power to alter or amend the terms of the trust except that she could not direct it to her own use. The court held the transfer free from estate taxes (Federal) on the ground that the donor had absolutely divested herself of all interest in the trust at the time of the creation of the deed. That this same trust would be subject to a state inheritance tax is now beyond argument. (*Saltonstall v. Saltonstall, supra*).

The court, however, had no hesitation in holding the transfer free of the Federal Estate Tax and this fact, therefore, leads us to a careful consideration of the distinctions between the two types of taxes and why cases on the one are not always dispositive of a similar issue arising under the other. In fact it is interesting to note at this point that the United States Circuit Court of Appeals (1st Cir.) in the case of *Brady v. Ham, supra*, limited its findings to estate taxes as is evidenced by the following excerpt from the opinion:

"At the outset it is agreed that the tax here assessed is an estate or transfer tax and not a succession tax; that is, it is an excise tax on the right to transfer property to another at death and not on the right to receive it by the beneficiary. *Knowlton v. Moore*, 178 U. S. 41, 56; *Edwards v. Slocum*,

264 U. S. 61; *Saltonstall v. Saltonstall*, 276 U. S. 260."

As a matter of fact the Court correctly concedes that the trust may be subject to a succession tax. The following excerpt is directly to the point:

"* * * So far as any economic benefits of the trust estate were concerned, they passed to the trustees at the time of the execution of the declaration of trust. *The enjoyment of them may not have been definitely settled on the beneficiaries until her death, and the beneficiaries may have been subject to a succession tax, but the right of enjoyment of any economic benefits thereof irrevocably passed from the decedent in 1911.*"

An estate tax, such as the Federal Government levies, is a tax on the right to *transmit*, or, as commonly referred to, a *transfer* tax. An *inheritance* tax, such as the majority of the States levy, is a tax on the right of the beneficiary to *receive*, often referred to as a *succession* tax. That there is a marked distinction between these two classes of excise taxes is well recognized by the highest State courts and the United States Supreme Court.

Saltonstall v. Saltonstall, 277 U. S. 260, 271;

Knowlton v. Moore, 178 U. S. 41, 56;

Hill v. Nichols, 18 Fed. (2d) 139;

Brady v. Ham, *supra*;

Coolidge v. Commissioner, etc., 167 N. E. 757;

Boston Safe Deposit and Trust Co. v. Commissioner, *supra*;

Minnesota v. Brooks, *supra*.

The United States Supreme Court in *Saltonstall v. Saltonstall*, *supra*, in distinguishing certain decisions of that court involving the right of the Federal government to an estate tax from a case involving the right of the State of Massachusetts to an inheritance tax, says: (pp. 271, 272)

"* * * But we are here concerned, not with a tax on the privilege of transmission, not with an

attempt to tax a donor's estate for an absolute gift made when no tax was thought of, and to do so at the probably appreciated value which the gift now bears, but with a tax on the privilege of succession, which also may constitutionally be subjected to a tax by the State whether occasioned by death, *Stebbins v. Riley*, *supra*, or effected by a deed; *Keeney v. New York*, 222 U. S., 525; *Chanler v. Kelsey*, *supra*; *Nickel v. Coolidge*, *supra*. The present tax is not laid on the donor, but on the beneficiary; the gift taxed is not one long since completed, but one which never passed to the beneficiaries beyond recall until the death of the donor; * * *

The United States District Court in *Hill v. Nichols*, *supra*, is directly to the point in the following excerpt: (p. 140)

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

The Supreme Court of Massachusetts in the case of *Coolidge v. Commissioner, etc.*, in refusing to give weight to certain Federal estate tax cases which were contrary to the claim of the State of Massachusetts to an inheritance tax, says: (p. 761)

"The case at bar is distinguishable from *Shwab v. Doyle*, 258 U. S. 529, 42 S. Ct. 391, 66 L. Ed.

747, 26 A. L. R. 1454; *Shukert v. Allen*, 273 U. S. 545, 47 S. Ct. 461, 71 L. Ed. 764, 49 A. L. R. 855; *Nichols v. Coolidge*, 274 U. S. 531, 47 S. Ct. 710, 71 L. Ed. 1184, 52 A. L. R. 1081; *Reinecke v. Northern Trust Company*, 278 U. S. 339, 345, 347, 49 S. Ct. 123, 73 L. Ed.—, and *Chase National Bank v. U. S.*, 278 U. S. 327, 49 S. Ct. 126, 73 L. Ed.—. In each of those cases the tax under consideration was the Federal state tax levied upon the property of the deceased transmitted at his death. That is a tax levied upon a subject quite different from the succession to property by a beneficiary which is the subject of the present excise."

And in the case of *Minnesota v. Brooks*, the Supreme Court of Minnesota says: (p. 332)

"It is always helpful and sometimes important to keep in mind that inheritance taxes may be and are 'imposed on either or both of two entirely different subjects.' One is the mere 'transmission of property of a deceased person' and the other 'the privilege of taking property by will or by inheritance or by succession in any other form upon the death of the owner.' In the latter case it 'is imposed upon each legacy or distributive share of the estate as it is received,' and 'is called a legacy or succession tax.' 26 R. C. L. 195."

Judicial statements along these lines might be multiplied interminably. However, the foregoing seem ample to conclusively establish that there is a decided difference between a *transfer* and a *succession* tax and that cases upon the former may not always be, and in fact in many instances are not, dispositive of a similar issue arising under the latter. As a matter of fact it often results that the transfer under the same deed of trust may be held taxable in so far as a State inheritance tax is concerned and yet non-taxable in so far as a Federal estate tax is concerned.

Saltonstall v. Saltonstall, *supra*; *Hill v. Nichols*, *supra*—Peter C. Brooks Estate.

Coolidge v. Commissioner; Nichols v. Coolidge,
274 U. S. 531—Randolph and Julia Coolidge
Estates.

People v. Northern Trust Co.; Commissioner v.
Northern Trust Co.—Ellen L. Van Schaick
Estate.

In *Saltonstall v. Saltonstall* and *Hill v. Nichols*, *supra*, certain deeds of trust executed by Peter C. Brooks were involved. In the former case the right of the State of Massachusetts to an inheritance tax was sustained, not only by the Supreme Court of Massachusetts, but by the Supreme Court of the United States, while in the latter case the trust was held not subject to the Federal estate tax by the United States District Court. In *Coolidge v. Commissioner*, deeds of trust executed by Randolph and Julia Coolidge were involved. The right of the State of Massachusetts to an inheritance tax on these trusts was upheld by the Supreme Court of that State while the United States Supreme Court in *Nichol v. Coolidge* held the same trusts not subject to Federal estate tax. These cases do not present an anomalous situation when it is remembered that the basis of the excise in each instance is entirely different.

It might be noted before leaving this feature of the case, however, that it does not result because of the difference in the taxes that we should always disregard Federal decisions upon the right of the Federal Government to an estate tax because the estate tax is on the right to transmit and the inheritance tax is on the right to succeed to the property which is the subject of the excise. It is often the fact, as above pointed out, that the transmission in so far as the donor is concerned is wholly complete at the date of the execution of the instrument of trust, although the succession of the ultimate beneficiaries may be suspended until at or after his death and therefore no estate tax would be chargeable although an inheritance tax might logically result. This was the possible circumstance as pointed out by

the United States Circuit Court of Appeals in the case of *Brady v. Ham*, *supra*.

It may be stated with reasonable certainty that under no set of circumstances could a deed of trust be held subject to the Federal estate tax as a transfer intended to take effect in beneficial possession and enjoyment at or after death and not be subject to a State inheritance tax. Although it is wholly possible, and, in many cases has been established to be the fact, that there may be no Federal estate tax, still there is properly chargeable a State inheritance tax. The basis of this conclusion is easily understood and an illustration of such a case readily presents itself. A transfer of property by A to B, as trustee, to pay the income therefrom to C during the life of A and upon A's death to transfer the corpus to C if then living or over to others in the event of the previous death of C, would constitute a completed transfer at the time of the execution of the deed in so far as the donor is concerned and there could be no Federal estate tax chargeable at the time of his death. The transmission of all right, title and interest in and to the corpus of the trust from him to the trustee was complete at the time of the execution of the deed. It is obvious, however, in such a case that the succession of **C** or the substitutionary beneficiaries in the event of his prior death is not complete at the time of the creation of the trust but could only take effect in complete beneficial possession and enjoyment at the donor's death. Such a transfer is clearly subject to a State inheritance tax. (*Saltonstall v. Saltonstall*; *Coolidge v. Commissioner*, *supra*.)

The transfer by the donor to the trustee took effect *eo instanti* the execution of the deed and the transmission as to the donor was complete at that time and could not be reached by an act which took effect only at or after his death. In short, the privilege of transmission was fully exercised at the time of the execution of the deed and long prior to the death of the donor. This is not true, however, of the succession of the ultimate

beneficiaries. That privilege was not and could not be fully exercised until the donor died and the rule is universal that so long as the privilege of succession has not been fully exercised it may be reached by an excise tax.

In closing the argument on this point too much stress cannot be laid upon the fact that the instant case requires only the consent of the *trustee* to the exercise of the power of alteration, amendment and revocation by the donor and not the consent of a *beneficiary* of the trust. There is a considerable difference not only in a practical way but in legal contemplation between the circumstances of a case such as *Reinecke v. Northern Trust Company* wherein the power of the donor to terminate the trust was dependent entirely upon the consent of the *beneficiary*, whose property rights were, of course, adverse to the exercise of the power to revoke, and in a case such as we are here concerned with where the only consent necessary to the exercise of the power was that of the husband of the donor, who was a co-trustee with the donor and who had made absolutely no contributions toward the corpus of the trust, and who, accordingly, had no adverse interest. There was no right whatever vested in any of the children of Mrs. Russell to prevent her from altering, amending or revoking the trust as to the disposition of both the corpus and the income at any time she might see fit. In fact, if Mrs. Russell had survived her husband, there would have been vested in her the absolute power to alter or amend this trust, since the power, by the terms of the agreement, was to run to the survivor of the trustees. It is very hard to see how there could be any absolute vesting of either the income or corpus of the trust property in the ultimate beneficiaries, freed of the power reserved to the creator, until both she and her husband were dead. The qualification was a technical one and as pointed out by the Court in *Sargent v. White, supra*, there is no reasonable ground upon which to believe that Mr. Russell would not have consented to such changes as Mrs. Russell may have seen fit to make had he been requested to do so by her.

It being now very definitely established that a power of revocation is sufficient to constitute the transfer a taxable one, it only seems logical that the rule should not be otherwise simply because the consent of a friendly trustee is necessary to its exercise. The principle that a power of revocation constitutes a taxable transfer is unquestionably to prevent wholesale evasion of inheritance tax statutes by those who desire to retain such control over their property while they live as to prevent an absolute vesting either in right, title, possession or enjoyment in the ultimate beneficiaries. If this rule is to be frustrated merely by inserting the requirement that the donor shall obtain the consent of a friendly trustee before exercising the power, then it is certain that the fear expressed by the New York Court of Appeals in *Matter of Bostwick*, 160 N. Y. 489, at page 494, and reiterated by the Surrogate in *Matter of Bowers*, *supra*, to the effect that

"if the trust transfers now in question were held to be without the operation of the act, too dangerous a latitude of action would be permitted to persons who desired to evade its provisions by some technical transfer, which would still leave the substantial rights of ownership in the donor,"

would be well founded. If a transfer by trust deed is to be exempted simply because the reserved power is a qualified one, then, to paraphrase the words of the United States Supreme Court in *Chase National Bank v. U. S.*, *supra*, it would be to grasp at the shadow while the substance escapes.

It must, of course, be remembered that the very basis for determining that a power of revocation constitutes a taxable transfer is that the corpus of the trust over which such power is exercisable cannot pass to the ultimate beneficiaries absolutely while this power exists, and that "so long as the privilege of succession has not been fully exercised it may be reached by the tax." (*Saltonstall v. Saltonstall*). The mere fact that the power to revoke is a qualified one does not in the slightest

degree enlarge the estate of the ultimate beneficiary. It must certainly be immaterial, in so far as the remaindermen are concerned, whether their interests in the trust property are dependent upon a power of revocation reserved to the donor or whether such power is vested in another or merely requires the consent of another to its exercise by the donor. In either event, their interests in the trust must be wholly contingent until this power is extinguished.

The United States Supreme Court in *Chase National Bank v. U. S.*, at pp. 336, 338, says:

"* * * The beneficiary's acquisition of the property is equally incomplete whether the power be reserved to the donor or another (p. 336).

* * * Termination of the power of control at the time of death inures to the benefit of him who owns the property subject to the power and thus brings about, at death, the completion of the shifting of the economic benefits of property which is the real subject of the tax, just as effectively as would its exercise, which latter may be subjected to a privilege tax, * * * And the non-exercise of the power may be as much a disposition of property testamentary in nature as would be its exercise at death * * *'" (p. 338).

POINT IV.

The Corpus of the Several Trusts Could, Under No Circumstances, Vest Absolutely in Right, Title, Possession and Enjoyment in the Beneficiaries Until at or After the Death of the Donor.

If the privilege of succession has not been fully exercised it may be reached by the tax. (*Saltonstall v. Saltonstall, supra*) The ripening of a more or less tenuous, dubious and immature right into actual possession, irrevocable enjoyment and full title constitutes a succession which may lawfully be the subject of a privilege

tax. (*Coolidge v. Commissioner, supra*) If there is a shifting of the "economic benefits and burdens of the property at death" the transfer may be reached by a succession tax. (*Saltonstall v. Saltonstall, supra; Minnesota v. Brooks, supra*)

It is appellees' contention that none of the four children of Mrs. Russell, before her death, had succeeded to an absolute and indefeasible interest in the corpus of the trust which could not be reached by the tax. Whatever may be the opinion relative to the effect of the qualified power to alter, amend or revoke, it is respectfully submitted that the transfers cannot in any event escape the statute, since the corpus of the trusts did not and could not, under any set of circumstances, vest with all the rights of ownership in the four children, prior to and independent of the death of the settlor.

We might even concede, for the purpose of argument, that Mrs. Russell's power over the corpus and income of the several trusts was limited to the right to designate other beneficiaries thereof and that she possessed no right to revoke the trusts in their entirety or to reinvest herself with the trust property, since the taxability of a transfer by deed of trust is not at all dependent upon the retention by the donor of a power of revocation.

Coolidge v. Commissioner, 167 N. E. 757, 761;

State Street Trust Co. v. Treas. and Rec. Gen'l., 209 Mass. 373, 378;

In re Miller's Estate, 43 Nev. 12, 47;

In re Dunlap's Estate, 188 N. Y. Supp. 762; aff'd, 199 N. Y. Supp. 147;

The following excerpt is from the opinion of the Supreme Judicial Court of Massachusetts in the case of *State Street Trust Co. v. Treas. and Rec. Gen'l, supra* (at p. 378):

"It is the first contention of the defendants in the second appeal, who are the beneficiaries under the trust, that they are exempt, as the transfer of the property in question became complete in the life-

time of the donor or settlor. By the terms of the instrument creating the trust no power of revocation is reserved. The test, however, by which the exemption is to be ascertained does not depend upon whether a power to revoke has or has not been inserted, but upon the passing of the property with all the attributes of ownership independently of the death of the transferor. It is the absence of power of control with the unrestricted right of the recipient to dispose of the property and to receive and use the proceeds, which by the express language of the statute subjects it to the tax."

The Supreme Court of Nevada *In re Miller's Estate*, *supra*, states the rule in this language (p. 47) :

"But it is insisted that the trustees accepted the trust, that their active duties began immediately upon the delivery of the deed; *that it contained no power of revocation*, and under the statute of California it was irrevocable. Section 2280, C. C. Cal. *Conceding this to be true as between the parties to the transaction, the weakness of the position is that the test in determining whether, under a deed, grant, or gift, the property was intended not to vest in possession or enjoyment until after the death of the grantor, does not depend upon whether a power to revoke has or has not been inserted*, but upon whether or not the property passes with all the attributes of ownership, independently of the death of the transferor. *State Street Trust Co. v. Treas. & Rec. Gen'l*, 209 Mass. 373, 95 N. E. 851."

(Italics appellees')

Of course, if a power to alter, amend or revoke (absolute or qualified) is reserved to the donor or "another," other than the beneficiary, the beneficiary's interest cannot vest with all of the attributes of absolute ownership until the donor's death and the transfer is, therefore, subject to a succession tax. But, as will be pointed out, the beneficiary's interest may be suspended by other equally effective devices which likewise render the transfer taxable.

Nor is it material to the determination of the question that the donor may not have reserved to himself the income arising from the trust property, if, in fact, the corpus could not vest absolutely until at or after his death.

Saltonstall v. Saltonstall, 276 U. S. 260;
Coolidge v. Commissioner, 167 N. E. 757;
Cover v. Commissioner, 17 U. S. B. T. A.
 1177;
Matter of Dunlap, 188 N. Y. S. 762; aff'd
 199 N. Y. S. 147;
Hill v. Nichols, 18 F. (2d) 139;
In re Fosdick, 139 Atl. Rep. 318;
Dean v. Willcuts, 32 F. (2d) 374;

In fact, even though the cestui que trust is in receipt of the income from the trust property, we may still have a taxable transfer, since receipt of income is not possession of the corpus.

Coolidge v. Commissioner, 167 N. E. 757;
St. Street Trust Co. v. Treasurer, 209 Mass.
 373, 378;
N. E. Trust Co. v. Abbott, 205 Mass. 279,
 281;
In re Patterson's Estate, 127 N. Y. S. 284,
 286; aff'd 146 App. Div. 286; aff'd 204
 N. Y. 677;
In re Cruger, 66 N. Y. S. 636; aff'd 166 N.
 Y. 602;
In re Dunlap's Estate, 188 N. Y. S. 762; aff'd
 199 N. Y. S. 147;

The two excerpts following clearly state the rule:
N. E. Trust Co. v. Abbott, *supra*, at pp. 281, 282:

"She (the cestui que trustent) had a vested interest in the income until the termination of the trust. The arrangement in regard to the principal was very different. Her only interest in that was contingent, and she was not to enter into possession and enjoyment of it, in any event, until after the death of Marshall, and then only if the trust had

not been terminated by either party by giving notice in his lifetime. * * * Miss Abbott could have no possession or enjoyment of the principal until after his death. *The fact that she had the possession and enjoyment of the income in his lifetime makes no difference. In that respect the case is the same as if this income had been given to another person, with the disposition of the principal that appears in the agreement. The income and principal stood each by itself, with a separate provision for the disposition of each and they were as independent of each other as if the income had been given to a third person. * * **

(Italics Appellees'.)

In re Patterson's Estate, supra, at p. 286:

"* * * I believe that the authorities sustain the proposition that a trust deed giving all the income of an estate to beneficiaries for the life of the grantor and the corpus at grantor's death, is, so far as the corpus is concerned, a transfer intended to take effect in possession and enjoyment at the death of the grantor, and therefore taxable. In such a case the beneficiary possesses and enjoys the income during the life of the grantor, but possession and enjoyment of income is not possession and enjoyment of the principal which produces that income. It seems to me that the plain wording of the statute is enough to fix taxability upon the entire corpus of the property passing by this trust deed, even if the entire income derived therefrom had gone to the beneficiaries from and after the delivery of the deed, because, by the terms of the deed, the corpus was intended to pass into the possession and enjoyment of the beneficiaries at or after the death of the grantor."

The cases are also very definite upon the point that the trust need not vest *eo instanti* the death of the donor, as the statute taxes transfers which pass in beneficial possession and enjoyment *after death* as well as *at death*.

- Chapter 228, *Laws of New Jersey* 1909;
- Boston Safe Deposit & Trust Co. v. Comm'r*,
etc., 166 N. E. 729, 731;
- Coolidge v. Comm'r*, etc., 167 N. E. 757;

Chapter 228, *Laws of* 1909, as amended by Chapter 151, *Laws* 1914, by section 1, subsection 3, specifically provides for a tax:

"Third. When the transfer is of property made by a resident, * * * by deed, * * * intended to take effect, in possession or enjoyment *at or after* such death."

(Italics appellees')

The Supreme Court of Massachusetts in the case of *Boston Safe Deposit and Trust Co. v. Comm'r*, etc., *supra*, specifically rules on this point:

"The circumstance that the succession in possession and enjoyment to the ultimate beneficiaries was not to occur until the death of a third person is of no consequence upon the facts here disclosed. There could be no such succession until 'after the death of the grantor'. The statute does not require that such succession must take place immediately upon such death, but only after such death. The lapse of a reasonable interval thereafter and the intervention of another specified event as a further condition of the succession do not affect the validity of the excise."

The Supreme Court in the case *sub judice* had no difficulty with this feature as shown by the following excerpt from the Court's opinion: (S. C. p. 44.)

"Further, though the transfer of permanent enjoyment was not effected, until after the death of Mr. Russell, the situation is precisely the same as though the transfer occurred at Mrs. Russell's death. The taxing statute is levied upon transactions to take effect at or after the death of the transferor. No part of Mrs. Russell's property passed to the beneficiaries named in the trusts save

the income they were permitted to take until after her death, and that is the test of taxability."

So much for what may be conceded without harming appellee's position. Let us now see what the crux of the case really is.

The real test of a taxable transfer is whether the trust property passed to the ultimate beneficiaries with all of the attributes of absolute ownership independently of the death of the donor. If it has not then the transfer is taxable.

Saltonstall v. Saltonstall, 276 U. S. 260;
Chase National Bank v. U. S., 278 U. S. 327;
Coolidge v. Comm'r, etc., 167 N. E. 757;
In re Miller's Estate, 32 Nev. 12, 47;
Cahen v. Brewster, 203 U. S. 543;
Orr v. Gilman, 183 U. S. 278;
Chanler v. Kelsey, 205 U. S. 466;
Moffitt v. Kelly, 218 U. S. 400;
Nickel v. Cole, 256 U. S. 222.

The United States Supreme Court states the principle of law in this fashion:

"So long as the privilege of succession has not been fully exercised it may be reached by the tax."

(*Saltonstall v. Saltonstall*, *supra*, p. 271.)

Continuing the court says: (p. 271)

"And in determining whether it (the succession) has been so exercised technical distinctions between vested remainders and other interests are of little avail *for the shifting of the economic benefits and burdens of property, which is the subject of a succession tax*, may even in the case of a vested remainder be restricted or suspended by other legal devices. A power of appointment reserved to the donor leaves the transfer, as to him, incomplete and subject to tax. *Bullen v. Wisconsin*, 240 U. S. 625. The beneficiary's acquisition of the property is equally incomplete whether the power be reserved to the donor or another. *And so the property passing to the beneficiaries here was acquired only be-*

cause of default in the exercise of the power during the donor's life and thus was on his death subject to the State's power to tax as an inheritance."

(Italics Appellees'.)

The foregoing excerpt was set forth verbatim by the Supreme Court in the present case. (S. C. 42)

If the supreme test of a taxable transfer is whether the property has passed with all of the attributes of ownership independently of the death of the decedent, and it is respectfully submitted that there can be no reason to question it in view of the imposing authority supporting the principle, then it is obvious that the present transfers cannot escape the tax. If the trust agreements are put to this test, it must unquestionably result that not only did the corpus of the trusts not vest absolutely in title, right, possession and enjoyment independently of the death of the donor, but that under no set of circumstances could the corpus vest absolutely in the ultimate beneficiaries independently of and before the donor's decease.

The trust instruments must of course supply the answer to the problem and we will, therefore, consider their provisions for a moment. The term of the four trusts was nominally predicated on the lives of Archibald D. Russell, Jr., and Ethelberta P. Eppley, and the survivor of them; they being the two oldest children of the donor; ages 26 and 29, respectively, at the date of the creation of the trusts. The income from the trusts was to be paid to the respective beneficiaries during the lives of these two children and the life of the survivor, unless the trusts be otherwise terminated as provided elsewhere in the agreements; the corpus, upon the death of the survivor of the two children, to be paid to the beneficiaries if then living, or if dead to their issue, with further provisions for distribution should any of the children die without issue.

Paragraph "Third" of each of the agreements specifically provides that: (S. C. 25)

"Notwithstanding any of the provisions to the contrary hereinbefore contained, the Trustees herein named or the survivor of them, whether serving alone or otherwise (but not any succeeding trustee appointed as herein authorized) are authorized and empowered at any time after the execution of this agreement, by instrument in writing duly signed and acknowledged by said Trustees or the survivor of them, *to direct the distribution of said trust estate and any part or parts thereof* (Distributions may be directed from time to time as, when and as often as the Trustees named herein or the survivor of them may determine and direct) *to and among the issue then living of the Grantor and the husbands and wives then living of any issue and to and among any other person or persons or corporations whatsoever.* Upon receipt of the said instrument or instruments in writing duly signed and acknowledged by the said Trustees or the survivor of them directing a distribution of the trust estate or of any part or parts thereof, the trustees or trustee then in office shall pay over any such part or parts, or the whole of said trust estate, in accordance with such direction or directions, and the trust shall cease and determine as to the whole or any part or parts of the trust estate paid over by the trustees in accordance with such direction, and shall continue as to any balance not directed to be distributed."

It is also important to note that paragraph "Second" of the agreements, which provides for the distribution of corpus on termination of the trusts, very carefully provides that the distribution therein directed shall not prevail if the donor and her husband, or the survivor, shall otherwise elect in accordance with the authority contained in paragraph "Third." See also paragraph "First" respecting the distribution of income wherein the right is reserved to the decedent and her husband

to otherwise dispose of the income under the authority of the "Third" paragraph.

Now, what is the effect of the proviso in paragraphs "First" and "Second" and the specific provisions of paragraph "Third". There would seem to be but one answer, viz.: that so long as the donor and her husband or the survivor of them should be living there could be no distribution of corpus without their consent, and no allotment of income contrary to their wishes. It is submitted that under no set of circumstances could the right to income or corpus of the four trusts vest absolutely in the four children prior to the death of the donor and without her approval. The only event which could even approximate this end would be the deaths of Archibald D. Russell, Jr., and Ethelberta P. Eppley during the lifetime of the donor or her husband, but even then the beneficiaries of the trusts would be confronted with the proviso of paragraph "Second" and the authority invested in the donor in paragraph "Third" to direct disposition of the corpus "to and among any other person or persons or corporations whatsoever"—"Notwithstanding any of the provisions to the contrary hereinbefore contained." In view of the fact that the donor was very careful to reserve the right to control the distribution of both corpus and income so long as she and her husband should live, it is not at all unreasonable to suggest that had the trust terminated by the happening of the aforementioned event, the donor would have been quick to have made other provisions for the payment of corpus and income than those provided for in paragraph "Second". But, be that as it may, we are not, for the purposes of an inheritance tax, to speculate on events as they might have happened. We must take the facts as we find them.

Matter of Schmidlapp, 236 N. Y. 278.

And the fact actually is that the corpus of the trusts in the case at bar did not and could not pass absolutely and indefeasibly to the children independently of the

death of the donor. Even their enjoyment of the income was at the discretion of the donor.

Not only were their interests both in income and corpus subject to the control of the donor, but they were further contingent upon their surviving the term of the trusts. Under these circumstances how can it be urged that the succession of the children had been fully exercised prior to and independently of the death of Mrs. Russell? Their interests at the best were purely contingent. The death of the donor and her husband ripened these tenuous and dubious interests into actual possession, irrevocable enjoyment and full title in the children. Their deaths replaced a contingency with a certainty, and worked a fundamental change in the nature of the beneficiaries' relations to and interest in the trust property, and the cases are clear to the effect that such a change constitutes a succession which may be the subject of a tax.

The following excerpts from the opinion of the Supreme Judicial Court of Massachusetts in the case of *Coolidge v. Commissioner*, 167 N. E. 757, at page 760, are directly in point:

"It is the succession to unrestricted and absolute title, in place of no possession or enjoyment whatever, and a contingency as to title, which is made subject to the excise under the statute. "The acquisition of the rights which accrued to the five sons on the death of the last settlor was a fundamental change in the nature of their relation to and interest in the trust. It replaced a contingency with a certainty. Full title, complete and unrestricted in every particular, did not vest in them until that event. By that event the actual transfer of the possession of the trust fund passed under the terms of the deed of July, 1907, from the trustees to the five sons and the full enjoyment thereof as to title and income for the first time became theirs. It seems to us that this change constituted a succession. The excise is not levied on

mere enjoyment, possession or ownership; it is levied upon the assured and completed ripening of a more or less tenuous, dubious and immature right into actual possession, irrevocable enjoyment and full title. We think that this constituted a succession which lawfully might be made subject to the excise by a statute enacted and effective before such succession took place."

Let us pause for a moment and see what our Supreme Court has to say about the contingent nature of the childrens' interests in the trust property and the taxability of their successions following Mrs. Russell's death: (S. C., pp. 41, 44)

(p. 41):

"It is apparent from this clause (Clause Three) that the power of Mrs. Russell and her husband, or the survivor of them, to absolutely defeat the interest of the beneficiaries named existed. * * * They, or the survivor, had the same control over the funds as though no settlements whatsoever had been made except in this, that neither could personally absorb the fund. * * *"

(pp. 43, 44):

"Obviously, no permanent right accrued to the life tenant, or the remainderman, until after the death of the settlor and her husband. The mere fact that the settlor could not retake made the interest of the beneficiary no more secure. In fact, the beneficiaries had no security until after the death of both parents. * * *"

(p. 44):

"Nothing vested in permanent enjoyment until after the death of Mrs. Russell. True, she could not retake either principal or income for her own benefit, but she could grant both principal and income to anyone she chose, if her husband acquiesced, so that in no sense was there a transfer until after her death. *Saltonstall v. Saltonstall*, 276 U. S. 260; *N. E. Trust Co. v. Abbott*, 205 Mass. 279."

These principles are all fundamentally sound and find unlimited and weighty support and should be followed.

It is only when the owner relinquishes all power of control over the property and confers upon another the right to dispose of it and receive and use its avails, without subsequent restriction or control by the donor, that the transfer escapes the tax.

In re Fulham's Estate, 96 Vt. 308, 315.

Whenever property is conveyed upon such limitation that it will vest in interest, possession or enjoyment by reason of the death of the grantor or donor, such succession falls within the descriptive words of the statute. The succession to any of these attributes of property occurring as the result of the death of the grantor or donor constitutes the taxable commodity.

Coolidge v. Comm'r, 167 N. E. 757, 760.

The test applied in all of the cases dealing with this phase of inheritance taxation is simply this: Were the interests of the beneficiaries in any different position after the death of the donor than they were before? If a change took place, the effect of which was to make their interests in the trust property absolute as to title, possession and enjoyment, in lieu of mere contingent and defeasible interests, then there was such a succession resulting at or after the death of the donor as to constitute a taxable transfer. In other words, there was such a shifting of the economic benefits and burdens of property as to constitute the transfer a taxable one for inheritance tax purposes.

Surely it will test the ingenuity of appellant to show that the interests of the four children in the trust property stood in the same relation after the death of the donor as before. It is beyond dispute that their interests down to the time of the death of Mrs. Russell and her husband were merely contingent, and that they did not have—in fact could not have—any absolute right to the corpus of the trust property. This all changed, however, within a very brief time of the death of the donor and her husband, since by virtue of the power vested in each

child under paragraph "Fifth" of the trust instruments every one of these trusts was terminated during the year 1920 and the property paid over absolutely to the beneficiaries freed of all trusts (S. C., p. 21). It cannot be suggested that any such circumstance could have taken place while Mrs. Russell survived. This was one of the valuable property rights accruing at or after the death of the donor.

As hereinbefore pointed out, appellant may not aid its cause by urging that the transfer of the corpus did not take effect at the instant of death of the donor, but only upon the death of her husband. As heretofore noted, transfers intended to take effect *after death* as well as *at death* are brought within the specific provisions of the statute, and the act has been so construed. Also, it must be remembered that right down to the time of Mrs. Russell's death it was always possible that she might survive her husband, so that there never could be a certainty that the interests of the children might not be subject to the exclusive control of the donor. Her death removed this contingency.

Neither may appellant claim that the transfers cannot be taxed because the interests of the children were vested, subject only to being divested by their deaths before the period of distribution or by the exercise of the power to alter or amend the trust reserved to the donor, since the rule is firmly established that the right of the State to a tax does not rest upon technical distinctions between vested remainders subject to divestiture and other interests purely contingent.

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

Coolidge v. Nichols, 4 F. (2d) 112, 115;

Chase Nat'l Bk. v. U. S., 278 U. S. 327.

As pointed out by the U. S. Supreme Court in *Chase National Bank v. U. S. supra* (p. 338):

"To make a distinction between a general power and a limitation in fee is to grasp at a shadow while the substance escapes."

The only escape from the tax is that the interest be absolutely vested. If the interest be vested subject to

divestiture, it is a mere play on words whether we call it a vested interest subject to being divested or term it merely a contingent interest. The effect for tax purposes is the same.

Nor can the claim that the children could have assigned or sold their interests affect the question of taxability.

Coolidge v. Comm'r, supra.

The only interests which the children could have disposed of prior to the deaths of their mother and father were contingent; and, being subject to the coercive powers of their parents, it is hardly likely that any one would have paid very much for so fickle an estate. It is plain that they could convey no absolute estate either as to income or principal so long as Mr. and Mrs. Russell were living.

Nor is the taxability of the transfer affected by the claim of appellant that the donor did not reserve a power of revocation, but simply a power to appoint to other persons. While appellees do not concede that paragraph "Third" of the trust agreements did not give Mrs. Russell the power not only to appoint both income and corpus to other persons, but as well to recover the trust property if she saw fit, it is not at all necessary to pursue this feature further since in either event a taxable transfer results. It is well settled that a power to appoint to others than the named beneficiaries has the same effect for tax purposes as a power of revocation.

Saltonstall v. Saltonstall, supra;

Minnesota v. Brooks, supra;

and the non-exercise of such a power may be as much a disposition of property testamentary in nature as its exercise.

Chase National Bank v. U. S., supra;

Minnesota v. Brooks, supra.

The Supreme Court of Minnesota in the case of *Minnesota v. Brooks, supra*, says that

"A transfer subject to a power of revocation in the transferrer, terminable at his death, is not com-

plete until his death. *Reinecke v. Northern Trust Co.*, 278 U. S. 339, 73 L. Ed. 410. *A power to appoint to others than the beneficiary has the same effect as a power of revocation. Saltonstall v. Saltonstall, supra. The exercise of such a power would be as effectual in divesting the interest of the beneficiary as a revocation. * * **

And in *Chase National Bank v. U. S.*, *supra*, the court says: (p. 338)

"And the non-exercise of the power may be as much a disposition of property testamentary in nature as would be its exercise at death. * * *

The Supreme Court in the present case says: (S. C. 43, 44)

"The mere fact the settlor could not retake made the interest of the beneficiary no more secure."

As stated by the Supreme Court of Nevada, *In re Miller's Estate*, 43 Nev. 12, 30:

"There is no natural right to create artificial and technical estates with limitations over, nor has the remainderman any more right to succeed to the possession of property under such deeds than legatees or devisees under a will. The privilege of acquiring property by such an instrument is as much dependent upon the law as that of acquiring property by inheritance. *Keeney v. New York*, 221 U. S. 534, 32 Sup. Ct. 105, 56 L. Ed. 304, 38 L. R. A. (U. S.) 1139."

The tax on transfers by trust deed intended to take effect at or after death, as said by the Supreme Judicial Court of Massachusetts in the case of *Coolidge v. Comm'r*, *supra* (p. 761):

"* * * is not levied on mere enjoyment, possession or ownership; it is levied upon the assured and completed ripening of a more or less tenuous, dubious and immature right into *actual possession, irrevocable enjoyment and full title.*"

The succession to these rights of property by trust deed is just as much a taxable commodity as succession

thereto by last will and testament or the intestate laws.

In appellees' view the present case is indistinguishable from the following cases and it should, therefore, be disposed of on the same principles of law as applied in those cases.

- Saltonstall v. Saltonstall*, 276 U. S. 260;
Coolidge v. Commissioner, 167 N. E. 757;
Boston S. D. & T. Co. v. Commr., 166 N. E. 729;
Hill v. Nichols, 18 F. (2d) 139;
Coolidge v. Nichols, 4 F. (2d) 112;
N. E. Trust Co. v. Abbott, 205 Mass. 279;
State St. Trust Co. v. Treasurer, 209 Mass. 373;
In re Dunlap's Estate, 188 N. Y. S. 762, aff'd 199 N. Y. S. 147;
In re Patterson's Estate, 127 N. Y. S. 284, 286, 146 A. D. 286, aff'd 204 N. Y. 677;
In re Cruger, 66 N. Y. S. 636, aff'd 166 N. Y. 602.

In every one of those cases the transfer was held to have been made to take effect in beneficial possession and enjoyment at or after the death of the donor, and the tax in every case was sustained, save in *Hill v. Nichols*, *supra*, and *Coolidge v. Nichols*, *supra*, wherein it was determined that notwithstanding that the transfers were to take effect at or after death they could not be taxed under the Federal Estate Tax act then in effect since to do so would require the statute to operate retrospectively, contrary to the Federal Constitution.

The cases of *Saltonstall v. Saltonstall*, *supra*, and *Coolidge v. Comm'r, etc.*, *supra*, are directly in point and the general principles announced by both the U. S. Supreme Court and the Supreme Judicial Court of Massachusetts are of such vital importance to the disposition of the present issue that appellees invite the Court's particular attention thereto.

POINT V.

**The Transfer Inheritance Tax Statute of This State
Construed so as to Apply to the Case Sub Judice Does
Not Contravene the Provisions of Either the Federal or
State Constitutions.**

Appellant in its reasons for the reversal of the assessment alleges that,

“if the said statute be construed to apply to the facts herein then the said statute is unconstitutional in that the same would be a taking of property without due process of law and a taking of private property for public use without just compensation in violation of the Fourteenth Amendment to the Constitution of the United States and in violation of Section 16 of Article 1 of the Constitution of the State of New Jersey.”

The objection that a tax such as we are here concerned with is in violation of the State and Federal Constitution has been so many times passed upon by our Courts, and such a tax uniformly held not to be objectionable on constitutional grounds, as to hardly be considered a mooted question at this time. In fact the constitutional phase of the case was practically considered *stare decisis* by the Supreme Court: (S. C. p. 44)

“In view of a number of cases in this State, notably *Carter v. Bugbee*, 91 N. J. L. 438; affirmed 92 Id. 390, and *Farmers Loan & Trust Co. v. Bugbee*, 6 N. J. Misc. Rep. 415, we think it unnecessary to consider the prosecutor's arguments that the transfer inheritance tax act contravenes the Constitutions of this State or the United States.”

This Court and the Supreme Court have heretofore decided that a tax on the transfer of property by deed or gift, the beneficial possession and enjoyment of which cannot take effect absolutely until at or after death, is not

unconstitutional as amounting to a tax on vested interests.

Carter v. Bugbee, 92 N. J. Law 390, affirming 91 N. J. Law 438;

Farmers Loan and Trust Co. (Muller) v. Bugbee, 6 N. J. Misc. Rep. 415, 416.

In fact, this Court, as well as the Supreme Court, in several cases, has upheld the right of the State to a tax on transfers by trust deed, notwithstanding the objection that such a tax was in violation of the Federal and State Constitutions.

Carter v. Bugbee, 91 N. J. Law 438, aff'd 92 N. J. Law 390;

Moore v. Bugbee, 3 N. J. Misc. Rep. 435, 128 Atl. Rep. 679, affirmed 102 N. J. Law 720;

American Board, etc., v. Bugbee, 98 N. J. Law 84;

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

This Court in the case of *Carter v. Bugbee*, *supra*, very definitely laid down the rule that if the interests of the remaindermen under the trust deed have not vested absolutely before the death of the donor they can be reached by a tax attaching at his death and that there can be no constitutional objection that the tax (a) diminishes the value of vested estates; (b) impairs the obligations of contracts; (c) or takes private property for public use without just compensation, contrary to the State Constitution. And there can be no question, in view of the long line of U. S. Supreme Court decisions, notably *Saltonstall v. Saltonstall*, *supra*, and *Chase National Bank v. U. S.*, *supra*, that the tax, under circumstances such as we have here, does not result in the taking of the donees' property without due process of law, contrary to the Fourteenth Amendment to the Federal Constitution.

Chief Justice Gummere in the *Carter case*, dealing with the specific issue, says (p. 394):

"The narrow question, therefore, now to be decided, as it seems to us, is whether a transfer tax can be legitimately imposed by the legislature upon property which has been made the subject of a deed of trust executed and delivered before the enactment of the statute, when such deed does not operate to transfer the title to such property until after the tax act comes into being. We see no reason to doubt it. Such legislation does not, as counsel for the appellants contends, diminish the value of vested estates, it does not impair the obligation of contracts, nor does it provide for the taking of private property for public use without compensation. That it runs counter to any other constitutional interdict is not even suggested."

The Supreme Judicial Court of Massachusetts in *Coolidge v. Comm'r*, *supra*, says (p. 761):

"* * * The element of succession being the taxable commodity does not deny to the petitioners the equal protection of the laws nor does it deprive them of their property without due process of law. *Cahen v. Brewster*, 203 U. S. 543; 27 S. Ct. 174, 51 L. Ed. 310, 8 Ann. Cas. 215; *Chanler v. Kelsey*, 205 U. S. 466, 27 S. Ct. 550, 51 L. Ed. 882; *Nickel v. Cole*, 256 U. S. 222, 41 S. Ct. 467, 65 L. Ed. 900; *Saltonstall v. Saltonstall*, 276 U. S. 260, 48 S. Ct. 225, 72 L. Ed. 565."

It is quite clear that the principle underlying the decision of the Court of Appeals in *Carter v. Bugbee* is that so long as the privilege of succession has not been fully exercised it may be reached by the tax. It is the principle which has been recognized and applied by the United States Supreme Court in numerous cases.

Chase National Bank v. U. S., *supra*;

Saltonstall v. Saltonstall, *supra*;

Orr v. Gilman, 183 U. S. 278;

Cahen v. Brewster, 203 U. S. 543;

Chanler v. Kelsey, 205 U. S. 466;

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

Appellant, in order to succeed on this objection, must affirmatively establish that the interests of the donees which have been the subject of a tax in this case, vested absolutely in right, title, interest, possession and enjoyment prior to the death of the donor, and, therefore, could not be reached by a tax attaching for the first time at the instant of death. In other words, their constitutional objection to the assessment is based solely on the ground that the interests of the donees were vested absolutely prior to the death of the donor and, therefore, could not be depleted by a tax chargeable at that time. That the absolute right to title, possession and beneficial enjoyment of the property did not and could not vest before the death of the donor seems obvious. The fact is that the estates of the children in the instant case are limited to a greater extent than those of the remaindermen in *Carter v. Bugbee*, *supra*. There it was only necessary that they survive the donor, while here the children not only had to survive the donor, but their interests were also subject to defeasance by the exercise of the power to alter, amend or revoke. If the remainders in *Carter v. Bugbee* were not vested and could, therefore, be reached by the tax, without violating any constitutional guarantee, then, *a fortiori*, the present transfers may likewise be reached by the State for inheritance tax purposes.

It must, of course, be kept in mind when considering this objection to the assessment that the United States Supreme Court will accept without question the construction placed by the State courts upon the State statute under which the assessment was levied,

Saltonstall v. Saltonstall, *supra*;

Stebbins v. Riley, 268 U. S. 137;

Chanler v. Kelsey, *supra*,

as it will also accept the State courts' interpretation and construction of the trust deed.

Saltonstall v. Saltonstall;

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

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

In other words, whether said statute is sufficiently broad to reach the transfer and whether the transfer is, in fact, one intended to take effect in beneficial possession and enjoyment at or after death is a matter purely for the determination of the state courts and with which the United States Supreme Court will not concern itself: its only inquiry being as to whether the deed of trust as so construed, and the statute so applied, will contravene any guarantee of the Federal Constitution.

It being so clear that the interests of the respective donees under the four trusts were not vested absolutely and indefeasibly in them prior to the death of the donor, it is respectfully submitted that appellant's objection that the tax deprives said donees of their property without due process of law and without just compensation contrary to the Federal and State Constitutions is without merit.

REPLY TO BRIEF OF APPELLANT

(a) Decisions of the Courts of New York Prior to 1909 Are Not Inconsistent With the Rule Laid Down In *Re Fosdick*.

The first point made by appellant is that Chapter 228 of the Laws of 1909, under which act, as amended by Chapter 151, Laws of 1914, the taxes in the present case were assessed, should be interpreted in accordance with the decisions of the Courts of the State of New York rendered prior to the passage of said act (1909). In other words, that section 1, subsection 3, of the statute, providing for the taxation of transfers intended to take effect in beneficial possession and enjoyment at or after the death of the decedent, can reach only such transfers as the Courts of the State of New York had determined before 1909 to be within its scope.

This contention is founded upon the well recognized rule, and with which appellees have no quarrel, that where a statute is adopted from a sister State the interpretations placed on such statute prior to the

enactment thereof by the adopting State will be presumed to have been adopted along with the law. There is no question but that our early statutes (1892, 1893, 1894, etc.), as well as Chapter 228, Laws of 1909, were modeled after the New York inheritance tax laws and that our decisions are clearly to the effect that the rulings of the New York Courts upon acts prior to the date of their adoption by New Jersey will be presumed to have been adopted with the passage of the law, providing, of course, such rulings are not contrary to the natural purport of the statute, or to some declared legislative or public policy of this State. But how all of this can further appellant's cause is not at all clear since it will require very brief argument to show that it was impossible for the Legislature of the State of New Jersey, at the time of the adoption of Chapter 228, Laws of 1909 (approved April 20, 1909), to determine just what judicial interpretation had been placed by the Courts of New York upon the provision of the statute respecting the taxability of transfers intended to take effect at or after death where the only reservation was a power to alter, amend or revoke the trust.

There are only two decisions of the Courts of New York which need to be considered in regard to this feature of the case, viz.: *Matter of Masury*, 28 App. Div. 580, *affirmed without opinion*, 159 N. Y. 532; *Matter of Bostwick*, 160 N. Y. Rep. 489.

In the *Matter of Masury*, the question was whether or not a transfer was taxable because of the reservation of a power to revoke or annul the trust. This case was the first of the two decided, having been passed upon by the Supreme Court during the April Term, 1898. The Supreme Court, sustained by the Court of Appeals *without opinion*, held that the transfer was not made taxable simply because a power of revocation and annulment was reserved to the donor. If this were the only decision upon the issue there might be some basis for appellant's claim. However, we are confronted not only with a later decision but one which carries an opinion by the

Court of Appeals of New York directly opposite to the result reached in the *Masury case*.

The case referred to is *Matter of Bostwick*, decided by the Court of Appeals of New York on November 21, 1899, approximately a year and a half subsequent to the *Masury decision*. The question in the *Bostwick case*, simply stated, was whether the reservation by the donor of a power to alter, amend and revoke the trust was sufficient to constitute the transfer a taxable one as intended to take effect in beneficial possession and enjoyment at or after the donor's death. *The Court of Appeals held that it was*. It not only did this but even questioned the propriety of its affirmance of the decision of the Supreme Court in the *Masury case*, as evidenced by the following excerpt (p. 493):

"The affirmance of the decision in the *Masury case* may seem to have committed this court to views which support the contention now made in behalf of these appellants; but if that be so, it is an erroneous inference from that decision.

I think that we may have gone too far in generally affirming the Masury decision; certainly the limit was then reached, beyond which the courts could not go without emasculating the provisions of the statute. We thought there was some reason in the facts of the *Masury case* for finding an intention in the donor to make an absolute transfer of property during his life which the mere reservation of a power to revoke was, of itself, insufficient to negative. But, if the trust transfers now in question were held to be without the operation of the act, too dangerous a latitude of action would be permitted to persons who desired to evade its provisions by such technical transfer, which would still leave the substantial rights of ownership in the donor. * * *'" (*Italics, appellees'.*)

These are the only two cases which it may be reasonably presumed the Legislature had in contemplation when it enacted Chapter 228 of the Laws of 1909. How it

can be urged, in view of these decisions, that the Legislature must have intended the provision for the taxation of transfers to take effect at or after death not to include transfers where a power to revoke, alter or amend was reserved, is very difficult of understanding. If any inference at all was to be drawn from the New York decisions upon this subject it would seem that the only logical one would be that such transfers were specifically intended to be within this provision of the statute since the *Matter of Bostwick* so held and this represented the last expression of the highest Court of the State of New York upon the subject.

As a matter of fact, whether *Matter of Masury* or *Matter of Bostwick* represented the law in New York was problematical in that State down to about 1920 or 1921 when *Matter of Bowers*, 195 App. Div. 548; aff'd 231 N. Y. 613; *Matter of Miller*, 236 N. Y. 290; *Matter of Carnegie*, 203 App. Div. 91, aff'd 236 N. Y. 517, were decided, when the rule in the *Masury* case was finally established as the law in that State. The fact actually is, as pertaining to our present inquiry, that even the New York Courts, as late as 1912, 1913 and 1914, were of the opinion that the *Bostwick* case really established the law on the taxability of such transfers, as is evidenced by the decisions of Surrogate Fowler of the New York County Surrogate's Court, *In re Ely's Estate*, 149 N. Y. Supp. 90; *In re Hoyt's Estate*, 149 N. Y. Supp. 91; *In re Schermerhorn's Estate*, 149 N. Y. Supp. 95. The Surrogate, in the three cases just named, held that the reservation of a bare power of revocation was sufficient to constitute a taxable transfer on the authority of the *Bostwick* case, and the ruling applied in these three cases appears to have been accepted without question until about 1920 when the decisions of the upper courts, as above listed, finally swung back to the *Matter of Masury*.

To say that the Legislature of the State of New Jersey must have known, when it passed the Act of 1909, that the rule of the *Masury* case was the law in that State

seems incredulous. How our legislative body could be presumed to have fathomed this fact when New York's own courts were not certain of what the rule was until about 1920, is not clearly understood. As a matter of fact, this ground was all well covered when the question of the taxation of a bare power of revocation was presented to the Prerogative Court *In re Fosdick*, 139 Atl. Rep. 318, and Vice Ordinary Buchanan, in writing the opinion of that Court, was of the view that the *Bostwick Matter* represented the rule, not only in New York, but also the one that should prevail in matters of this kind in the State of New Jersey.

There is no reason, at least apparent, why we should hark back to decisions of the Courts of the State of New York about 1900 to determine what the intent and meaning of our legislation is as of today when we have such authority as the United States Supreme Court as recent as 1928. (*Chase National Bank v. U. S.*, *supra*, *Reinecke v. Northern Trust Co.*, *supra*.) There is no reason to doubt that the rule of the *Fosdick case* is a practical one and should be followed, especially in view of the fact that the United States Supreme Court has now in several cases accepted its logic.

It might be noted in passing that appellant refers to the *Matter of Keeney*, 194 N. Y. 281, and several decisions of the upper courts of New York about 1920, 1921 and 1922, notably, *Matter of Bowers*, *Matter of Carnegie*, *Matter of Miller*, *Matter of Cochrane*, but it is respectfully submitted that these decisions have no bearing upon the rule urged by it in the first point of its brief. In *Matter of Keeney*, *supra*, the opinions of the New York Courts clearly show that there was no attempt made by the taxing authorities to tax, in the first instance, that portion of the trust in which the decedent reserved only a bare power to alter, amend or revoke. It is of no concern at this time why the taxing officials saw fit to take this course. The only important fact is that in the *Keeney case* the taxation of the reservation of a bare power to alter, amend or revoke a trust was

not mooted since no tax had been assessed in this respect and therefore no question along this line was presented for judicial determination. The other cases referred to have no bearing on the question since they were all decided long after the passage of the 1909 act by our Legislature and, therefore, cannot be said to have been adopted along with this act.

(b) It Is Immaterial That Donor Reserved No Power of Revocation Since She Did Have a Qualified Power to Alter, Amend or Appoint Both as to Income and Corpus of the Trust.

Appellant says that Mrs. Russell, under the terms of the four trust deeds, did not reserve the power to revoke. Under clause third of the agreement she reserved, with the consent of her husband, the right to direct the distribution of the trust estate and any part or parts thereof to the issue of grantor and their husbands and wives and "*to and among any other person or persons or corporations whatever.*" The power reserved to Mrs. Russell to appoint the property to "any other person or persons or corporations whatever" is very broad and must necessarily raise a grave doubt as to whether this provision did not give her the right to alter or amend the trust in almost any manner that she might see fit. It is not at all illogical to suggest, in view of the very broad terms of paragraph three, that Mrs. Russell was fully of the opinion that she had adequately reserved the power to alter, amend or revoke this trust as she might choose. If this is not so, then what explanation is there for the following statement appearing in paragraph "Fourth" of the agreement wherein provision is made for the appointment of successor trustees, their duties and powers:

(State of the Case, p. 27):

"* * * Every successor (trustee) so nominated shall have all of the powers and succeed to all the duties granted, conferred and imposed by this instrument or by law upon the trustees herein named,

* * * *but excepting, however, the power to terminate this trust.* * * *

(Italics, appellees'.)

The very exception would seem to presuppose a power vested in her and her husband as the original trustees to terminate the trust. It might be further noted that the circumstances of this trust are very peculiar and the powers and duties of the trustees could hardly be said to be controlled by rules ordinarily applicable to persons acting in a fiduciary capacity. Mrs. Russell was the donor and also one of the trustees; her husband was the other. When Mrs. Russell gave to the trustees the power to alter or amend the trust, she, in substance, reserved that qualified power to herself when she proceeded to appoint herself as one of the trustees.

However all of this may be, it is not at all material to the disposition of the case that Mrs. Russell reserve the power to revoke the trust. It is undisputed that she did have a power to appoint both income and corpus to beneficiaries other than those named. As has been fully pointed out in the main brief, a power to appoint to others has the same effect as a power of revocation. *"The exercise of such a power would be as effectual in divesting the interest of the beneficiaries as a revocation."* *Saltonstall v. Saltonstall, supra; Minnesota v. Brooks, supra.* So long as the beneficiary's power of succession has not been fully exercised prior to the death of the donor it is immaterial whether complete succession was suspended by a power to revoke or simply a power to appoint to others.

(c) The Tax in the Present Case Was Not Based on a Transfer Resulting From the Exercise or Non-Exercise of a General or Qualified Power of Appointment, But Simply on a Transfer Taking Effect in Beneficial Possession and Enjoyment After the Death of the Settlor.

Appellant says that the New Jersey statute imposes no tax upon the exercise or the failure to exercise a power of appointment. On this claim we are agreed. No attempt whatsoever has been made by the State to tax

the transfers on the basis of the exercise or the non-exercise of either a general or qualified power of appointment reserved to the donor. Nowhere in the state of the case nor in the main brief of appellees will there be found a single statement even intimating that these transfers were taxable for that reason. It very clearly appears in every part of the proceeding that the Comptroller assessed the tax in question purely on the ground that the transfers were intended to take effect in beneficial possession and enjoyment at or after death, under the provisions of Section 1, Sub-section 3, of the statute.

Sub-section 4, of Section 1, has no application whatever to the instant matter, and the Comptroller made no attempt to apply this section. It might be noted at this point that the State of New Jersey never has, such as the State of New York, the Federal government and several of the other States, attempted to tax the exercise or non-exercise of general or qualified powers of appointment in the estate of the donee of the power, in the same manner as though the property to which such appointment related belonged absolutely to the donee and had been bequeathed or devised by the donee's will. (See Chapter 62, Laws of New York, 1909—Section 220, Sub-section 6—as amended.)

It is respectfully submitted that the Court should not allow this claim of appellant to cloud the main issue which is simply whether the transfers were intended to take effect at or after death within the ambit of Section 1, Sub-section 3, of the act. We are concerned with the question of the power to alter, amend, revoke or appoint only in so far as it may suspend the power of complete succession of the beneficiaries until at or after the death of the donor. Where the settlor has reserved a general or qualified power to appoint there can be no absolute vesting of the corpus in the donees until the power is extinguished. Whether we consider the reservation in the present case in the nature of a power of appointment or a power to revoke we have a taxable transfer, since in either event the ultimate beneficiaries' interests were

wholly contingent right down to the time that the power, whether it be termed a power to appoint or a power to revoke, was extinguished. It was the extinguishment of this power and the survival of the decedent and her husband by the four children that vested the corpus of the trusts in them with all of the rights of absolute title, possession, ownership and enjoyment. The privilege of succession had not been fully exercised until those events happened and the shifting of the economic benefits and burdens of property at that instant is the subject of this excise tax.

(d) The Fact That the Interests of the Children in the Corpus of the Trusts Did Not and Could Not Vest Until at or After the Death of the Donor Is Material to the Disposition of the Issue.

It is claimed by appellant that the mere fact that the remainders are subject to a conditional limitation or defeasance, and that the physical manucaption of the corpus may not occur until at or after the death of the grantor is immaterial. That this contention is not in harmony with the broad principles of law applicable to cases of this kind, as fully reviewed hereinbefore in this brief, is apparent. That the claim is directly opposed to the principles clearly announced and applied in the following cases is at once apparent.

Coolidge v. Commissioner, 167 N. E. 757;

State Street Trust Co. v. Treasurer, 209 Mass. 373, 378;

New England Trust Co. v. Abbott, 205 Mass. 279, 281;

In re Patterson's Estate, 127 N. Y. Supp. 284, 286; aff'd 146 App. Div. 286; aff'd 204 N. Y. 677;

In re Cruger, 66 N. Y. Supp. 636; aff'd 166 N. Y. 602;

In re Dunlap, 188 N. Y. Supp. 762; aff'd 199 N. Y. Supp. 147.

It is worthy of comment that three of these cases are by the New York courts, and two of them bear the approval of the New York Court of Appeals. Further time of the Court will not be consumed referring to excerpts from these decisions. Statements from two of these cases, namely, *New England Trust Company v. Abbott*, *supra*, and *In re Patterson's Estate*, *supra*, appear at p. 53 of this brief.

(e) The Test of a Taxable Transfer Is Not Whether Income Has Been Reserved But Whether the Privilege of Succession of the Ultimate Beneficiaries Has Been Fully Exercised, Prior to and Independently of the Death of the Donor.

Appellant says that the real test of a taxable transfer is whether, at the time of the death of the grantor, a property right *owned or enjoyed by the grantor* is transferred to the living by reason of such death. With all due respect to learned counsel for appellant, this statement strongly intimates a confusion between the rules applicable to a *succession* tax, such as we are here concerned with, and an *estate* or *transfer* tax such as levied by the Federal government. Appellant's test as applied to *estate* taxes, otherwise known as *transfer* taxes, is wholly in accord with the authorities. That it is in direct opposition to the test of a taxable transfer in so far as *succession* taxes are concerned is equally well settled. We are not here concerned with what the *donor reserved*. This is not a tax laid on his power to *transmit* at death. The excise is on the privilege of the *beneficiary* to *succeed* either at or after the death of the testate, intestate, or settlor.

As a corollary of the aforementioned test appellant says that it must appear, in order to have a taxable transfer, that the donor has either reserved the income from the trust property or a power to alter, amend and revoke the same, or both. That the taxability of the transfer does not depend solely upon reservation of income or power to revoke has been so fully covered

hereinbefore as to warrant any further consideration of the subject merely accumulative. That a donor may completely divest himself of all right, title, possession and control of property before death and still leave a taxable transfer at or after death is apparent. Just by way of illustration, take the case of an absolute, irrevocable transfer of property by "A" to a trustee to hold said property and accumulate the income *until the death of "A"*, and then to distribute the corpus to "B", if living, or if then dead, to others. It is obvious that the donor entirely divested himself, at the time of the execution of the trust deed, of all property rights, including all interest in and control over such property, and in all likelihood freed his estate from liability for estate taxes, but, it is equally apparent that the ultimate succession of "B" or the alternative beneficiary, could only take effect in complete possession and enjoyment at or after the death of the settlor. Could there be any question of the taxability of such a transfer? As just previously pointed out, the courts have in numerous cases passed upon situations of this kind with the result that a taxable transfer has been held to exist. It may be safely stated that any transfer wherein the donor:

- (a) Reserves income,
- (b) Reserves power to revoke,
- (c) Transfers corpus absolutely to trustee to accumulate income and pay principal at death to named beneficiaries, or their substitutes.
- (d) Or, transfers corpus absolutely to trustee to pay income to a third party, or even to the ultimate donee, and corpus upon death to others or even to the donee of the income.

results in a taxable transfer.

If we are to be held to any fixed test of the taxability of transfers of this nature, then the only accurate test is that laid down by the United States Supreme Court and followed by several of the State courts, viz;

So long as the privilege of succession has not been fully exercised it may be reached by an excise

tax and that whenever there is a shifting of the economic benefits and burdens of property at death the resultant transfer may be reached for inheritance tax purposes.

There is no inherent right to create artificial estates any more than there is the right to transfer property by will or the intestate laws. Either may be the subject of an excise tax by the sovereignty granting the power. The State may lay a tax upon such transfers in such manner as it may see fit and when it says that possession and enjoyment should be the test of a taxable transfer it is respectfully submitted that there is no constitutional inhibition against so providing.

It is respectfully submitted that the inheritance tax statute of this State in force when the decedent died, specifically provides for the taxation of transfers intended to take effect in beneficial possession and enjoyment at or after the death of the donor; that the present transfer was clearly of this nature; and, that the State is well within its constitutional rights in providing for such a tax. The judgment under review should, therefore, be affirmed.

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