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Notice of Appeal.

Filed January 28, 1919.

NEW JERSEY PREROGATIVE COURT

In the matter of the Appeal of KARL G. ROEBLING and FERDINAND ROEBLING, JR., Executors of the Estate of Ferdinand W. Roebling, deceased, from assessment of the transfer inheritance tax made by the Comptroller of the State of New Jersey.	*On Appeal from Assessment.* *Notice of Appeal.*

TAKE NOTICE that Newton A. K. Bugbee, Comptroller of the Treasury of the State of New Jersey, and William T. Read, Treasurer of the State of New Jersey, hereby appeal to the New Jersey Court of Errors and Appeals in the last resort in all causes, from the whole and every part of a final decree entered herein on the 14th day of January, A. D. 1919, modifying the appraisement, made by the said Comptroller of the Treasury of the State of New Jersey, of the clear market value of the property of the estate of the said Ferdinand W. Roebling, deceased, and amending the appraisal thereof and the assessment of the transfer tax thereon by the said Comptroller.

Dated, January 24, A. D. 1919.

JOHN W. WESCOTT,
Proctor for Appellants.

I conceive that there is good cause for appeal in the above stated cause.

JOHN R. HARDIN,
Of Counsel with Appellants.

Petition.

Petition.

Filed June 12, 1918.

NEW JERSEY PREROGATIVE COURT.

In the matter of the Inheritance Taxes of the Estate of FERDINAND W. ROEBLING, Deceased.	*On Appeal.* *Petition.*

To Edwin Robert Walker, Ordinary of the State of New Jersey:

The petition of Karl G. Roebling and Ferdinand W. Roebling, Jr., of the City of Trenton, County of Mercer, State of New Jersey, executors of the last will and testament of Ferdinand W. Roebling, deceased, respectfully shows:

1. That Ferdinand W. Roebling, a resident of the City of Trenton, aforesaid, died on March 16th, 1917, leaving a last will and testament, wherein and whereby the said testator did appoint your petitioners as the executors thereof, which said will was duly admitted to probate on the 27th day of March, 1917, by the Surrogate of the County of Mercer, aforesaid, and letters testamentary were duly issued thereon to your petitioners.

2. That said testator died seized and possessed of certain real and personal property within this jurisdiction, and as required by law your petitioners duly filed with the Comptroller of the Treasury of this State a full and complete Schedule or Inventory, under oath, of all of the property or interest of the testator passing by said last will and testament.

3. That your petitioners in and by said schedules, set up and claimed as a deduction from the gross estate of said decedent, the sum of $1,165,253.16, the same being the amount of a certain Federal tax levied under the provisions of Title II of "An Act to Increase the Revenue and other purposes," approved September 8, 1916, as amended (39 Stats. at Large 777), and known as "Estate Tax," due and payable from the estate of the said decedent to the United States.

4. That your petitioners claim that by the terms of the act of the Legislature of New Jersey, entitled "An act to tax 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, as amended, the said Federal Estate Tax is properly deductible from the testator's estate, before ascertaining the clear market value of the property, real or personal, passing under the will of the testator to the persons entitled thereto.

Petition.

5. That the said Comptroller of the Treasury refused to allow said deduction and on May 23rd, 1918, assessed the transfer tax on the property passing immediately by said will at the sum of $256,-763.07, without allowing or deducting the said Federal Estate Tax above mentioned.

6. That petitioners claim that the action of the said Comptroller in refusing to allow said deduction was illegal and contrary to the provisions of the statute, in such case made and provided, and that so much of the said assessment above referred to as is made upon the tax payable to the United States, as aforesaid, known as the "Estate Tax," is illegal and void.

Your petitioners therefore pray that the action of the said Comptroller of the Treasury be decreed to be illegal and void, insofar as there has been a tax assessed upon that portion of the testator's estate as is required to pay and discharge the "Estate Tax" payable to the United States of America.

And your petitioners will, as in duty bound, ever pray.

KARL G. ROEBLING,
FERDINAND W. ROEBLING, JR.
Petitioners.

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

Karl G. Roebling and Ferdinand W. Roebling, Jr., being duly sworn according to law, upon their oaths depose and say that the facts and matters set forth in the within petition are true to the best of their knowledge, information and belief.

KARL G. ROEBLING,
FERDINAND W. ROEBLING, JR.

Sworn and subscribed to before me on this 10th day of June, A. D. 1918.

CHARLES DEF. BESORE,
M. C. C. of N. J.

Answer.

Answer of the Comptroller of the Treasury of the State of New Jersey to the Petition of Carl G. Roebling and Ferdinand W. Roebling, Jr., Executors of the Last Will and Testament of Ferdinand W. Roebling, Deceased.

Filed June 21, 1918.

1. This defendant admits to be true the facts set forth in said petition, namely, the death of the decedent, Ferdinand W. Roebling, a resident of the State of New Jersey; the last will and testament of said decedent; that the testator died seized and possessed of real and personal property within the State of New Jersey, and that the petitioners, as required by law, duly filed with the Comptroller of the Treasury a full and complete schedule or inventory under oath of all of the property and interest of the testator passing by his said last will and testament; that the petitioners, in and by the schedule and inventory set up and claim as a deduction from the gross estate of the decedent the sum of $1,165,253.16, the amount of a certain Federal tax levied under the provisions of Title II of "An act to increase the revenue and other purposes," approved September 8, 1916, as amended, and known as "Estate Tax," due and payable from the estate of the said decedent to the United States, and that the said petitioners in their said petition claim that by the terms of an act of the Legislature of the State of New Jersey, entitled "An act to tax the transfer of property of resident and non-resident decedents, by devise, bequest, descent, distribution, by statute, gift, deed, grant, bargain and sale in certain cases," approved April 20, 1909, as amended, the said Federal estate tax is properly taxable from the testator's estate before ascertaining and fixing the market value of the property, real and personal, passing under and by virtue of the will of the testator, and before fixing and determining the tax imposed thereon under and by virtue of said act.

2. And this defendant says that he refused to allow said deduction and assessed the transfer tax on the whole property passing under and by virtue of said will after deduction of debts, administration expenses and other proper allowances, at the sum of $256,763.07, and did not allow or deduct therefrom the said Federal estate tax above mentioned.

3. And this defendant further answering says that the inheritance or transfer tax so levied and assessed by him is in all respects just and true and in accordance with the provisions of the statute in that case made and provided, and that the said petitioners are not entitled to have deducted the amount of said estate tax levied and imposed by the United States as a deduction or allowance before fixing and determining the tax due and to be paid the State under and by virtue of said act.

Conclusions of Vice-Ordinary.

And defendant prays that the said assessment and appraisement and levy of tax as made by him may be in all respects affirmed and this defendant be dismissed with his proper costs.

JOHN W. WESCOTT,
Attorney General of New Jersey, Solicitor of Defendant.

Conclusions of Vice-Ordinary.

Filed June 21, 1918.

The death duty imposed by the War Revenue Act of 1916 is a tax upon decedents' estates, and in assessing the State Transfer Inheritance Tax is to be deducted from the value of the estate, in ascertaining the clear market value of the property transferred.

On appeal from an assessment of the Comptroller of the Treasury.

For the appellants, Mr. Scott Scammell.

For the State, Mr. Herbert J. Boggs, Assistant Attorney General.

BACKES, *Vice-Ordinary.*

The problem presented on this appeal is whether the death duty imposed by the War Revenue Act of Congress, approved September 8, 1916, Chapter 463, Vol. 39, Public Laws 756, 777, is to be deducted from the value of the estates of decedents in assessing the Transfer Inheritance Tax of 1909 (P. L. 325) as amended in 1914 (P. L. 267).

Ferdinand W. Roebling, a resident of Trenton, died March 16, 1917, testate, leaving an estate appraised, for taxing purposes, at $10,000,000 plus. The Federal tax amounts to over $1,000,000, and the question is whether this sum should have been deducted from the appraisement and the State tax levied on the transfer of the remaining $9,000,000. The Comptroller of the Treasury refused to grant the allowance and this appeal is from his ruling.

The point does not involve the power of Congress to levy the tax, nor is the question one of precedence as between the two governments, nor yet whether a double tax is lawful, but the decision turns upon the nature of the tax levied by the National Government and the construction to be given to the State statute in respect of it.

The power of Congress to levy death duties, and the constitutionality of such legislation, was settled by the U. S. Supreme Court in the cases of Scholey *v.* Row, 90 U. S. 331, and Knowlton *v.* Moore, 178 U. S. 41. In the elaborate opinion of Mr. Justice White in the last-named case, the history of death duties and their fundamental basis are interestingly and instructively discussed. There the learned present Chief Justice declared that, although different modes of assessing such duties prevail, nevertheless tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing

power takes its being and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested; that all courts and all governments concede that the transmission of property, occasioned by death, is a usual subject of taxation; and that while the transmission of property by death is exclusively subject to the regulating authority of the several States, the thing forming the universal subject of taxation, upon which inheritance and legacy taxes rest, is the transmission or receipt of property, occasioned by death, and not the right to regulate its devolution. In adverting to the view, commonly accepted, that the tax rests on the privilege enjoyed by States to regulate succession, he indicated that the doctrine of taxation upon the privileges, as adopted by the Courts, is merely a qualification of the fundamental right to levy duties upon the power to transmit or the transmission or the receipt of property by death, and is in harmony with the principle he laid down, and subordinately affords a legitimate and defensible basis of taxation.

That both State and nation have the right to levy, at the same time, the same class of death duties—double taxation—is also settled by Knowlton *v.* Moore, *supra*; Blackstone *v.* Miller, 188 U. S. 189; Hopper *v.* Edwards, 88 N. J. L. 471.

This brings us, then, to inquire into the character of the tax levied under the Federal statute. Section 201 of the act of Congress provides:

"*That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this act, whether a resident or non-resident of the United States.*" Then follows a graduated increase of percentage upon increased amounts of the net estate up to "*Ten per centum of the amount by which such net estate exceeds* $5,000,000." The net estate is to be determined by deducting from the gross estate, funeral and administration expenses, debts, certain losses incurred during the settlement of the estate, and such other charges against the estate as are allowed by the laws of the jurisdiction under which the estate is being administered, and a flat exemption of $50,000.

The sub-title of the act, "Estate Tax," is significantly descriptive, and a persuasive indication of the class of death duties Congress was dealing with; and upon looking into the twelve sections comprising the legislation all doubt vanishes regarding the particular transfer upon which the tax is imposed.

The value of the net estate is the unit of taxation. This includes the real estate devised or descending, as well as the personal property passing to the executor. A return, in duplicate, under oath, is to be made by the executor of the value of the gross estate; of the deductions; of the value of the net estate, and of the tax payable thereon. The tax is to be paid by him out of the personal estate

before distribution, and a receipt for it entitled him to credit and allowance therefor upon the settlement of his account. There is no apportionment of it among the various transferees, nor is the real estate, devised or descending, liable to contribution. On the contrary, the collector may recover the tax by a sale of the land, and in that event the devisee, or heir-at-law, shall be reimbursed out of any part of the personal estate unadministered, or by an equitable contribution by those whose interest is subject to equal or prior liability for the payment of taxes, debts or other charges against the estate. The concluding words of section 208: "It being the purpose and intent of this title that so far as is practicable, and unless otherwise directed by the will of the decedent, the tax shall be paid out of the estate before its distribution," are unmistakable in their purport that the death duty is imposed upon the estate and payable out of the residue. To be more precise, it is imposed upon the *estate,* transferred by death, and not upon the *succession* resulting from death. The distinction is well defined and recognized in countries where both kinds of tax exist. The Federal tax resembles the probate duty of the act of 1862, Ch. 119, 12 U. S. Stat. p. 483, which was payable by the executor out of the estate, while the legacy duty therein provided for (p. 485) was payable by the beneficiaries. The tax occupies the same field of death duty as does the "Estate Tax" in England. By the Finance Act of 1894 an estate duty is levied upon the principal value of all property, real or personal, which passes on the death of a person and is imposed upon the estate and is payable by the executor as an administration expense. In addition to this tax there is also a legacy tax and a succession duty upon the realty, payable by the recipients. Speaking of the death duty, Mr. Hanson, in his opening chapter (Hanson's Death Duties, 6th Ed.), says: "The new duty imposed by the Finance Act, 1894, and called estate duty, supersedes probate duty; but the key to the construction of the Finance Act, 1894, and the amending acts lies in remembering that the new estate duty, although it is leviable on property which was left untouched by the probate duty, such as real estate, yet is in substance of the same nature as the old probate duty. What it taxes is not the interest to which some person succeeds on a death, but the property in respect of which an interest ceased by reason of the death. Unless this principle is clearly kept in view, the mind is constantly tempted by the wording of the act to revert to principles of succession duty, which have no real connection with the subject."

The specie of death duty of the Federal tax determined, we come next to consider the character and scope of the Transfer Inheritance Tax Act and its application to situations like the present one. The part with which we are concerned reads:

"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:*

Conclusions of Vice-Ordinary.

When the transfer is by will or by the intestate laws of this State from any person dying, seized or possessed of the property while a resident of the State.

All taxes imposed by this act shall be at the rate of five per centum upon the clear market value of such property, except as hereinafter provided.''

The tax, it will be observed, is not imposed upon the immediate transfer of property occasioned by death, but upon the transfer *to any person or corporation,* when the transfer is the subject of a legacy or devise, of distribution or descent. In other words, it is not on the transitory succession of the executor or administrator, but upon the separate successions of the transferees, whether the succession be of the whole of the estate—a universal succession—or of the singular succession of a legatee or devisee. It is not on the amount that goes into their pockets, but upon the clear market value of the estate transferred to them, at the decedent's death, by the instrumentalities enumerated in the act. The tax is not upon the aggregate value of the estate transferred, apportioned among the transferees, but is assessed upon the value of the several interests and is levied upon kindred at varying rates, depending upon the relationship of the transferees to the decedent. Each transferee is liable for the tax upon his share of the estate which is to be deducted from the legacies or distributive shares by the executor, and for the payment of which he is personally liable.

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 Westurn, 152 N. Y., 93; Matter of Gihon, 169 N. Y., 443; *in re* Sherman Estate, 166 N. Y. Supp., 19; Aff'd 222 N. Y., 540; Dixon *v.* Russell, 79 N. J. L., 490; Carr *v.* Edwards, 84 N. J. L., 667; Christie's Estate, 87 N J. Eq., 303.

Conceiving, then, the state of the law to be that the Federal tax is imposed upon the estate and that the transfer Inheritance Tax is levied upon the succession, it becomes at once apparent that the clear market value of the property transferred from the dead to the living is the value of the estate after all lawful charges against it, including taxes, are satisfied. In the case in hand the beneficiaries succeeded to $9,000,000, and upon this sum, as apportioned by the testator, the State tax should have been assessed. While the practical result is a financial loss to the State, it is not brought about by an assumed supremacy in the United States; nor is the exercise of the taxing power by the National Government an interference with State rights, as some Judges have intimated. The statutes do not clash, albeit the operation of the Federal act effects a reduction of the State ratable. They function in entirely different taxing zones. Relief lies in appropriate legislation. It is undoubtedly within the

power of the Legislature to impose an estate death duty, co-extensive with the Federal act—a tax on the power to transfer at death, for instance—and which may co-exist with the Transfer Inheritance Tax Act, which, as we have seen, levies on the power to receive at death.

The highest courts in two of the States have recently decided the question, reaching opposite conclusions. The Minnesota Supreme Court held that the Federal tax should be deducted. Smith *v.* Probate Court of Hennepin Co., 166 N. W. 125. The Court of Appeals of New York held to the contrary view. In *re* Sherman Estate, *supra.* The New York Supreme Court allows that its transfer tax is based upon the amounts passing to the respective transferees, but holds to the view that the conditions of transfer, as embodied in its Transfer Tax Act, comprehend the clear market value of the property at the time of the transfer, exclusive of the Federal tax, and expresses the opinion that if the Federal Government may impose an inheritance tax, which is entitled to be deducted from the estate prior to the assessment of the estate transfer tax, it has interfered with such conditions, and that the constitutionality of a Federal act entitled to such a construction and effect might well be doubted. If the Court had acknowledged the Federal tax as levied upon the estate transferred, doubtless a different result would have been reached.

In the earlier case, Matter of Gihon, *supra,* the Court of Appeals had before it the question whether the Federal legacy tax of 1898 should be allowed as a deduction, and it held, and I quote from the Sherman case: "Neither the amount of the State tax, nor the amount of the Federal inheritance tax imposed under the War Revenue Act of 1898, was deductible, because each was a tax, not upon property, but upon succession—that is, a tax on a legatee for the privilege of succeeding to the property—and was payable out of his legacy, *not out of the estate*"; a tacit evincement that if the Federal tax had been upon the estate, and not upon the legacies, it would have been deductible from the assets of the estate before computing the State transfer tax. Previous to the decision in the Gihon case, the Supreme Court of Massachusetts, in Hooper *v.* Shaw, 176 Mass. 190, decided that the legacy tax of the War Revenue Act of 1898 should be deducted in ascertaining the State's succession tax. In view of the fact that both Federal and State taxes were imposed upon the same successions and were payable by the beneficiaries, it is difficult to reconcile the deliverance in that case with the principles of the Gihon case.

The appraisement upon which the tax was assessed will be reduced by the sum of the Federal tax.

P. S.—Since writing the above my attention has been called to the case of Corbin *v.* Townshend, 103 Atl. Rep. 647, in which the Supreme Court of Connecticut decided that the Federal tax is to be deducted from the appraisement in computing the State's succession tax.

Stipulation.

Filed January 14, 1919.

The following facts are hereby stipulated to be true.

1. Ferdinand W. Roebling, deceased, died on the 16th day of March, 1917, a resident and citizen of and domiciled in the City of Trenton, in the County of Mercer and State of New Jersey.

2. The said decedent had made and executed his last will and testament which was duly admitted to probate by the Surrogate of said County of Mercer on or about the 27th day of March, 1917, wherein and whereby he appointed Karl G. Roebling and Ferdinand W. Roebling, Jr., the executors thereof, who duly qualified as such and to whom letters testamentary were duly issued by the said Surrogate on the last mentioned date. A true copy of said will is hereunto annexed marked Schedule A.

3. The said executors filed with the Comptroller of the State of New Jersey a return under oath, in accordance with the provisions of an act of the Legislature of New Jersey entitled "An act to tax the transfer of property of resident and non-resident decedents, by devise, bequest, descent, distribution by statute, gift, deed, grant, bargain and sale, in certain cases," approved April 20, 1909, and the acts of the Legislature amendatory thereof and supplemental thereto.

4. The beneficiaries named in said will were as follows, the relationship and age of each beneficiary following after the name:

Names		*Relationship*	*Age*
Karl G. Roebling		Son	44
Ferdinand W. Roebling, Jr.		"	38
Augusta Henrietta Roebling White		Daughter	43
Margaret Roebling Perrine		"	48
William T. White		Son-in-law	38
Margaret Perrine Moore	Children of Margaret Roebling Perrine, daughter of decedent	Granddaughter	22
Anne Alison Perrine		"	20
John Augustus Roebling Perrine		Grandson	14
Margaretta Roebling White	Children of Augusta Henrietta Roebling White, daughter of decedent	Granddaughter	12
Ferdinand Roebling White		Grandson	9

5. Thereafter an appraisal was made under the act aforesaid, and the acts amendatory thereof and supplemental thereto, by the Comptroller of the State of New Jersey, of the clear market value of the property of said estate, taxable under the acts of the Legislature aforesaid, and an assessment of the transfer tax under said acts

was made by the Comptroller, a true copy of which is annexed hereto as Schedule B. Decedent did not own real estate outside of the State of New Jersey.

6. The said executors in their return set up and claimed as a deduction to be made from the gross estate of said decedent before the assessment of the said tax by the said Comptroller of the State of New Jersey, the sum of $1,209,902.59, being the amount of a Federal tax levied under the provisions of an Act of Congress entitled "An Act to increase the revenue and for other purposes," approved September 8, 1916, as amended, and known as "Estate Tax," and which said sum has been paid to the United States by said executors. Said Federal tax was imposed without deduction or allowance from the corpus of the estate. on which the tax was assessed, of the transfer tax payable under the New Jersey statutes aforesaid.

7. The Comptroller of the Treasury of the State of New Jersey refused to allow said deduction and on May 23, 1918, assessed the transfer tax upon the clear market value of the property of said estate, as aforesaid, as shown by said appraisal, without deduction of the amount of said Federal estate tax. Thereafter the said Comptroller presented to said Executors a notice of the said assessment and a statement of the amount of tax due thereunder, after making due allowance for the amount of a payment theretofore made on account of said tax, a true copy of which notice and statement is annexed hereto as Schedule C. It being understood that said payment was made without prejudice to the claim for deduction by said executors as aforesaid.

SCOTT SCAMMELL,

Proctor for Appellants, Karl G. Roebling and Ferdinand W. Roebling, Jr., Executors of Ferdinand W. Roebling, deceased.

JOHN W. WESCOTT,

Proctor for Respondents, Newton A. K. Bugbee, Comptroller of the Treasury of the State of New Jersey, and William T. Read, Treasurer of the State of New Jersey.

SCHEDULE A.

I, FERDINAND W. ROEBLING, of the City of Trenton, in the State of New Jersey, being of sound and disposing mind, memory and understanding, do hereby make, publish and declare this to be my LAST WILL AND TESTAMENT:

FIRST. I direct that all my just debts and funeral expenses be paid and satisfied by my executors, hereinafter named, out of my estate as soon as may conveniently be done after my decease.

SECOND. I give and bequeath to my son Karl G. Roebling one equal half part of all and every the shares of the capital stock of John A. Roebling's Sons Company which may belong to me at the time of my decease; and in the event of my said son being dead at

the time of my decease, I give and bequeath all and every the said shares of the capital stock which my said deceased son would have taken hereunder to his then surviving male child or children, if there be more than one male surviving child of my said deceased son, to be divided in equal parts among them.

THIRD. I give and bequeath to my son Ferdinand W. Roebling, Jr., one equal half part of all and every the shares of the capital stock of John A. Roebling's Sons Company which may belong to me at the time of my decease; and in the event of my said son being dead at the time of my decease I give and bequeath all and every the said shares of the capital stock which my said deceased son would have taken hereunder to his then surviving male child or children, if there be more than one male surviving child of my said deceased son, to be divided in equal parts among them.

FOURTH. I give, devise and bequeath unto my son Ferdinand W. Roebling, Jr., my property consisting of the real estate and buildings thereon situate at No. 222 West State Street, Trenton, New Jersey, more fully described upon page 23 of the City Atlas as lots Nos. 6 and 7, to him and his heirs forever, together with all my household goods, furniture, plate, silverware, cutlery, linen, jewelry, wearing apparel, books, wines and family stores, horses, carriages and automobiles, with their appurtenances, and the contents of my stable, and all other articles of personal and household property pertaining to my domestic establishment or establishments; and I further give and bequeath unto my said son Ferdinand W. Roebling, Jr., all pictures, paintings, engravings and works of art to me belonging at the time of my decease.

For the purpose of the division among my children of my property as hereinafter set forth, I place a valuation of Sixty thousand dollars ($60,000) upon the property given, devised and bequeathed unto my said son Ferdinand W. Roebling, Jr., in the foregoing paragraph numbered Fourth, and direct that such valuation shall be used by my executors in equalizing the shares in my residuary estate.

FIFTH. I hereby authorize and direct my executors, hereinafter named, to sell and dispose of, as speedily as may be, all the real estate of which I die siezed (not hereinbefore disposed of) at the best price obtainable, the proceeds thereof to form part of and be disposed of in the manner provided herein for my residuary estate; provided, nevertheless, that any of the legatees or devisees of my residuary estate may take over, with the consent of my executors, at a fair valuation placed thereon by my executors, such real estate, or any part thereof, as part and parcel of the portion of my residuary estate going to such legatee or devisee; and I hereby give unto my said executors full power and authority to manage said real estate, and full power and authority to sell and dispose of said real estate at either public or private sale, and either for cash or for some other valuable consideration, or both, and upon such terms as they shall see fit, and to allow any portion of the purchase moneys to be secured by a purchase money mortgage upon the real estate

so sold, and to make, execute and deliver to the purchaser or purchasers thereof a good and sufficient deed or deeds in law for the conveying to him or them of the lands so sold, hereby waiving any obligation on the part of the purchaser or purchasers to see to the application or disposal of the purchase money.

SIXTH. I give and bequeath to my son-in-law William T. White of Trenton, New Jersey, all the shares of the capital stock of the Mercer Automobile Company which may belong to me at the time of my decease.

SEVENTH. I give and bequeath to my executors, hereinafter named, the sum of Three thousand dollars ($3,000) and request them to distribute the same among my servants in such amounts respectively as to my said executors shall seem proper.

EIGHTH. I give, devise and bequeath all the rest, residue and remainder of my estate, whether real, personal or mixed, and wheresoever situate, as follows:

(a) One-fourth part to my son Karl G. Roebling as his own absolute property to him and his heirs and legal representatives forever; and in the event of my said son Karl G. Roebling being dead at the time of my decease the said one-fourth part to be divided in equal parts among his wife and children him surviving at the time of my decease as their absolute property.

(b) One-fourth part to my son Ferdinand W. Roebling, Jr., as his own absolute property to him and his heirs and legal representatives forever; and in the event of my said son Ferdinand W. Roebling, Jr., being dead at the time of my decease the said one-fourth part to be divided in equal parts among his wife and children him surviving at the time of my decease as their absolute property.

(c) One-fourth part to my sons Karl G. Roebling and Ferdinand W. Roebling, Jr., to them and their heirs and legal representatives forever; in trust, nevertheless, during the lifetime of my said sons and the survivor of them to hold, manage and invest the same, and keep the same invested, and to receive the rents, income, issues and profits therefrom arising, and after defraying all taxes and other lawful charges upon the same, to pay over the net income thereof to my daughter Margaret Roebling Perrine during her lifetime (should the trust hereby created so long continue), and upon her decease to pay over the same in equal parts to her children her surviving during the lifetime of each of them respectively (should the trust hereby created so long continue), and upon the death of the survivor of my two sons the trust hereby created shall terminate; and upon the happening of that event I give, devise and bequeath the corpus of said trust estate hereby created to my daughter Margaret Roebling Perrine to her and her heirs and legal representatives forever if she be then living, but if she be not living at the termination of the trust hereby created, I give, devise and bequeath the corpus of said trust estate to the surviving issue of my said daughter Margaret Roebling Perrine per stirpes and not per capita.

Stipulation—Schedule A.

(d) One-fourth part to my sons Karl G. Roebling and Ferdinand W. Roebling, Jr., to them and their heirs and legal representatives forever; in trust, nevertheless, during the lifetime of my said sons and the survivor of them to hold, manage and invest the same, and keep the same invested, and to receive the rents, income, issues and profits therefrom arising, and after defraying all taxes and other lawful charges upon the same to pay over the net income thereof to my daughter Augusta Henrietta Roebling White during her lifetime (should the trust hereby created so long continue), and upon and after her death to pay over the sum of Ten thousand dollars ($10,000) yearly, at convenient periods, to my son-in-law William T. White during his lifetime (should the trust hereby created so long continue), and the remainder of said net income to the children of my said daughter Augusta Henrietta Roebling White in equal parts during the lifetime of each of them respectively (should the trust hereby created so long continue), and upon the death of the survivor of my two said sons the trust hereby created shall terminate; and upon the happening of that event I give, devise and bequeath the corpus of said trust estate hereby created to my daughter Augusta Henrietta Roebling White to her and her heirs and legal representatives forever if she be then living; but if she be not living at the termination of the trust hereby created, I give, devise and bequeath the corpus of said trust estate to the surviving issue of my said daughter Augusta Henrietta Roebling White per stirpes and not per capita.

NINTH. In order to determine the value of the one-fourth interest of my residuary estate for the purpose of distribution among my two sons and two daughters as provided in the foregoing paragraph numbered Eighth, there shall be added to the total value of my residuary estate the sum of Sixty thousand dollars ($60,000) in excess thereof, one-fourth of which total amount shall be the share of my said residuary estate going absolutely to my son Karl G. Roebling, one-fourth of which total amount shall be the share of my said residuary estate going to my sons Karl G. Roebling and Ferdinand W. Roebling, Jr., as Trustees for my daughter Margaret Roebling Perrine and others, and one-fourth of which total amount shall be the share of my said residuary estate going to my sons Karl G. Roebling and Ferdinand W. Roebling, Jr., as Trustees for my daughter Augusta Henrietta Roebling White and others, and the remaining one-fourth of said total amount less Sixty thousand dollars ($60,000) shall be the amount of my residuary estate going absolutely to my son Ferdinand W. Roebling, Jr.

TENTH. I direct that all legacies, devises and bequests given by this my Last Will and Testament shall be free from legacy duty or tax.

ELEVENTH. I declare that such advances or gifts as I have made or may hereafter make during my lifetime to any of my children or to any of the persons named as legatees or devisees under this Will, shall be in addition to and not on account of or in satisfaction of any legacies, devises, portions or benefits given to them by this Will.

Stipulation—Schedule A.

TWELFTH. I authorize my executors to satisfy any debts claimed to be owing to me or my estate and settle any liabilities to which I or my estate may be alleged to be subject, upon any evidence they or he shall think proper, and to accept any composition or security for any debt and to allow such time for payment, either with or without taking security, as to the said executors or executor shall seem fit; and also to settle all accounts and matters belonging or relating to accounts, and generally to act in regard thereto as they or he shall deem expedient, without being responsible for any loss thereby occasioned.

THIRTEENTH. If any beneficiary or beneficiaries under this my Will shall directly or indirectly, in any judicial proceeding, object to the probate of or attack the validity of this Will in whole or in part or of any of its provisions, the legacy, devise or bequest which such beneficiary would otherwise receive hereunder shall *ipso facto* lapse and become null and void, and thereupon be divided among my residuary legatees other than the one or those so contesting.

FOURTEENTH. I hereby authorize and empower the trustees of the trusts hereby created, and the survivor and survivors of them or those who may be acting for the time being, or their successor or successors, at any and all times so long as any of the trusts created by this my Last Will and Testament shall continue, to mortgage, sell or lease, whenever it shall be deemed expedient by them or him, any or all of the property, whether real, personal or mixed, and wheresoever situate, by them at any time held under any trust hereby created so remaining unexecuted, whether at public or private sale and whether for cash or other valuable consideration, or for both, and upon such terms as they or he shall see fit, and allow any portion of the purchase moneys to be secured by a purchase money mortgage or other lien upon the lands or property so sold, and on any terms in any manner as he or they in their discretion shall deem for the best interest of my estate; and I hereby authorize and empower him or them to execute and deliver good and sufficient instruments in law to carry out the intent of this provision.

And I hereby authorize and empower my executors and trustees, or the survivor or survivors, the successor or successors, or the one or those thereof who shall qualify and shall be executor or executors and trustee or trustees for the time being of this my Last Will and Testament, if in his or their discretion it shall seem expedient, to retain any of my property in the same form of investment in which it may be at the time of my decease, any law to the contrary notwithstanding.

And I hereby declare that my executors and trustees, or those who may be acting, or their successor or successors, shall not be restricted in either capacity to the investments provided by law in which executors or trustees invest, but shall have full power and authority to invest in any securities, stocks, bonds, property or other investments which in his or their judgment are safe and for the best interest of my estate, and that all such property, whether in the

original or converted state, shall be subject to the powers, provisions, regulations and trusts herein contained, giving them full power to sell, invest, and re-invest from time to time any and all assets which may come into their or his hands.

FIFTEENTH. If any trustees hereinbefore appointed, or either of them, shall die or be unwilling or incompetent to execute the trusts of my Will from time to time subsisting and not fully executed, I do authorize and empower the other trustee for the time being, whether retiring from the office of trustee or not, to substitute by any writing under his or their hand or hands (though I do not require that a substitute be appointed) any fit person or persons to be trustee or trustees, in whom, either alone or, as the case may be, jointly with the surviving or continuing trustee, the respective trust estates then subsisting shall be vested, and I do hereby declare that any and all powers conferred by my Will upon my said trustees are intended to be equally conferred upon each and every trustee or trustees so appointed as aforesaid.

SIXTEENTH. Should any of the gifts, devises and bequests made by me in any paragraph of this my Will lapse or fail for any reason, I direct that the gift, devise or bequest so lapsing or failing shall go into and form part of my residuary estate.

SEVENTEENTH. I hereby appoint my son Karl G. Roebling and my son Ferdinand W. Roebling, Jr., to be the Executors of this my Last Will and Testament.

EIGHTEENTH. I hereby expressly exempt my executors and my trustees and each of them from the necessity of giving bonds or other security for the performance of their duties in either of such capacities.

NINETEENTH. I hereby expressly revoke any and all former Wills and Codicils by me at any time heretofore made, and do hereby make, publish and declare this instrument as and for my Last Will and Testament.

In Witness Whereof I have hereunto set my hand and seal and subscribed this Will at the end thereof this Tenth day of December in the year of our Lord one thousand nine hundred and fourteen.

FERDINAND W. ROEBLING (L. S.)

Signed, subscribed at the end thereof, sealed, published and declared by the said Ferdinand W. Roebling, the above named testator, as and for his Last Will and Testament, in the presence of us and in the presence of each other, who in his presence and in the presence of each other at the same time and at his request have hereunto subscribed our names as attesting witnesses.

Alice D. Colkitt, residing at 296 Spring St., Trenton, N. J.

Austin C. Cooley, residing at 38 Atterbury Ave., Trenton, N. J.

Herbert Noble, residing at 170 West 58th St., New York.

Stipulation—Schedule B.

SCHEDULE B.

Chapter 228, Laws 1909.

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

TRANSFER INHERITANCE TAX.

Assessment.

Estate of Ferdinand W. Roebling, of Mercer County, N. J.
Late resident of Trenton. Date of Death, March 16, 1917.

Amount of Estate			
	Personal	$10,506,940.94	
	Real	242,550.00	$10,749,490.94
Debts, expenses, etc.			572,866.40
Net estate for distribution			10,176,624.54
Exempt interests—*Exempt and contingent*.....			1,146,893.02
Taxable interests			9,029,731.52
Will Tax			$256,763.07

ITEMS OF WILL	BENEFICIARIES AND BEQUESTS	Relationship	Age	Value of Life Estate or Annuity	EXEMPT	TAXABLE
1	Payment of debts.....					
2	Karl G. Roebling.....	Son		$5,000.00	$3,492,228.43	
	Stock	$1,950,000.00				101,366.85
8a	¼ of residue	1,547,228.43				
		$3,497,228.43				
3	Ferdinand W. Roebling, Jr.	Son		5,000.00	3,499,164.23	
	Stock	$1,950,000.00				101,574.93
4	Real estate	45,000.00				
	Chattels	21,935.80				
8b	¼ of residue	1,487,228.43				
		$3,504,164.23				
6	William T. White.....	Son-in-law		5,000.00	72,775.00	
	Stock	$77,775.00				1,594.38
7	Servants	None				3,000.00
						150.00
8c	Margaret R. Perrine.....	Daughter	48	5,000.00	~~93,360.79~~	933,60
						24,608.20
	Income from ¼ residue...	$938,606.79				
	At death balance is contingent	*Contingent*		608,621.65		
8d	Augusta H. P. White.....	Daughter	42	5,000.00	1,028,957.07	
						27,468.71

Stipulation—Schedule B.

Income from ¼ residue...	$1,033,957.07	
At death balance is contingent	*Contingent*	513,271.37
	1,146,893.02	9,029,731.52
		256,763.07

Computation as follows:

Karl G. Roebling—		
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%	3,247,228.43	97,416.85
	$3,497,228.43	$101,366.85
Ferdinand W. Roebling, Jr.—		
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%	3,254,164.23	97,624.93
	$3,504,164.23	$101,574.93
William T. White—		
Exempt	$5,000.00	
2%	45,000.00	900.00
2½%	27,775.00	694.38
	$77,775.00	$1,594.38
Margaret R. Perrine—		
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%	688,606.79	20,658.20
	$938,606.79	$24,608.20
Augusta H. R. White—		
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%	783,957.07	23,518.71
	$1,033,957.07	$24,468.71

Stipulation—Schedule C.

TRANSFER INHERITANCE TAX.

Payment of this tax is to be made to and checks should be drawn to the order of "Treasurer, State of New Jersey." This statement should accompany payment, and will be returned to you properly receipted.

SCHEDULE C.

STATE OF NEW JERSEY,
OFFICE OF THE COMPTROLLER OF THE TREASURY.

TRENTON, May 23, 1918.

Karl G. Roebling, Ferdinand W. Roebling, Jr., Executors of the estate of Ferdinand W. Roebling; Scott Scammell, Esq., Mechanics Bank Bldg., Trenton, N. J., late of Mercer County:

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

Two hundred and fifty-six thousand seven hundred and sixty-three dollars and seven cents		($256,763.07)
Paid on account Sept. 13, 1917	$210,000.00	
Discount	11,052.63	221,052.63
Balance due		$35,710.44

(Karl G. Roebling.....$101,366.85)
(Ferdinand W. Roebling..... 101,574.93)
(William T. White..... 1,594.38)
(Servants ..... 150.00)
(Margaret R. Perrine..... 24,608.20)
(Augusta H. R. White..... 27,468.71)

.....
Comptroller.

Decedent died March 16, 1917, at which time this tax became due.

It is payable prior to Sept. 16, 1917, with discount 5 per cent.

It is payable subsequent to March 16, 1918, with interest added at rate of 10% per annum.

This discount or penalty does not preclude the State from an immediate proceeding to collect the tax in accordance with the provisions of Sections 21-22, Chapter 228, Laws of 1909.

M. This Receipt Must Not Be Detached.

Final Decree.

OFFICE OF STATE TREASURER

$..... TRENTON, N. J.,.....

RECEIVED from .....

..... Dollars

in settlement of account as above set forth.

Treasurer.

COUNTERSIGNED

Comptroller.

This tax was assessed on the value of property of decedent disclosed to the State in accordance with the statute. The State does not waive its right to any tax on property not disclosed. Additional receipt for specific parcels of property included in this assessment will be issued upon request.

Final Decree.

Filed January 16, 1919.

This matter being opened to the Court by Scott Scammell, Esquire, of counsel with the appellants, and it appearing that the Comptroller of the Treasury of the State of New Jersey has assessed the tax imposed upon the estate of Ferdinand W. Roebling, deceased, upon an appraisement of said estate, under and by virtue of an act of the Legislature of the State of New Jersey, entitled "An act to tax the transfer of property of resident and non-resident decedents, by devise, bequest, descent, distribution by statute, gift, deed, grant, bargain and sale, in certain cases," approved April 20, 1909, and the acts amendatory thereof and supplemental thereto, without first deducting the amount required to be paid by the appellants as executors of said estate, under and by virtue of the provisions of Title II of an act of the Congress of the United States, entitled "An act to increase the revenue and for other purposes," approved September 9, 1916, known as the "estate tax," and an appeal having been taken from the action of the Comptroller of the Treasury of the State of New Jersey, in this regard, and said appeal having regularly come before this Court, and Scott Scammell, Esquire, of counsel of the appellants, and Herbert W. Boggs, Esquire, First Assistant Attorney General of the State of New Jersey, being heard thereon, and the Court having considered the arguments of counsel and being of the opinion that as a matter of law there should be deducted from the amount of the appraisement of the clear market value of the property of said estate, taxable under the acts of the Legislature aforesaid, such sum as shall equal the amount required to be paid by way of said "estate tax" under and by virtue of the provisions of said act of the Congress of the United States before making the assessment under the acts of the Legislature aforesaid.

Petition of Appeal.

IT IS, THEREFORE, on this fourteenth day of January, A. D. 1919, ORDERED, ADJUDGED and DECREED that the appraisement heretofore made by the Comptroller of the Treasury of the State of New Jersey, of the clear market value of the property of the estate of the said Ferdinand W. Roebling, deceased, taxable under the statutes of New Jersey aforesaid, be modified by deducting therefrom a sum equal to such sum as shall be payable to the United States by way of "estate tax," under and by virtue of the provisions of Title II of the act of Congress of the United States, hereinbefore referred to, entitled "An act to increase the revenue and for other purposes," approved September 8, 1916, and that the assessment of taxes upon the clear market value of the property of the estate of said Ferdinand W. Roebling, deceased, under and by virtue of the acts of the Legislature of the State of New Jersey, hereinbefore referred to, be made on the said value of the property of the estate as reduced by such deduction, and that the appraisal and assessment by the said Comptroller be amended accordingly.

E. R. WALKER,
O.

Respectfully advised,

JOHN H. BACKES,
V. O.

Petition of Appeal.

Filed February 4, 1919.

New Jersey Court of Errors and Appeals

In the matter of the Appeal of KARL G. ROEBLING and FERDINAND ROEBLING, JR., Executors of the Estate of Ferdinand W. Roebling, Deceased, from assessment of the Transfer Inheritance Tax made by the Comptroller of the State of New Jersey.	*On Appeal from Prerogative Court.* *Petition of Appeal.*

To the Honorable the Court of Errors and Appeals in the last resort in all causes:

The petition of Newton A. K. Bugbee, Comptroller of the Treasury of the State of New Jersey, and William T. Read, Treasurer of the State of New Jersey, respectfully shows that your petitioners find themselves aggrieved by a final decree made in the New Jersey Prerogative Court by his Honor Edwin Robert Walker, Ordinary of

the State of New Jersey, bearing date the fourteenth day of January, one thousand nine hundred and nineteen, in this respect, to-wit: That the said decree orders, adjudges and decrees that the appraisement theretofore made by the Comptroller of the Treasury of the State of New Jersey of the clear market value of the property of the estate of said Ferdinand W. Roebling, deceased, taxable under and by virtue of an act of the Legislature of the State of New Jersey, entitled "An act to tax the transfer of property of resident and non-resident decedents, by devise, bequest, descent, distribution by statute, gift, deed, grant, bargain and sale, in certain cases," approved April 20, 1909, and the acts amendatory thereof and supplemental thereto, be modified by deducting therefrom a sum equal to such sum as shall be payable to the United States of America by way of "Estate Tax," under and by virtue of the provisions of Title II of an act of the Congress of the United States, entitled "An act to increase the revenue, and for other purposes," approved September 8, 1916, and that the assessment of taxes upon the clear market value of the property of the said estate of said Ferdinand W. Roebling, deceased, under and by virtue of the acts of the Legislature of the State of New Jersey, hereinbefore referred to, be made on the said value of the property of the said estate as reduced by such deduction, and that the appraisal and assessment by the said Comptroller be amended accordingly. And your petitioners humbly appeal from the whole and every part of the said decree of the Ordinary upon the ground that the same is erroneous, for that the Ordinary should have held and adjudged that, as a matter of law, there should not be deducted from the amount of the said appraisement of the clear market value of the property of the said estate, taxable under the acts of the Legislature aforesaid, such sum as should equal the amount payable to the United States of America by way of "Estate Tax" under and by virtue of the provisions of said act of the Congress of the United States, before making an assessment under the acts of the Legislature aforesaid, and should not have ordered, adjudged and decreed that the said appraisement be modified as aforesaid, and that the assessment of taxes aforesaid be made on the said value of the property of said estate, as reduced by such deduction aforesaid, and that the said appraisal and assessment by the said Comptroller be amended accordingly, but should have ordered, adjudged and decreed that the said appraisement and assessment, theretofore made by the said Comptroller, be affirmed.

Your petitioners therefore pray that the said decree of the Ordinary may be reversed, set aside and for nothing holden, and that your petitioners may have such relief in the premises as to this Honorable Court shall seem meet.

JOHN W. WESCOTT,
Attorney General of New Jersey,
Proctor for Appellants.

JOHN R. HARDIN,
Of Counsel with Appellants.

Answer to Petition of Appeal.

Filed February 10, 1919.

The answer of the respondents of Karl G. Roebling and Ferdinand W. Roebling, Jr., Executors of the Estate of Ferdinand W. Roebling, deceased, to the Petition of Appeal of the appellant.

The respondents admit it to be true that a certain Final Decree, bearing date the fourteenth day of January, one thousand nine hundred and nineteen, was made in the New Jersey Prerogative Court by his Honor Edwin Robert Walker, Ordinary of the State of New Jersey, as in the Petition of Appeal is stated, but as to the substance and form thereof, these respondents pray to refer thereto when the same shall be produced.

And these respondents are advised and believe that the said decree is agreeable to law and equity, and they pray that the same may be affirmed with costs to be adjudged to them.

SCOTT SCAMMELL,
Proctor for Respondents.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

In the Matter of the Appeal of KARL G. ROEBLING and FERDINAND ROEBLING, JR., Executors of the Estate of FERDINAND W. ROEBLING, Deceased, from assessment of the Transfer Inheritance Tax made by the Comptroller of the State of New Jersey.	*On Appeal from Prerogative Court.*

Brief for Appellants, N. A. K. Bugbee, Comptroller of the Treasury, and W. T. Read, State Treasurer.

This appeal brings to this Court the decree of the Ordinary overruling the Comptroller of the State Treasury in the assessment of State transfer taxes on the succession to the estate of Ferdinand W. Roebling, a resident decedent, who died March 16, 1917, because the Comptroller declined before making such assessment to deduct from the taxable property of the decedent the transfer tax payable to the Federal Government under the provisions of Title II. of "An act to increase the revenue and for other purposes," approved September 8, 1916, c. 463, § 200, *et seq.*, as amended (39 U. S. Statutes at Large, 777; U. S. Comp. Stat. 1916 (Ann.), § 6336½a, *et seq.;* amended by act approved March 3, 1917, c. 159, § 300; 39 U. S. Statutes at Large, 1002; U. S. Comp. Stat., Supp. 1917, § 6336½b).

The amount of the Federal tax is $1,209,902.59 (Case, p. 11, Stipulation 6), and the State of New Jersey by the decree of the Ordinary, if sustained, will be deprived of the tax on that amount at the rate of 3%, or $36,297.08, payable in part immediately, and in part upon the death of life tenants (subject to slight variation in amount dependent upon the number of the remaindermen).

This individual case is therefore of great importance to the State. Other cases awaiting the result of this appeal, and the continuing application of the principle involved, emphasize the interest of the State in resisting the withdrawal from the liability to inheritance taxes of large portions of an estate's taxable wealth.

The Federal tax was imposed without deduction or allowance from the corpus of the estate of the transfer tax payable to the State of New Jersey (Case, p. 11, Stipulation 6).

The presently taxable interests of the Roebling estate total $9,029,731.52, and the tax imposed by the Comptroller's assessment was $256,763.07 (Case, p. 17, Schedule B). The decree appealed from (Case, pp. 20, 21) directs the Comptroller to modify his assessment by the deduction from the appraisement of the Federal tax paid by the estate, and while the amount of the tax as reduced is not stated in the decree, it will be, under the decree, reduced by substantially $36,297.08, as above mentioned.

No facts are in dispute and the question of law is raised by the claim of the executors of the decedent set forth in paragraph 4 of the petition of appeal to the Ordinary (Case, p. 2), that by the terms of the act of the Legislature of New Jersey, entitled "An act to tax the transfer of property, of resident and non-resident decedents, by devise, bequest, descent, distribution by statute, gift, deed, grant, bargain and sale, in certain cases," approved April 20, 1909, as amended, the said Federal estate tax is properly deductible from the decedent's estate before ascertaining the clear market value of the property, real and personal, passing under the will to the persons entitled thereto.

This claim was upheld by the decree now appealed from.

An examination of both the State and Federal statutes with reference to the nature of the transfer tax imposed by each is essential to an understanding of the State's contention.

I.

What is the New Jersey Transfer Tax and on what is it imposed?

This question has been answered authoritatively by the decisions of this Court.

The State law of April 20, 1909 (P. L. 1909, 325; 4 Comp. Statutes, 5301), was a revision made in the light of earlier decisions.

Neilson v. *Russell,* 76 N. J. L., 27, reversed *ibid,* 655.
Dixon v. *Russell,* 78 N. J. L., 296.
S. C., reversed on error, 79 N. J. L., 490.
Tilford v. *Dickinson,* 79 N. J. L., 302.
S. C., reversed on error, 81 N. J. L., 576.

Sawter v. *Shoenthal,* 81 N. J. L., 197.
S. C., reversed on error, 83 N. J. L., 499.

These cases left no doubt about the nature of these taxes, and the Revision of 1909 made perfectly clear the legislative intent to impose a transfer or succession tax, as distinguished from a legacy duty.

Carr v. *Edwards,* 84 N. J. L., 667.
Senff v. *Edwards,* 85 N. J. L., 67.
Hopper v. *Edwards,* 88 N. J. L., 471.
Howell v. *Edwards,* 88 N. J. L., 134.
S. C., affirmed on appeal, 89 N. J. L., 713.
In re Diehl's Estate, 88 N. J. Eq., 310; affirmed *per curiam,* 103 Atl., 822.

The tax is not a property tax and is in no way controlled by our constitutional requirements that *property* shall be assessed for taxes under general laws and by uniform rules according to true value.

We may illustrate the uniform judicial view in this State as to the origin and nature of succession taxes by a quotation from the opinion of Mr. Justice Garrison, for the Supreme Court, in *Neilson* v. *Russell, supra,* beginning on page 33:

> "Examination will show that the consensus of judicial opinion is that the impost we are considering is not a tax upon property, but is a premium or privilege upon the devolution of property—in fine, a succession tax, and that as such it rests fundamentally upon the sovereign right of a State to withhold, and hence to limit, the right of testamentary disposition or of intestate succession.
>
> "Prior to the statute of wills passed in the reign of Henry VIII. the right of testamentary disposition and not extend to real estate, and as to personalty was limited by the common law as it stood in the time of Henry II., by which one-half, or in some cases one-third, of a man's goods were all that he could thus dispose of, the remainder being distributed by law.
>
> "By the Code Napoleon various fractional parts only of a man's property were within his testamentary disposal. By the law of Italy a moiety might be thus disposed of. So that while historically there has been and is a general recognition by civilized states both of some right to disposition and of some right to inheritance, there is no established principle of law to prevent a sovereign state from abridging either of such rights, and *a fortiori* from imposing upon their exercise or operation such conditions as the public good may require. As matter also of history, succession taxes have existed in European

state from an early time. Under the Roman law they were imposed quite generally. They were introduced into England in 1780, and into this country in 1826, Pennsylvania being the first State to adopt them. Constitutionally they rest, as before indicated, upon the doctrine that the rights of testamentary disposition and of succession are creatures of law, upon the exercise and operation of which the lawmaker may impose terms.

"This was the ground of the opinion in the Supreme Court of the United State in *United States* v. *Perkins,* 163 U. S., 625, 628, where the United States itself was the legatee. In the course of his opinion Mr. Justice Brown said: 'If it be true (as he had argued) that the right of testamentary disposition is purely statutory, the State has a right to require a contribution to the public treasury before the bequest shall take effect. Thus the tax is not upon the property, in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the State that it becomes the property of the legatee.' In an earlier case Chief Justice Taney, speaking of a somewhat similar law, in *Mager* v. *Grima,* 49 U. S., 490, 493, said: 'The law in question is nothing more than an exercise of the power, which every state and sovereignty possesses, of regulating the manner and terms upon which property, real or personal, within its dominion may be transmitted by last will and testament or by inheritance. If a state may deny the privilege altogether, it follows that when it grants it it may annex to the grant any conditions which it supposes to be required by its interests or policy.' This was likewise the view taken by the Court of Appeals of Maryland in *State* v. *Dalrymple,* 70 Md., 294, in which the Court said: 'One of the conditions upon which strangers and collateral kindred may acquire a decedent's property which is subject to the dominion of our laws is that there shall be paid out of such property a tax to the state. This, therefore, is not a tax upon the property itself, but is merely the price exacted by the state for the privilege accorded in permitting property so situated to be transferred by will, by descent or distribution.' To the same effect are *United States* v. *Fox,* 94 U. S. 315; *State* v. *Ferris,* 53 Ohio St. 314; *State* v. *Hamlin,* 86 Me. 495; *State* v. *Alston,* 94 Tenn. 674; *Eyre* v. *Jacob,* 14 Gratt. (Va.) 422; 27 Am. & Eng. Encycl. L. 337; *Dos Pas. Inheritance Tax;* with which compare *Chambe* v. *Durfee,* 100 Mich. 112; *State* v. *Gorman,* 40 Minn. 232; *Curry* v. *Spencer,* 61 N. H. 624; *State* v. *Mann,* 76 Wis. 469."

As is shown by the citations in Mr. Justice Garrison's opinion, the United States Supreme Court holds identical views as to the nature of the State transfer tax.

See also *Magoun* v. *Illinois Trust and Savings Bank,* 170 U. S., 283; 42 L. ed., 1037.

Plummer v. *Coler,* 178 U. S., 115; 44 L. ed., 998.

As to the intended application of the tax, under the act of 1909, this Court has also spoken authoritatively. The application is all inclusive of every type of succession, and these transfer taxes are conditions under which succession is permitted by the New Jersey law. We quote from Mr. Justice Swayze's opinion in this Court in *Carr* v. *Edwards, supra,* p. 668:

> "It is plain that the legislature meant by the act of 1909 to reach all transfers from a decedent to his successors, whether they succeeded to the whole estate as a universal succession, or to the estate in New Jersey as a universal succession of the New Jersey executor or administrator, or the singular succession of a devisee or legatee. The language of the first section is broad. So far as we are now concerned, it imposes a tax upon the transfer of any property of the value of $500 or over when the transfer is, by will or intestate law, of property within the state, and the decedent was a non-resident at the time of his death. We had in *Neilson* v. *Russell,* 47 *Id.* 655, just prior to the passage of the act of 1909, held that a legacy under a non-resident's will was not taxable here because, among other reasons, it depended for its validity and amount upon the law of the testator's domicile. We said that the justification of special taxes of this character imposed without regard to the limitation contained in our constitution upon property taxes, was found in the fact that the rights of testamentary disposition and of succession were creatures of law upon the exercise and operation of which the lawmaker might impose terms, and that it followed logically that the only law that could impose the terms was the law that created the right. The only special right given by the New Jersey law in case of a non-resident decedent is the right of an executor or administrator to succeed to the property having its *situs* in New Jersey. Unless, therefore, the legislature meant by the act of 1909 to tax this right—the transfer by grace of our law of the property having its *situs* here from the decedent to his representative—its enactment was futile as far as the estates of non-residents are concerned. We cannot attribute such futility to a legislative act. The intent apparent on its face was to overcome the effect of our decision in *Neilson* v. *Russell,* which we must assume, as the fact undoubtedly was, the legislature had in mind.

> * * * By section 1 property passing to certain classes of legatees or devisees was exempt. The act in this section makes a distinction between the 'transfer' and the 'passing of property.' Transfer as far as concerns personal property connotes the immediate fiduciary succession of the executor or administrator; the passing of property connotes the ultimate beneficial succession of the legatee or devisee. So, in section 12 a distinction is made between the transfer of property in this state, and the passing of the estate wherever situate. The object and the effect of section 12 was to equalize the rate of the transfer tax as between the estate of resident and of non-resident decedents. This determination of the rate of taxation by the ultimate beneficial succession to the property, did not, however, change the nature of the tax from a transfer tax to a legacy duty. Nor does the fact that by section 7 the administrator, executor or trustee is authorized to deduct the tax, change its character."

The tax, under the New Jersey statute, is upon the right or privilege of the successor to receive the property.

Mr. Justice Swayze, for this Court, in *Carr* v. *Edwards, supra,* said the legislature meant to tax "the transfer by the grace of our law of the property having its *situs* here from the decedent to his representative."

> "The tax is not imposed upon the right to give, but upon the right to take, property." *State* v. *Cline,* 91 Kan. 416, 137 Pac. 932, 50 L. R. A. (N. S.) 991.
>
> "* * * the succession * * * is the subject matter of the tax * * *, or, in other words, it is the right to become the successor * * * upon the death of the predecessor * * *" *Scholey* v. *Rew,* 23 Wall. 331, 23 L. ed. 99.
>
> "* * * on the privilege of succeeding to the inheritance or of becoming a beneficiary under the will." *Washington County Hosp.* v. *Mealey's Estate,* 121 Md. 274, 88 Atl. 136, 48 L. R. A. (N. S.) 373, Ann. Cas. 1915 B, 1050.
>
> "* * * a charge upon the right or privilege of receiving it, and when the right to receive the property is considered it is apparent that it is something distinct and separate from the property itself, and it is this right to receive property by descent or devise that the State taxes." *Northern Trust Co.* v. *Buck & Rayner,* 263 Ill. 222, 104 N. E. 1114, affirming 183 Ill. App. 170.
>
> "* * * not on the right to give or grant, but upon the right to receive." *Lacy* v. *State Treasurer* (Ia.), 121 N. W. 179, 182.
>
> "* * * upon the right to receive the property from the estate of the decedent * * *" *State* v. *Vinsonhaler,* 74 Neb. 675, 105 N. W. 472.

"* * * upon the privilege of acquiring property by inheritance." *Wallace* v. *Myers,* 38 Fed. 184, 4 L. R. A. 171. (Approved in *U. S.* v. *Perkins, infra.*)

"The tax * * * is, once for all, an excise or duty upon the right or privilege of taking property, by will or descent, under the law of the State." *State* v. *Hamlin,* 86 Me. 495, 30 Atl. 76, 25 L. R. A. 632, 41 Am. St. 569.

"It is not a tax upon the right of alienation, but on the privilege of receiving by inheritance or will, or otherwise, at the death of a former owner." *State* v. *Alston,* 94 Tenn. 674, 30 S. W. 750, 28 L. R. A. 178.

And see note in 33 L. R. A. (N. S.) 606, to *re McKenna* (So. Dak.), 126 N. W. 611, 130 N. W. 33.

Re Macky, 46 Colo. 79, 102 Pac. 1075, 23 L. R. A. (N. S.) 1207.

State v. *Furnell,* 20 Mont. 299, 51 Pac. 267, 39 L. R. A. 170.

There is, therefore, substantial unanimity among judges, and certainly with no dissent in this court or in the United States Supreme Court from the doctrine, that wills, rights of inheritance and successions are all of them creatures of municipal laws, are in all respects regulated by such laws, and that transfer taxes are conditions imposed by sovereignty under this control over successions.

None of the amendments to the act of 1909 change in any way the character of the tax.

II.

The "Estate Tax" imposed by the United States is not of the same nature as the State Transfer Tax; it is not an exercise of any sovereign right to regulate successions to property within the jurisdiction of the United States, and does not find its justification in any such claim.

The United States Supreme Court cases cited either in the opinions heretofore quoted, or directly, were not cases involving the right of the United States Government to impose estate taxes.

This right was sustained by the Federal Supreme Court in *Knowlton* v. *Moore,* 178 U. S. 41, 44 L. ed. 969, on an opinion by Mr. Chief Justice White, in which the *paramount* right of the states over successions, on the theory of sovereign control over the devolution of property recognized repeatedly by that court

in the cases cited and other cases, was fully recognized, and the right of Congress to impose taxes on successions by the Act of 1898, enacted to raise revenue for the Spanish War, was upheld because of the right of the Federal Government to reach all usual subjects of taxation.

In the course of the opinion, it is said (p 55):

> "Thus, looking over the whole field, and considering death duties in the order in which we have reviewed them—that is, in the Roman and ancient law, in that of modern France, Germany and other continental countries, in England and those of her colonies where such laws have been enacted, in the legislation of the United States and the several states of the Union,—the following appears: Although different modes of assessing such duties prevail, and although they have different accidental names, such as probate duties, stamp duties, taxes on the transaction, or the act of passing of an estate or a succession, legacy taxes, estate taxes, or privilege taxes, nevertheless tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested."

* * * * * * *

> (At p. 58) "All courts and all governments, however, as we have already shown, conceive that the transmission of property occasioned by death, although differing from the tax on property as such, is, nevertheless, a usual subject of taxation. Of course, in considering the power of Congress to impose death duties, we eliminate all thought of a greater privilege to do so than exists as to any other form of taxation, as the right to regulate successions is vested in the states and not in Congress.
>
> "It is not denied that, subject to a compliance with the limitations in the Constitution, the taxing power of Congress extends to all usual objects of taxation."

The Chief Justice, therefor, sustained the right of the Federal Government to impose an inheritance tax because of the right of the Federal Government to reach all usual objects of taxation, but the opinion in no way denied the rights of the states, under the authority inherent in them, to regulate successions to property, real or personal, within their jurisdiction.

The case does not involve the discussion of the effect of the Federal Constitution on the right of the states to levy inheritance taxes. The *Magoun* case did involve that question and very strongly sustained the power. The extended quotations

from the *Magoun case* in *Knowlton* v. *Moore* show that the latter case was not intended to overrule the former. There is no withdrawal by the Supreme Court of the United States in the *Knowlton* case from the broadest recognition of the right of the states to regulate the succession to property within their jurisdiction, or any departure from the rule abundantly supported by legal history and previously recognized by the court, that the right of succession is a creature of municipal law.

As we proceed with our argument we ask this court to keep in mind that in this leading case sustaining the Federal Tax, the Chief Justice of the United States has used "death duties" as a *generic term* to include every type of imposition resting in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and has also, in considering the power of Congress, eliminated all thought of a greater privilege to impose death duties than exists as to any other form of taxation, *"as the right to regulate successions is vested in the states and not in Congress."*

This is an express recognition of the supremacy of the sovereignty of the states to regulate successions, and an express denial of any authority in Congress to impose taxes upon successions as conditions of succession under sovereign right to regulate.

Moreover the Supreme Court of the United States in *United States* v. *Perkins,* 163 U. S. 625, 41 L. ed. 287, had admitted the constitutionality of the application of the New York succession taxes to a legacy to the United States, in an opinion by Mr. Justice Brown, in the course of which it was said:

> "In this view, the so-called inheritance tax of the state of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases; a declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use; in other words, that the right to dispose of his property by will shall remain, but subject to a condition that the state has a right to impose. Certainly, if it be true that the right of testamentary disposition is purely statutory, the state has a right to require a contribution to the public treasury before the bequest shall take effect. Thus the tax is not upon the property, in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the state that it becomes the property of the legatee. This was the view taken of a similar tax by the court of appeals of Maryland in *State* v. *Dalrymple,* 70 Md., 294, 299 (3 L. R. A., 372), in which

the court observed: 'Possessing, then, the plenary power indicated, it necessarily follows that the state in allowing property * * * to be disposed of by will, and in designating who shall take such property when there is no will, may prescribe such conditions, not in conflict with or forbidden by the organic law, as the legislature may deem expedient. These conditions, subject to the limitation named, are consequently wholly within the discretion of the general assembly. The act we are now considering plainly intended to require that a person taking the benefit of a civil right secured to him under our laws should pay a certain premium for its enjoyment. In other words, one of the conditions upon which strangers and collateral kindred may acquire a decedent's property, which is subject to the dominion of our laws, is, that there shall be paid out of such property a tax of 2½ per cent. into the treasury of the state. This therefore is not a tax upon the property itself, but is merely the price exacted by the state for the privilege accorded in permitting property so situated to be transferred by will or by descent or distribution.'

* * * * * * *

"We think that it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is imposed upon the legacy before it reaches the hands of the government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it."

The State tax under this case is conceded to be paramount because it is the condition on which the State Legislature assents to the succession, and because the property passing only becomes the property of the successor after it has suffered diminution by the amount of the State tax.

This was held as to a legacy to the United States, but the United States is not in that respect a peculiar legatee.

It is, therefore, to be authoritatively deduced from the controlling Federal decisions that the United States does not tax in derogation of State authority over successions. Whether the United States has the right to tax at all until after the State conditions of succession have been satisfied by the payment of the State transfer tax is not involved in this case, and probably is for the Federal courts. The Federal right may be conceded to be concurrent without violence to the State's sovereign imposition. Certainly the Federal Government has no para-

amount right to withdraw a part of the succession from State taxation altogether.

The Federal "Estate Tax" under the Act of 1916 is a "death duty," and by its nature such that it can have no application to diminish the property passing before the State transfer tax is imposed.

The Federal tax is, of course, not imposed upon the State's right to regulate, but upon the transmission or receipt of the property passing. It is a burden cast upon the recipient. (*Knowlton* v. *Moore, supra.*)

The Vice-Ordinary's view as to the Federal tax does not seem to be in harmony with the nature of the tax or the authority which justified its imposition.

He determines that the Federal tax under the act of Congress of September 8, 1916, differing from the Federal act of the Spanish War days considered in *Knowlton* v. *Moore, supra,* was a tax upon the estate transferred by death and not upon the succession.

If the Federal tax is upon property and not a "death duty," it is a direct tax, and subject to constitutional directions as to apportionment. That view would result in the unconstitutionality of the Federal law, and altogether defeat the right to impose the tax which the executors of Roebling have paid.

> See *In re Sherman's Estate,* 179 App. Div. 497, 166 N. Y. Supp. 19, aff'd 222 N. Y. 540, 118 N. E. 1078.

English analogies are perhaps misleading because the English taxing acts are not subject to, and are not construed in the light of, Federal or State constitutional restrictions; English "death duty" phraseology is very technical and not always readily interpreted by strangers to their system. We cannot look to English text books for much aid without technical definitions in mind, or without making sure that the author and ourselves are talking about the same thing.

It is true that Mr. Chief Justice White, in *Knowlton* v. *Moore,* referred to the English analogies and to some extent recognized them as of weight in his discussion, but he was dealing in part with types of "death duties" of recognized English origin, and yet, even as to all of them he recognized fully the power of the states to regulate successions. No more than concurrent power in Congress can possibly be inferred from *Knowlton* v. *Moore.*

The Vice-Ordinary recognizes a superior Federal power to take "from property in respect of which an interest has ceased by death" a part of that property in diminution of the State's right to regulate the succession, because he finds the Federal tax to resemble the English "probate duty." The assessment against the estate as a whole and the payment by the executor before distribution lead him to the conclusion that the tax is "upon the *estate* transferred by death and not upon the succession resulting from death."

The fact that the Federal statute makes no provision for apportionment of the burden of the tax among the various transferees is not of importance. The imposition of the tax on the entire estate before distribution is for convenience of collection, and does not preclude the distribution of the burden on the individual transferees. The Federal Government is not required to concern itself about that. The New Jersey act as to the tax on estates of non-residents exacts payment of the executor or administrator and leaves distribution of burden entirely alone. It is competent for the taxing power to make the tax a charge on the entire estate, and so doing does not necessarily change the character of the tax. (*Carr* v. *Edwards, supra,* p. 670.) It was doubtless also the desire of Congress to make the assessment and collection against the entire estate to escape the question decided adversely to the Government in *Knowlton* v. *Moore* as to the application of the progressive rate.

Neither is the treatment of real estate of the decedent by the Federal act of any importance. The Vice-Ordinary seemed to think that the real estate, devised or descending, was not made liable to contribution for the tax. So far as real estate is concerned the amount thereof is included in the valuation of the estate. The gross estate (section 202) includes all property of the decedent, real or personal, tangible or intangible, wherever situated, to the extent of the interest therein of the decedent at the time of his death, which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate. Such gross estate also includes any interest of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a *bona fide* sale for a fair consideration in money or money's worth, and any transfer of a material part

of his property in the nature of a final disposition or distribution made by the decedent within two years prior to his death, without consideration, is *prima facie* deemed to be made in contemplation of death. Such gross estate also includes the interest of the decedent and any other person held jointly or as tenants by entirety, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent.

We will presently contrast this gross estate with the taxable property under the New Jersey statute.

The net estate (section 203) to be subjected to the tax under the Federal law is determined by deducting from the value of the gross estate "(1) such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, and such other charges against the estate, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered; and (2) an exemption of $50,000." (We do not need for present purposes to consider the special provisions with reference to non-resident decedents.)

By section 205 the executor (and by definition in section 200 "executor" means executor or administrator of the decedent, or, if there is no executor or administrator, any person who takes possession any any property of the decedent), is required to notify the collector and file with the collector a return, under oath, in duplicate, setting forth the value of the gross estate, the deductions, the value of the net estate and the tax paid or payable thereon.

Section 207 requires the executor to pay the tax to the collector or deputy collector.

Section 208 subjects the property of the decedent to sale to satisfy the tax, and provides that if the tax or any part thereof is paid by or collected out of a part of the estate passing to or in possession of any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the

estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate, or whose interest is subject to equal or prior liability for the payment of taxes, debts or other charges against the estate, it being the purpose and intent that so far as practicable, and unless otherwise by the will of the decedent directed, the tax shall be paid out of the estate before distribution.

If from this last provision there results any exoneration of real estate, by remedy over, the operation of the section is not to change the nature of the tax, but rather to preserve distributive rights as between legatees, devisees and distributees.

It is also to be emphasized that the tax is a progressive one on the entire net estate and is not affected in any way by the degrees of relationship of the ultimate takers to the decedent. The Federal Government has not undertaken to distinguish between persons near and far in relationship to the decedent in the imposition of the tax and has shown no interest whatsoever in such ultimate distribution, leaving that to the local law, but this indifference cannot be construed into an intention to interfere with the conditions of succession under the local law, or the taxes imposed by way of condition of successions, under state sovereignties. *It is rather a recognition that the subject is outside of the scope of its power.*

The total estate subjected to the Federal tax may be scattered in many sovereignties, but it is subjected to tax once for all as a whole. This is convenient and makes more readily applicable the progressive rate, but it indicates no purpose to interfere with State regulation of successions in any jurisdiction in which *situs* may be of any of the property of the decedent.

But if the Federal tax is not a transfer tax upon the succession, and is comparable to the "Estate Tax" of England, as held by the Vice-Ordinary, it is, under *Knowlton* v. *Moore,* none the less a "death duty" and just as incapable of application in derogation of the State's authority to regulate the succession. The Federal Government may put a burden of excise upon the recipient, but cannot deny the right of the State to impose conditions of taxation before enjoyment of the property of a decedent within the State's jurisdiction by a successor, and cannot limit the measure of the State's taxation by an arbitrary withdrawal from State transfer taxation of that part of the property within the State's jurisdiction of which the decedent died possessed or seized.

And whatever the nature of the particular death duty, Congress has clearly evinced an intention to impose its levy (regardless of regulations of Federal collectors refusing deduction of the State tax) after the State's conditions of succession have been actually complied with. This is shown in the definition in section 202 of the gross estate and in section 203 of the net estate. The value of the gross estate includes the value of all property, real or personal, tangible or intangible, of decedent at the time of his death, wherever situated, to the extent of his interest therein which is subject to the payment of the charges against his estate and the expenses of its administration *and is subject to distribution as part of his estate.* The net estate upon which the tax is figured is the gross less administration expenses and deductions from the estate of sundry kinds "and such other charges against the estate as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered."

This language of the law is not limited to expenses of administration, but recognizes before the "estate" becomes "net" for the Federal imposition every charge allowed by the laws of New Jersey against property in course of administration in that State.

If, however, the State transfer tax is not under the Federal law a charge allowed as a deduction and if the Federal tax is paramount, an extraordinary situation results from the provision of Section 209 of the law which provides that the Federal tax is a lien for ten years upon the gross estate of the decedent, "except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien." The Treasury Department takes the position that under the specific terms of this section the tax is a lien for ten years upon all the property in the gross estate except such part as is necessarily expended for the payment of charges and expenses of administration; further, that beyond any doubt the lien follows all the rest of the property in the gross estate into the hands of distributees and purchasers, and that no provisions of any other statute modify in the least degree this specific provision for estate tax lien.

This ruling was made by the Commissioner of Internal Revenue under date of October 4, 1917, and may be found in the "War Tax Service," issued by the Corporation Trust Company

of New York, Service of 1919, paragraph 242. In the particular instance the Commissioner ruled that the lien attached to real estate of a decedent as against a bona fide purchaser up to such time as the entire tax due, because of a final return which the Commissioner accepts as complete and accurate, has been paid.

The result, therefore, of this view is that so long as the Federal tax remains unpaid *even that portion of a decedent's property which the State exacts as a premium upon the privilege of succession is subject to the lien of the Federal tax,* and that even after payment to the State, since under the interpretation of the Federal authorities the sale or conversion of the assets does not divert the lien.

The gross estate reaches out for all property "subject to distribution" and the deductions recognized literally include State transfer taxes. If such deductions do not literally include State transfer taxes, the latter are, nevertheless, to be imposed before even the "gross estate" is valued, as the value of the gross includes only property which is subject to distribution after payment of charges and expenses of administration. A transfer tax is not a charge of administration, but until it is paid no distribution can be had under the State law. There is no interest of a decedent subject to distribution until the State transfer tax is paid. *United States* v. *Perkins, supra.*

III.

The New Jersey Transfer Tax Act is not to be construed as a legislative consent to the diminution of the property passing by the withdrawal therefrom, before the assessment of the State Tax, of the amount required to meet the Federal imposition.

The Vice-Ordinary in his opinion does not doubt the State's right to impose taxes of the same kind he finds the Federal tax to be. He says:

> "Conceiving, then, the state of the law to be that the Federal tax is imposed upon the estate and that the transfer inheritance tax is levied upon the succession, it becomes at once apparent that the clear market value of the property transferred from the dead to the living is the value of the estate after all lawful charges against it, including taxes, are satisfied. In the case in hand, the beneficiaries succeeded to $9,000,000, and upon this sum, as apportioned by the testator, the State tax should have

> been assessed. While the practical result is a financial loss to the State, it is not brought about by an assumed supremacy in the United States; nor is the exercise of the taxing power by the National Government an interference with State rights, as some judges have intimated. The statutes do not clash, albeit the operation of the Federal act affects a reduction of the State ratable. They function in entirely different taxing zones. Relief lies in appropriate legislation. It is undoubtedly within the power of the Legislature to impose an estate death duty, co-extensive with the Federal act, a tax on the power to transfer at death, for instance, and which may co-exist with the Transfer Inheritance Tax Act, which, as we have seen, levies on the power to receive at death."

The State taxes are transfer taxes on successions as distinguished from legacy duties. The system has been developing for years and the law now represents a well understood plan, applicable, without conflict of construction, to successions to the property of resident and non-resident decedents, and the State cannot be expected to abandon this developed and comprehensive scheme of taxation for a different policy, without compelling reason.

It is a part of the means devised by the Legislature for the support of the government of the State.

In re Diebl's Est., supra.

The Federal "Estate Taxes" do not offer such a reason, and the Vice-Ordinary's construction of the State statutes is not supported by a view of the character of the transfer tax and the history of the legislation, both State and Federal.

The Federal tax itself, it is submitted, is a death duty, akin to the New Jersey succession type, but if a death duty of another type, its effect on the State system of taxation is no greater.

The State system is established under a power to regulate successions; the Federal system under a power to levy excise on a usual subject of taxation, the generating source of which is death. (*Knowlton* v. *Moore, supra.*)

The Federal power and the Federal system are not in derogation of the State's right to regulate successions.

Doubtless the State could modify its conditions of succession so as to impose as one of them and a primary one the payment of any death duty the Federal Government might impose.

Such legislation would subordinate the State succession tax to the Federal with the State's consent.

But it is easily demonstrable that the State has not yielded any portion of the taxable property of decedents to the Federal tax gatherer.

The statute of 1909 was prior in point of time to the Federal statute, and is not to be given different construction as to the measurement of the tax as a condition of succession to property within this State of decedents, testate or intestate, by a subsequent Federal excise duty which the State has not contemplated or consented to.

If the decedent Roebling (says the Vice-Ordinary in effect) had died prior to the enactment of the Federal "Estate Tax," the condition of succession to his property fixed by the State of New Jersey would have required the payment in tax of $36,000 more than if his death succeeded the Federal law. And if he had died March 16, 1919 (after the passage of the new revenue act, approved February 24, 1919), instead of March 16, 1917, the State would impose a lesser tax by over $50,000 than before September 8, 1916, and $12,000 less than prior to February 25, 1919.

And this result is reached without any change in the State's conditions of succession as evidenced by the transfer tax statutes.

At the time the transfer tax act of 1909 was passed there was no Federal death duty, and there never had been from the time of the first inheritance tax act in this State in 1892, except for a year or two during the Spanish War, when the Federal Government imposed a "legacy tax," which admittedly would not operate in priority to the State's regulatory imposition.

What canon of construction can read into the State statute any consent to the withdrawal by the Federal Government of $1,200,000 from the taxable succession of the decedent Roebling? Or of $1,600,000 of a resident decedent of like wealth dying since February 24, 1919, under the increased rates of the latest Federal act?

The language of the act appealed to by the Vice-Ordinary was never designed to meet any such test of construction. The property passing was subjected by the State law to taxation after reduction by certain exemptions. The statute did not even in terms recognize the right to deduct debts and administration expenses, but the deduction was approved by the courts because no purpose was evinced by the legislature to tax insolvent estates. (*Neilson* v. *Russell, supra,* p. 657.)

The machinery of the law for the collection of the tax prevents distribution by the executor or administrator before the tax is paid, as to resident decedents, and puts the tax directly on the executor or administrator of non-resident decedents. For all practical purposes it is on the universal succession in both cases, the distributive succession being made the measure of the tax, but the burden of the distributive collection being put for the convenience and security of the State upon the universal successor. *Whether the decedent die testate or intestate, resident or non-resident, the distributive succession must be as to personal property through the medium of the universal successor, who must collect the tax and turn the same over to the State, under penalty of personal liability.* Successions to real estate are made liable to lien for the tax, but the duty is cast upon the heirs, devisees, executors and administrators of decedent to notify the Comptroller, and in case of real transfers through wills vesting initial title in trust in executors, the duty of collection is upon the universal successor as in cases of personal distributive successions. So far as the nature of the property passing permits, the State, as between the decedent and his successors, universal or singular, treats the estate as a whole for the collection of the tax. The universal successor is given power to sell to raise money to pay the tax, and, if legacies are charged on real estate, he must pay the tax and enforce collection as in case of the legacy. The individual succeeds to no particular part of the estate, except as to specific gifts, and takes such distributive share as the law permits to be taken under testamentary or intestate designation. (*Tilford* v. *Dickinson, supra,* 79 N. J. L., 302, 309).

But there is more than the machinery of the law in refutation of the Vice-Ordinary's construction of the legislative purpose to limit the transfer tax, by applying it, not upon the clear market value of the estate, but upon the clear market value of what may be left to reach the ultimate distributee after the payment of all exactions of any kind or description that may be put upon the estate, of whatsoever origin, before final distribution.

The act was passed in 1909 and, notwithstanding that it was a revision and possibly might therefore be dated farther back in origin, we may take the time that it became effective, July 4, 1909, for the purpose of ascertaining its meaning.

Reference has already been made to the absence in the statute of any authority for even the deduction of debts and adminis-

trative expenses. This deduction was made by the taxing authorities notwithstanding the absence of specific mention in the law and, as also hereinbefore mentioned, approved by the courts because there was no purpose indicated by the law to tax insolvent estates.

The State could have imposed a tax on the gross of the property passing without any allowance for deductions whatsoever without doing violence to its sovereign right to impose conditions on succession.

It is, however, a reasonable inference that the State did not intend to impose a transfer tax upon the passing of property which would not pass beneficially to the successor if exhausted in the satisfaction of claims against the decedent, which under the laws of the State were made prior claims upon the decedent's real and personal property.

In the absence, however, of any express exemption or deduction, an excise tax upon the transfer of property within the State, imposed upon the clear market value of such property, cannot be presumed to have been fixed with any thought in the legislative mind beyond the requirements of the State law at the time of the passage of the succession tax act.

While the New Jersey Legislature of 1909 was in session and when the transfer tax act took effect on July 4, 1909, estates of decedents were subject to definite claims arising out of administration expenses and the obligations of the deceased. There were preferred debts; judgments entered of record against the decedent in his lifetime, funeral charges and expenses, and the physician's bill during the last sickness. There was general liability for the claims against the estate originating in the lifetime of the decedent presented in the manner and within the time required by law.

If the Federal or the State Government had a claim which had accrued prior to the death of the decedent, it would have been competent to present such claim for recognition.

Only the expenses incident to the settling of the estate and the debts, preferred and general, of the decedent were entitled to recognition as deductions at the time the New Jersey transfer statute of 1909 was passed. And even such debts and administration expenses are deductible only by construction.

Succession taxes are not expenses of administration in any legal sense. They are paid before distribution, but not as a

charge on the decedent or as a result of any administrative requirement relating to the ascertainment of the property of the decedent. Their amount is not ascertained or even ascertainable until after all expenses of administration and debts are paid. They are a burden on the succession, and neither debt nor expense of the decedent or his estate. They represent the price the successor pays for permission to take by grace of our law. They do not diminish the quantum of the estate as it reaches the successor by the application of any imposition founded in any right or duty of the decedent, but the amount of the tax is taken by the State from the successor. As Mr. Chief Justice White said in *Knowlton* v. *Moore,* at p. 60, (with reference to the Federal tax):

> "Certainly, a tax placed upon an inheritance or legacy diminishes, to the extent of the tax, the value of the right to inherit or receive, but this is a burden cast upon the recipient, and not upon the power of the state to regulate. This distinction shows the inapplicability to the case in hand of the statement made by Mr. Chief Justice Marshall in *McCulloch* v. *Maryland,* 4 Wheat., 431, 4 L. ed. 607, 'that the power to tax involves the power to destroy.'"

Local property taxes imposed on the real and personal property of the estate, *pending the administration and distribution,* are not entitled to be paid as against the excise on the succession. Such taxes, by existing State law, are a lien on personal and real property and must be paid before distribution. The State succession tax does not recognize the liability of the estate to such taxes, but ascertains the estate as of the death of the decedent.

Under the New Jersey act, losses incurred in or during the administration of the estate, are not deductible. *Security Trust Co.* v. *Edwards,* 90 N. J. L., 558, 568. This is in sharp contrast to the provisions of the Federal Act above stated.

Nothing in the act of the legislature of New Jersey can be found authorizing the deduction of any tax imposed by the United States from the net value of an estate before inheritance tax assessment.

As no such tax as the Federal estate tax existed when the New Jersey law was passed, that tax cannot be presumed to have been in the legislative mind when the State law was enacted.

As, under the holdings of the Supreme Court of the United States, Congress has no authority to interfere with succession

taxes as an imposition imposed in right of sovereignty, there was no reason for the legislature to conclude that, if a Federal estate tax law were passed, there would be any interference by the Federal Government with the taxes already required by New Jersey as part of her laws regulating successions to property, real or personal, within her jurisdiction.

As New Jersey has not passed any act since the Federal estate tax law was enacted, postponing the application of the New Jersey succession taxes until after the United States has first been paid whatever amount its exaction may require, no consent can be implied from any source whatsoever to the reduction of the New Jersey transfer taxes because of the passage of the Federal estate tax law.

The argument of the Vice-Ordinary, that the Federal estate tax must be recognized as a primary charge by the State of New Jersey before the imposition of the State succession tax, is equally applicable to succession tax laws of other states.

Double taxation or, rather, concurrent taxation, not infrequently results from the operation of succession statutes as different kinds of property have situs not only at the domicile of the decedent but also in another state or country. The readiest illustration perhaps is the stock of corporations which is taxable property of the decedent both at the domicile of the decedent and at the domicile of the corporation. Other kinds of property—bank deposits, mortgages on real estate, notes and bonds—may have double situs with resulting double or concurrent taxation.

In re Hartman's Estate, 70 N. J. Eq., 664.

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

Blackstone v. *Miller,* 188 U. S., 189, 47 L. ed., 439.

Buller v. *Wisconsin,* 240 U. S., 625, 60 L. ed., 830, affirming 143 Wis., 512, 128 N. W., 109, 139 Am. St., 1114.

Kinney v. *Stevens,* 207 Mass., 368, 93 N. E., 586, 35 L. R. A. (N. S.), 784, Ann. Cas. 1912 A, 902.

Bliss v. *Bliss,* 221 Mass., 201, 109 N. E., 148, L. R. A. 1916 A, 889.

State v. *Probate Court,* 128 Minn., 371, 150 N. W., 1094, L. R. A., 1916 A, 901.

Re Rogers, 149 Mich., 305, 112 N. W., 931, 11 L. R. A. N. S.), 1134, 119 Am. St., 677.

It is true that New Jersey does not at the present time undertake to tax all property within its jurisdiction, the transfer tax

act in its present form excluding from its operation certain property of non-resident decedents having situs in this State formerly included within the law, such as deposits in banks in this State, mortgages on real estate in this State, notes and bonds actually within the State, and open debts owing to the non-resident decedent by citizens of this State, but, even so, such property illustrates the possibility of double taxation, or rather concurrent taxation, because of double situs.

No deduction has ever been made by our law, in appraising the taxable property within this State of decedents, of succession taxes paid in other jurisdictions. The position of the Vice-Ordinary would necessarily extend to deduction by the State of the transfer taxes of other states before imposing its own transfer taxes. While some cases may be cited in which this has been done, such cases on analysis will be found to be construction of local statutes in which more emphasis was given to the allowance of the payment of the transfer tax by the executor or administrator in the course of administration, as an expense incurred in such administration, than to the true character of the tax, whatever the method of its payment, as a condition imposed by the State upon the succession. Certainly if the preference given by the Vice-Ordinary to the Federal tax is to be extended generally to all the states, reciprocal recognition should be in order, with a resulting confusion which would indefinitely postpone the computation of transfer taxes and harass the distribution of estates.

In *Hooper* v. *Shaw,* 176 Mass. 190, 57 N. E. 361, referred to by the Vice-Ordinary, the opinion of the Massachusetts Supreme Court shows that while the State deducted the Federal tax (under Act of 1898) the United States reciprocally deducted the State tax. The disposition of the case turned *on construction of the Massachusetts statute,* but it is obvious that in these days of universal Federal and State succession taxes a reciprocal rule is impractical and unworkable. *The only reasonable rule must be one that allows each jurisdiction to ascertain the quantum of an estate without reference to the taxes imposed by another.*

It is also to be noted that the New Jersey taxable property may be different from the worth of the Federal statute (entirely ignoring the possibility of the estate to be subjected to the Federal tax being scattered in different states), in that under the Federal statute advances made within two years to distributees are *prima facie* included in the estate and made subject to the

tax unless shown to have been upon full consideration. Our statute does not tax advances unless made in contemplation of death.

Again, the Federal tax covers real estate wherever located, while the New Jersey tax cannot reach real estate without its jurisdiction.

The Federal law of 1916 exempted no charities from succession taxes, while the New Jersey Act has rather liberal provisions in this regard. The Federal tax, so far as the same was applied to successions enjoyed by charities, if applied prior to the imposition of the State tax, would compel not only the exemption by the State of the gifts to the charities but of the tax paid on the amount thereof to the Federal Government.

It is also to be remarked that the Federal tax is effective as against successions in remainder, while under the New Jersey law the payment of the transfer tax, so far as the same is applicable to successions to interests in remainder, is postponed until the coming into enjoyment of the remainder interest. This might result in an application of the Federal tax and the State tax at different times on large interests and to the derogation of the State tax as compared with the Federal.

The Federal imposition may include property in many different states and in foreign countries, and the progressive rate is applied to the whole estate wheresoever situated. There can, therefore, be no equality of operation of the progressive rates under the Federal statute and the progressive rates under the State statute. Under the Federal statute relationship has no effect on the tax, while under the State law the amount of the tax depends on nearness or remoteness of the successor to the decedent.

While both taxes are death duties the Federal tax is not *due* until one year after the decedent's death, although it may be sooner optionally paid (Section 204). The New Jersey tax is *due and payable* at death (Section 1), although discounts and relief from interest are given for prompt payment.

There is, therefore, no identity of subject matter of the property subjected to transfer tax for the Federal imposition and the State imposition. There is no correspondence in the exemptions of successors or of property. There is no parallelism in the rate itself or in the application of the rate. The Federal law is different in policy from that of the State, and the two

policies are so irreconcilable in origin and application that it is impossible to suppose, in the absence of any express recognition by the State of the subordination of the State policy to the Federal, that any such subordination could possibly have been within the legislative intention at the time of the adoption of the New Jersey law, even if the State legislation had not preceded in point of time the Federal legislation. Even the authority for the imposition of the tax is different, the State authority finding its origin in sovereignty and the Federal authority in the selection of successions as a usual subject of taxation.

Moreover, the Federal Statute itself recognizes, in the determination of the value of the net estate under the Federal law (under Section 203 hereinbefore referred to), in addition to enumerated items, deductions for "such other charges against the estate as are allowed by the laws of the jurisdiction under which the estate is being administered." Clearly, therefore, the Federal statute recognizes, before the imposition of the Federal excise, the right to deduct the New Jersey succession tax, which is a condition of succession to the property, the collection of which is imposed upon the New Jersey estate under penalty of personal liability if the duty is neglected. *This provision in the Federal law is an express recognition of the existing State law at the time the Federal law was passed, and not an attempt to repeal a part of the State legislation intricately tied up with the administration of estates.*

"The generating source of succession taxation is death," said Chief Justice White in *Knowlton* v. *Moore, supra,* but it is the legal consequence of death that is taxed. That legal consequence —the transmission of property from the dead to the living— is a privilege created by the State and not by the Federal Government. The privilege in essence is the right of the living to succeed to so much of the property of the dead as the State permits, in other words, that which remains after the State has subtracted therefrom whatever it sees fit as a premium, or indeed as a curtailment or diminution from the privilege. *Inasmuch as the privilege does not have its source in the Federal law, the Federal tax in its nature and by the very necessity of the situation, is and can be only an excise upon the privilege accorded to the living successors by the State.* The conclusion therefore seems compelled that the Federal tax should properly be levied, and can only be levied, upon the amount which the successors receive after the State tax is deducted, and which is the extent

of the privilege accorded by the State to the successor (as was recognized by the United States Supreme Court in *U. S.* v. *Perkins, supra,* the United States itself being in that case the residuary successor). This conclusion seems to have been recognized by Congress in the authority to deduct, under the Federal statute, all charges against the estate allowed by the laws of the jurisdiction under which the estate is being administered. To say that the Federal tax should be first deducted and the State tax levied upon the remainder is not only to suggest the analogy of a stream rising higher than its source, but to suggest a subtraction from the volume of the stream before it has its source, or to suggest thinking of the source as giving rise to something less than the full volume which the source generates.

The State law having been passed at a time when there was no Federal imposition, being a revision of a law which originated before there was any Federal imposition, having its origin in sovereignty and containing no recognition of any right to diminish the subject matter by deductions of the Federal exaction before application of the State rate to the subject matter—the Federal law itself recognizing the priority of the State tax—*there is no ground for any construction of the State statute which would lead to the correction of the original assessment made by the State Comptroller in the manner required by the decree below.*

The State transfer tax system was not affected by the Federal estate tax act, and appraisals of estates for State succession taxes should be made exactly as before the passage of the Federal statute, as was done by the State Comptroller in the present case. The fact that contemporaneously, concurrently, or otherwise, the United States exacts from the Roebling estate an excise not based on the sovereign control over successions has no bearing on the sovereign exercise by the State of its authority over the succession to property within its jurisdiction.

The theory recognized by the Vice-Ordinary, according paramount right to the Federal imposition, is in derogation of the State's sovereignty, and, in the absence of express legislative intention, against State policy. It is quite possible to recognize completely the Federal authority in the matter of taxation without a surrender of the State prerogative.

New Jersey taxes the franchise of her corporations on a basis of issued capital stock, but many states lay excise taxes upon the franchises of corporations measured by a certain percentage of the net income of the corporation. Let us suppose that New Jersey changes her system and imposes an excise tax upon the franchises of New Jersey corporations measured by net income. Let us also suppose the Federal Government, at the same time, imposes an excise tax, such as was imposed by the Federal Act of 1909 and succeeding acts, upon the conduct of the business as a corporation, measured by the net income of the corporation. Would it not be manifestly improper, in computing the State franchise tax on the privilege to be a corporation, to insist, under the State law, that the Federal excise tax upon the conduct of the business in corporate form should be deducted from the income?

The stipulation in the present case (Case, p. 11, Stipulation 6) says that the Federal tax in the Roebling case was imposed without deduction or allowance from the corpus of the estate on which the tax was assessed of the transfer tax payable under the New Jersey statutes as aforesaid. This seems to be in direct indifference to the provisions of the Federal statute, but New Jersey is thereby made to suffer, not only by the deduction of the Federal tax as assessed, but by the inclusion in its assessment of the amount of property payable under the laws of New Jersey to the State out of the Roebling succession as a condition of the right to the succession. The unfairness of this actual result in the Roebling case is emphasized by the foregoing corporate illustration of future possibilities.

Inheritance taxes are by no means the only customary objects of taxation subject to tax by both state and federal authority. Mr. Chief Justice White, in the case of *Knowlton* v. *Moore, supra,* instances objects of customary taxation which are under either national government control or state governmental control, but which are reached by the taxing power of both state and nation, and generalizes as follows (p. 60):

> "Under our constitutional system both the national and the state governments, moving in their respective orbits, have a common authority to tax many and diverse objects, but this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of government of the other, for if it did it would practically be an end of the dual system of government which the constitution established."

These objects of taxation by both the state and federal authorities are not, by the application of the taxing power of the one, held, as against the taxing power of the other, diminished in value. Indeed it may be said, that, notwithstanding that the payment of a tax results in taking from its owner the amount of the tax, it does not ordinarily result, in common understanding, of any loss in value of the subject of the tax. However high may be the rate and the consequent tax paid by the property owner he does not look upon his house and lot as worth less after the tax has been paid than it was before. Under both the state and federal death duties the tax is imposed upon a valued estate, the net worth not being exactly the same, but the value in each case relating to the time of death. Ordinarily taxes are not fixed by the legislative authority on the assumption that the net worth, subjected to taxation, is to be lessened by the operation of the taxing authority of another sovereignty. If any such result follows it can only be by reason of the recognition by the one taxing authority of some paramount right in the other. Congress must be presumed to have had knowledge of the absolute control of the state over successions to property within the jurisdiction of the state; and cannot be presumed to have intended to interfere with such successions or with the conditions that the state might impose thereon. Congress is chargeable with knowledge that the Congress has no power to interfere by taxation with the control of successions inherent in the state. An act of Congress relating to matters within the sovereign control of the states, not within the power conferred by the Federal Constitution, is void. This has frequently been held by the Supreme Court of the United States with reference to police regulations, but police regulations are no more the exercise of sovereign authority than the control by the state over successions. We may quote as illustrative from the opinion of Mr. Justice Chase in *United States* v. *DeWitt,* 76 U. S. 41, 19 L. ed. 593, with reference to an act which in the opinion of the court could not be justified other than as a police regulation:—

> "As a police regulation, relating exclusively to the internal trade of the states, it can only have effect where the legislative authority of Congress excludes, territorially, all state legislation, as, for example, in the District of Columbia. Within state limits it can have no constitutional operation. This has been so frequently declared by this court, results so obviously from the terms of the constitution, and has been so fully explained and supported on former occasions (License cases, 5 How. 504; Passenger cases, 7

> How. 283; License tax cases, 5 Wall. 470, 72 U. S. XVIII, 500); and the cases cited) that we think it unnecessary to enter again upon the discussion."

To so interpret the Federal estate tax act as to interfere with the sovereignty of the states would, therefore, make it unconstitutional. To recognize it as imposing excise tax on a customary object of taxation, to operate subject to but not in derogation of the states' sovereign authority over successions, gives it an effect within the power of Congress and makes it a valid enactment.

It is significant that in the original interpretation of the act of Congress, imposing the "estate tax," the Commissioner of Internal Revenue ruled that before the "estate tax" was imposed, the state succession taxes should be deducted. (Treasury Decisions 2395, Oct. 17, 1916.) Later this ruling was revoked and the deduction of state succession taxes refused. (Treasury Decisions No. 2524, Sept. 10, 1917.)

On the other hand, in the construction of the New Jersey statute, enacted pursuant to inherent right to regulate successions, nothing less than an express declaration of legislative intention should influence a conclusion to waive the state's sovereign right to impose the conditions under which successions may be permitted by grace of our law.

No such express waiver can be found in the state legislation (nor even an implied waiver), and the succession taxes should therefore be imposed as the legislature has defined them.

The question in the case at bar has had consideration by the courts of other states, some of the authorities having been discussed by the Vice-Ordinary in his opinion.

The Federal statute is of such recent origin that decisions directly addressed to the present "estate duty," which is different in form from the earlier death duties of the Civil and Spanish war times, are few in number. The New York courts have apparently given careful attention to the construction of the present Federal act, with relation to the powers of Congress to levy death duties, and, in reaching the conclusion that the Federal "estate duty" is not deductible as against the levy of the State's transfer taxes, have not, by extension of so-called administration expenses to embrace the Federal imposition, so construed the State statute as to reduce the clear value of the succession in a way not in legislative contemplation when the State statute was passed. The Vice-Ordinary disagreed with the New York

courts as to the nature of the Federal tax, and therefore disagreed with their conclusion that the Federal duty was not deductible as against the State succession tax. If the Vice-Ordinary's own construction of the Federal statute necessarily leads to the unconstitutionality of the Federal law as beyond the power of Congress, as the New York court intimates, his reason for rejecting the reasoning of the New York decisions disappears.

In the recent case of *In re Sherman's Estate* (179 App. Div. 497; 166 N. Y. Supp. 19, affirmed *per curiam* 222 N. Y. 540, 118 N. E. 1078), the Court of Appeals of the State of New York, by unanimous affirmance of the Appellate Division of the Third Department, has thrown the great weight of its authority against the deduction of the Federal "estate tax" under the Act of Congress of September 8, 1916.

The opinion below, reported in 166 N. Y. Supp. 19, was written by Mr. Justice Lyon. The court considers both the Federal and State legislation and, so far as necessary for the decision of the case, construes both. In reading this opinion it should not be forgotten that the New Jersey transfer tax act is closely related to the New York act, and that, with special reference to the question we are discussing, the New York statute, like the New Jersey statute, does not contain any express provisions for the deduction before the assessment of the succession tax of expenses of administration, such deduction, however, having been sustained in New York, as in New Jersey, by construction. The learned Justice rejects the theory held in other cases, which we later refer to, that a proper definition of "expenses of administration" includes succession taxes.

> "It is not every legitimate expenditure," holds Mr. Justice Lyon, "by an executor or administrator which is to be deducted as an expense of administration in fixing the sum upon which the transfer tax is to be computed. For instance, the transfer tax paid by the administrator in order to effect the transfer of stock in a corporation of another state, which payment is necessary in order to render the stock effective as an asset of the estate, is not to be allowed as an expense of administration in fixing the transfer tax, although it is payable out of the estate upon a final settlement as a disbursement. *Matter of Wm. H. Penfold Estate,* 216 N. Y. 171, 110 N. E. 499."

The illustration used to support the court's view with reference to transfer taxes payable in other jurisdictions is in exact accord with the New Jersey practice. It is also proper to observe here, that "expenses of administration" ought not, unless

so expressly defined by statute, to have its definition influenced by reasons which are controlling in the determination of the amount of the residuary estate under testamentary intention, express or implied, as between beneficiaries, and are entirely unrelated to the incidence of death duties under laws of other states and of the United States.

Mr. Justice Lyon did not regard the Federal tax as levied upon the estate transferred because (166 N. Y. Supp. 26) the tax, if so regarded, would be a direct tax and void as in violation of Article I, Section 9, sub-division 4, of the Constitution of the United States providing that "no capitation or other direct tax shall be laid, unless in proportion to the census." He rejected an interpretation of the Federal act that would make it unconstitutional, holding that the Federal act of 1916 imposed a tax not upon the net estate but upon the transfer of the net estate and that the fact that a tax is to be paid out of property does not render it a tax on property. He also (p. 24), citing *United States* v. *Perkins, supra,* doubted the constitutionality of a Federal law imposing an inheritance tax which was entitled to be deducted from the estate prior to the assessment of the State transfer tax, on the ground that it would be an interference with the conditions of transfer imposed by the State in its own transfer tax law, saying:

> "The State transfer tax will thus become one not upon the whole estate transmitted, but one upon the whole estate less the amount of the Federal tax. This lessening of the transfer tax, while not large in the case at bar, would aggregate a very considerable sum when applied to all the estates subject to tax within the State. The constitutionality of a Federal act entitled to such construction and effect might well be doubted."

The Appellate Division of the First Department, prior to the affirmance of the *Sherman* case by the New York Court of Appeals, speaking by Mr. Justice Scott, reached the same conclusion in the case of *In re Bierstadt's Estate,* reported in 178 App. Div. 836; 166 N. Y. Supp. 168.

Both *In re Sherman's Estate* and *In re Bierstadt's Estate* followed a similar holding with reference to the Federal tax of 1898 rendered in the case of *Matter of Gihon,* 169 N. Y. 443, 62 N. E. 561. In this earlier case Mr. Justice Cullen held that in contemplation of the law the full amount to be received by a distributee was paid, and deduction made from it and paid to the State or Federal Government, is paid on account of the

legatee from the legacy which he receives—a holding in harmony with the holding of the United States Supreme Court in *Knowlton* v. *Moore,* that while the amount received by the distributee was reduced by the payment of the tax, the tax was a burden cast upon the recipient. This decision is also in harmony with the provisions of our present transfer tax act which puts the burden of the tax upon the executor or administrator in the first instance with direction, however, to the executor or the administrator to collect the same from the legatee or distributee.

Another case in the New York Court of Appeals deserves reference, *Re Estate of Swift,* 137 N. Y. 77, 32 N. E. 1096, 18 L. R. A. 709, holding that because the transfer tax law imposed a tax upon special legacies and contemplated their payment by the legatees the residuary legatees could be allowed no deduction on the transfer tax upon the residuary estate because of the provision in the law that the transfer taxes upon the specific legacies should be paid from the residuary estate.

The case of *Hooper* v. *Shaw,* 176 Mass. 190, 57 N. E. 361, has already been referred to earlier in this brief. It avowedly turned on the construction of a Massachusetts statute quite different from the New Jersey law, and under which the tax was not due until two years after the qualification of the representative, and enforced a doctrine of reciprocity between State and Federal tax gatherers which the Federal authorities have refused under the Federal law of 1916, and, which, as pointed out earlier in the brief, would lead to great delays and embarrassment in the settlement of estates.

The Supreme Court of Illinois, in *People* v. *Pasfield,* 284 Ill. 450, 120 N. E. 286, also regarded the Federal tax under the Act of 1916 as an expense of administration deductible before imposition of the State transfer tax. Reference is made in the opinion to the fact that the probate duty in England was treated as an administration expense to be deducted out of the residue of the estate. This consideration is in the discussion of the incidence of transfer taxes, as between the states and the United States, without weight. In England (as in a state), whether the tax is paid from the residue or from the legacies affect only the beneficiaries, and is the subject of testamentary direction, express or implied, and, as in the cases in New Hampshire and Rhode Island hereinafter referred to, follows testamentary intention. When, therefore, it is said that the probate duty in

England is an administration expense, the only valid meaning is that such a duty (like a state transfer tax) is such an expense *as between the beneficiaries, and not, of course, against the sovereignty itself which imposes the duty.* In the imposition of such duty, it is not treated as an administration expense to the diminution of the valuation of the property on which the duty is laid. The sovereign power imposing the duty is not deprived of its impost on the succession. The Federal tax, not being imposed in right of control over successions, or as a condition of succession, is different in type, and has the effect, if deducted, of withdrawing a portion of the property passing by grace of the state law from the operation of the state's condition of succession.

In *Smith* v. *Probate Court,* 166 N. W. 125, the Minnesota Supreme Court held that the Federal tax, under the Act of September 8, 1916, should be deducted before application of the State transfer tax. This case was also based upon a construction of a state statute. The Vice-Ordinary's theory that the Federal act imposed a tax upon the estate and not upon the transfer to beneficiaries is rejected, the view of the court being that the net estate as defined by the act of Congress is the net value for distribution to the beneficiaries after all proper charges, including those imposed by the laws of the jurisdiction have been paid and deducted. The State statute is somewhat like the New Jersey statute, and the court holds that the tax is to be computed upon the clear value of the property, or the interest therein, which actually passes to the beneficiary, excluding from the clear value the amounts expended in administration of the estate or in paying proper charges against it. The court apparently included as a proper charge the Federal tax. There is no discussion in the opinion of the nature of death duties, either State or Federal, and the only authority quoted for the deduction of the Federal tax is *Smith* v. *Probate Court,* 164 N. W. (Minn.) 365. The case so cited approved the expenditure by an executor of a reasonable sum for a tombstone as an expense of administration and held that the amount so expended was not subject to state inheritance tax. Apparently the court gave no consideration to anything else than that the payment of the Federal tax, like the payment for a tombstone, resulted in a diminution of the clear value of the property ultimately passing to the beneficiary and treated the Federal tax as an ordinary expense of administration.

A better considered case is the case of *Corbin* v. *Townsend,* 103 Atl. (Conn.), 647, which construes the Connecticut statute regulating transfer taxes. A revised statute, which upon examination will be found to impose duties more like the legacy taxes under the earlier New Jersey law than like the succession taxes under the New Jersey act 1909. (Public Acts Conn. 1915, Cap. 332.) Under the act the tax is not payable until fourteen months after death. Besides, the executor or administrator is allowed (as he is not in New Jersey) deduction for losses incurred in the reduction of choses in action to possession. The decision practically turns up on the definition given by the court to administration expenses. The court holds that such expenses embrace any expense incurred by an executor or administrator in the care, preservation and conservation of the assets of the estate, in converting the assets, and in paying the debts and all expenses incurred by operation of law, and in turning over the assets remaining to the residuary legatees or distributees. The court looks upon not only the Federal estate tax but also succession taxes imposed by other states as within this definition and deductible expenses under the Connecticut tax act of 1915. The inclusion of succession taxes as administration expenses does not seem to be in accordance with the nature of such taxes and their application as interpreted by the New Jersey decisions earlier referred to in this brief, and certainly is in contradiction of our State practice as to inheritance taxes imposed by other states. The case, of course, is in sharp contrast to the New York authorities in thus expanding administration expenses.

Pennsylvania also, contrary to the New Jersey and New York practice, recognizes as a deduction, in appraising the clear value of an estate subject to collateral inheritance tax in Pennsylvania, the amount paid as a New Jersey transfer tax on stocks and bonds belonging to the decedent subject to tax because of their *situs* in New Jersey.

The Pennsylvania court, however, proceeds on a ground entirely different from Connecticut, namely, that the New Jersey transfer tax is a charge on the stocks and bonds having *situs* in New Jersey and that the value thereof in Pennsylvania is reduced by the amount of the tax. *Re Van Beil's Estate,* 257 Pennsylvania, 255; 101 Atl., 316. This view was extended by the same court to the Federal Estate Tax *In re Kingtie's Estate,* 104 Atl. (Pa.), 765.

This is in substantial accord with the doctrine of the Supreme Court of New Hampshire in *Kingsley* v. *Bazeley,* 75 N. H., 13; 70 Atl., 916; 139 Am. St., 664; 20 Ann. Cas., 1355, that the transfer tax paid by an executor upon the property of his decedent located in another State, in order to obtain that property, should be regarded in the absence of a contrary intention expressed in the will as an expense of administration, to be paid from the general property of the estate and not a charge upon the specific legacies. *In the same case the Supreme Court of New Hampshire held that the transfer tax imposed by the New Hampshire law, under transfer tax law requiring an executor holding property subject to an inheritance tax to deduct the tax therefrom or collect it from the legatee, was not a part of the expense of administration.* Whether or not the transfer tax of another State should be paid from the residuary estate was decided from the standpoint of the intention of the testator.

So in *Bullard* v. *Redwood Library,* 37 R. I., 107; 91 Atl., 30, there was a like holding based upon testamentary intention that succession taxes paid on particular property having *situs* in Massachusetts was to be regarded as part of the expenses of administration chargeable against the general estate and not against pecuniary legatees.

In neither the New Hampshire nor the Rhode Island case does it appear whether, in imposing transfer taxes under the State laws upon the general estate, the payment of foreign taxes was deductible before the imposition of the State tax. The inference would be that it was so deductible as an expense of administration.

It is to be inferred from this line of cases that there may be some difference, in ascertaining the clear value of an estate for the purpose of imposing succession taxes, between property of the decedent within the State coming into the possession of the executor or administrator, and property of the decedent without the State of which the executor or administrator can only procure possession by first paying the succession taxes imposed in the State in which the property has its *situs.* This distinction is clearly based on the theory that the property brought in by the executor or administrator from the foreign jurisdiction is lessened in value before it comes to the executor or administrator by the amount of the foreign tax, and that the executor or administrator is obliged to account for such diminished

value. It does not, of course, follow that because payments are to be recognized as allowances to an executor or administrator on final accounting that they are necessarily deductible as against the State transfer tax.

But the theory of deductions of duties paid under the laws of other states, if accepted, has no application to a Federal death duty, as a Federal death duty is not imposed in right of sovereignty and does not in any way interfere with the enforcement of the right of possession of the executor or administrator to property of the decedent wherever located. The Federal taxes are not imposed as a condition of succession or under any right to impose condition on succession.

The New York Court of Appeals declined, in the case of *Matter of Penfold,* 216 N. Y. Supp., 171; 110 N. E., 499, to recognize the deduction of foreign transfer tax paid by an executor prior to the imposition of the New York tax.

To the same effect is *People* v. *Palmer's Estate,* 25 Colorado Appeals, 450; 139 Pac., 554 (1914), holding that under inheritance tax law of 1902, chapter 3, there should not be deducted in the appraisement of the property of a resident decedent transfer taxes paid to foreign states (New York and New Jersey) on personal property located in those states, because such foreign taxes were obligations of the legatees and devisees and not of the decedent nor of the estate and not necessary expenses of administration, and did not diminish in value the amount of property passing upon death.

The soundness of the Vice-Ordinary's conclusion depends entirely upon his view of the Federal statute. If he was mistaken in his construction of the act of Congress his conclusion cannot be sustained. We submit that he was in error as to the character of the Federal tax and that the result of his conclusion as to that act, if accepted, would necessarily make the Federal act unconstitutional both as a direct tax and as unwarranted interference with the states' control over successions to property within its sovereign jurisdiction.

The act of Congress properly construed not only does not conflict with the State's jurisdiction over successions, but, on the contrary, gives full recognition to the payment, before the imposition of the Federal tax, of the transfer taxes imposed by the State on successions.

The State itself has shown no intention of yielding its authority over successions. The action of the Comptroller in making the assessment upon the Roebling estate without prior deduction of $1,209,902.59, paid by the executors to the United States as "estate tax" imposed by the Federal act of 1916, was in accordance with the requirement of the State law and should be upheld by the reversal of the decree of the Prerogative Court.

IV.

The decree of the Prerogative Court should be reversed.

JOHN R. HARDIN,
Of Counsel for Appellants.

NEW JERSEY COURT OF ERRORS AND APPEALS.

In the Matter *of* The Appeals of Karl G. Roebling and Ferdinand W. Roebling, Jr., Executors of the Estate of Ferdinand W. Roebling, Deceased, from assessment of the Transfer Inheritance Tax made by the Comptroller of the State of New Jersey.	On Appeal from Prerogative Court.

Brief on Behalf of Respondent.

The question involved in this appeal, is whether the Federal Estate Tax established under the Act of Congress of September 8, 1916 (U. S. C. S. 1916, Sec. 6336½), shall be allowed as a deduction from the appraised value of the estate of a resident decedent in determining the amount taxable under the New Jersey Succession Tax established under P. L. 1909, p. 325, C. S. p. 5301, as amended by P. L. 1914, p. 267.

Ferdinand W. Roebling, a resident of Trenton, died March 16, 1917, testate, leaving an estate ap-

praised, for taxing purposes, at $10,000,000 plus. The Federal tax amounts to over $1,000,000, and the question is whether this sum should have been deducted from the appraisement and the State tax levied on the transfer of the remaining $9,000,000. The Comptroller of the Treasury refused to grant the allowance and an appeal was then taken to the Prerogative Court and heard before Vice Ordinary Backes, who decided that the federal tax was deductible, in an opinion appearing on page 5 of the State of the Case.

An appeal was then taken to this court by the Attorney General.

Construction of the Federal Estate Tax Act by Other States.

The case being one of first impression in New Jersey, and the Federal Estate Tax Act being a very recent statute, the following statement of the construction given to the Act by the Courts of other states in cases involving the allowance of this tax in calculating State Inheritance Taxes is submitted by way of preliminary statement.

The propriety of deduction of the Federal Estate Tax has been supported by the highest courts of the States of Pennsylvania, Connecticut, Minnesota and Illinois, and by the Ciruit Courts of Brown County and Portage County, Wisconsin.

In *Knights Estate,* 104 Atl. Rep., p. 765, the question was decided by the Supreme Court of Pennsylvania, construing the Pennsylvania statute, which bears a considerable resemblance to the New Jersey succession tax act.

In a *per curiam* proceeding the Court affirmed the Orphans' Court of Philadelphia County on the Orphans' Court opinion holding that the words "clear value" as used in the Pennsylvania statute

presupposed the deduction of the Federal Tax before the State Tax could be assessed. The Orphans' Court held that while the Pennsylvania tax was perhaps a tax on the right of succession, the important question was—what is the thing to which that right attaches and concludes that the estate which passes to the legatee, devisee or next of kin, is the estate as diminished by the deduction of the Federal Tax.

In *Corbin* vs. *Townshend,* 103 Atl. Rep., p. 647, the Supreme Court of Connecticut holds that the inheritance taxes due the State of Connecticut are measured by the amount of property passing to the beneficiary while the Federal Estate Tax is an obligation of the estate calculated upon the whole net estate and taken from the net estate before the distributive shares are determined, rather than off the distributive shares, and holds the Federal Tax to be an expense of the estate as much so as any expense of administration, and as such to be deductible before calculation of the State Tax.

In *State* vs. *Probate Court of Hennepin County,* 166 N. W., p. 125, the Supreme Court of Minnesota holds the Federal Tax to be deductible from the value of the net estate before assessment of the State Tax.

In *People* vs. *Pasfield,* 120 N. E., p. 286, the Supreme Court of Illinois held the Federal Estate Tax to be an expense or charge against the estate and as such deductible before ascertainment of the State Inheritance Tax.

In *re Estate of John Ebeling* decided in the Circuit Court of Brown County, Wisconsin, and not yet reported, the Court in passing upon this question construed the Federal Estate Tax as a charge against the entire estate forming an estate obligation like any administration expense, and there-

fore, deductible before ascertaining the State Tax.

In matter of the *Estate of Andrew R. Week, Deceased,* decided by the Circuit Court of Portage County, Wisconsin, and not yet reported, the Court says:

> "I believe that both the Federal Estate Tax and like taxes imposed by sister states of the Union should be held to be expenses of the administration and therefore, deducted. I do not think that the New York courts should be followed, but rather the courts of Connecticut, and Illinois and the reasoning of the courts of Massachusetts and Pennsylvania."

Quoting

> *Corbin* vs. *Townshend, supra.*
> *People* vs. *Pasfield, supra.*
> *In re Otto's Estate* (Penn.), 25 Pa. Dist. 644.
> *Hooper* vs. *Shaw* (Mass.), 57 N. E. 361.
> *Hooper* vs. *Bradford* (Mass.), 59 N. E. 678.

It must be conceded that the decisions of the New York courts are to the contrary. They will be commented upon at length in the discussion of Point I following. But one other case to the contrary has been found, that of *People* vs. *Palmer's Estate,* 25 Col. App. (Colo.), page 45.

Rules of construction.

The whole question involved then is whether the legatees under the will must pay to the State of New Jersey an inheritance tax on such amount of money as they shall be compelled to pay to the Federal Government by way of estate taxes.

This is double taxation of the most extreme character; it is paying taxes on taxes.

Double taxation is a harsh thing, and never to be taken as the intent of the legislature unless such a construction of the language of the tax law makes it plainly unavoidable. (Old Dominion Copper *v.* State Board Ct. of Err., 1918, 103 Atl. 79-81; Matter of Cooley, 186 N. Y. 220, 227; Matter of James, 144 N. Y. 6, 11; Tennessee *v.* Whitworth, 117 U. S. 129).

In deciding this question, two important principles must be borne in mind, first; the well established principle that an inheritance tax is a special imposition to be strictly construed against the government and in favor of the tax payer, and all doubts as to the taxability of the particular fund should be decided in favor of the citizen. (*Torrance* v. *Edwards,* 89 N. J. L. 507; *People* v. *Griffith,* 245 Ill. 532; *People* v. *Konig,* 37 Colo. 283; *In re Harbeck,* 161 N. Y. 211; *Matter of Fairweather,* 143 N. Y. 114; *Matter of Swift,* 137 N. Y. 77, 87; *Gleason and Otis, on Inheritance Taxation,* p. 33; *Matter of Enston,* 113 N. Y. 174; *Eidman* v. *Martinez,* 184 U. S. 578), and second; that a construction placed upon a similar statute in foreign jurisdictions should not be adopted, when its adoption requires a contortion of the natural sense of the language of the Act from its plain import (Torrance *v.* Edwards, 83 N. J. L. 507).

In submitting that the decision of the Vice Ordinary should be affirmed, in the light of the foregoing, the following argument is presented:

POINT I.

The measure of taxation prescribed by the New Jersey Succession Tax Act is based upon the clear market value, i. e., the net amount of the legacy or other ultimate transfer received by the ultimate transferee, as distinguished from that received by the personal representative merely, and the Federal Estate Tax by the terms of the Act imposing it, is deductible before the ultimate transfer is made.

Must the legatees pay a tax to the State of New Jersey on something they do not receive, when the New Jersey law expressly provides that they shall pay only on the "clear market value" of the property passing to the legatee or beneficiary.

The Federal Estate Tax Act.

The Federal Estate Tax is imposed by the Act of September 8, 1916, Chapter 463, Sec. 201, (U. S. C. S. Sec. 6336½ b), the substantial provisions of which are as follows:

> "A tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value if the net estate to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this act, whether a resident or non-resident of the United States: One per centum of the amount of such net estate not in excess of $50,000"—then by graduated percentages increasing as the net estate increases to—"Ten per centum of the amount by which such net estate exceeds $5,000,000."

The net estate is to be calculated by deducting from the gross estate (consisting of the entire estate of the decedent, including gifts in contemplation of death, U. S. C. S. Sec. 6336½ c), the amount of the funeral and administration expenses, of claims against the estate, of unpaid mortgages and of certain losses incurred during settlement of the estate, and of such other charges as are allowed as expenses of administration by the State Law and finally an exemption of $50,000. (U. S. C. S. Sec. 6336½ d.)

The tax is payable by the executor or administrator and a receipt therefor to him shall "entitle the executor to be credited and allowed the amount thereof by any court having jurisdiction to audit or settle his accounts." (U. S. C. S. 6336½ h.) The tax is made a lien for ten years upon all of the gross estate of the decedent, unless paid, except as to such amounts used for payment of administration, etc., expenses. (U. S. C. S. 6336½ j.)

In event of payment by any person other than the executor, provision is made for reimbursement from the balance of the estate. (U. S. C. S. 6336½ i.)

The tax is due one year after the testator's death, and carries ten per cent. interest from ninety days thereafter, and a deduction of five per cent during such time in case of payment in anticipation. (U. S. C. S. 6336½ e.)

Appropriate provisions as to the assessment of the tax, penalties and powers of the collector of Internal Revenue to make sale of the estate to collect the tax, are made by the act.

The legislative intent of the act is clearly expressed in the concluding sentence of section 208 (U. S. C. S., 1916, sec. 6336 i) as follows:—"it

being the purpose and intent of this title so far as is practicable and unless otherwise directed by the will of the decedent, that the tax shall be paid out of the estate before its distribution."

The effect of this act, therefore, is to impose upon the entire net estate of the decedent, calculated by deducting certain fixed liabilities from the entire gross estate, a tax payable by the executor in his capacity as such, out of the estate generally. It bears none of the characteristics of a legacy tax, it is neither measured by individual legacies nor payable from them. There is one entire exemption from the whole estate, and the tax is calculated on the whole value of the net estate.

The New Jersey Inheritance Tax Act.

The New Jersey Act may be summarized as follows:

Section 1 provides for a tax upon the transfer of any property, real or personal, of the value of $500. or over, or any interest therein, or income therefrom, in trust or otherwise, to persons or corporations by will or intestate laws of this State from any person dying seized or possessed of the property while a resident of the State, which tax shall be at the rate of 5% upon the clear market value of the property transferred, and for which tax all administrators, executors, trustees, grantees, donees or vendees shall be personally liable until paid, except that property passing to churches, etc., shall be exempt from taxation, and property to the amount of $5000. passing to * * * a child or lineal descendant born in lawful wedlock, * * * or the husband of a daughter shall be exempt. (C. S. S. p. 1538, Sec. 148).

On property in excess of $5000. transferred to the husband of a daughter, the tax is at a progressive rate from 2% to 4%. On property in excess of $5000. transferred to a child or children, or their issue, the tax is at a progressive rate from 1% to 3%.

Section 4 provides that on bequests to executors or trustees in lieu of commissions or allowances in excess of an amount equal to reasonable compensation for their services, shall be taxable (C. S., p. 5305, Sec. 540).

Section 5 provides that all taxes shall be payable at the death of the testator, etc., and if paid within six months thereafter they shall be subject to a discount of 5%. If not paid within one year they shall bear interest at the rate of 10% from the expiration of the year and they shall remain a lien upon all property (C. S. S., p. 1540, Sec. 149).

Section 7 provides that any administrator, executor or trustee shall deduct the tax from property subject thereto, which he has in charge and in case of specific legacies he shall collect the tax upon the appraised value thereof from the legacy before delivering the same, and that in any legacies chargeable on real estate, the heir or devisee shall deduct the tax before paying the legacy, and pay the same to the executor or trustee (C. S., p. 5306, Sec. 543).

Section 8 provides for power of sale by executors, etc., for the purpose of paying the tax (C. S., p. 5306, Sec. 544).

Section 9 provides for payment of the money retained as tax by the executor to the treasurer of the State and the giving of a receipt for such payment, which receipt shall be a proper voucher in the settlement of the executor's, administrator's or trustee's account, with provision for recording the receipt (C. S., p. 5306, Sec. 545).

Section 11 provides for a pro rata refund of the tax paid where debts are proven, after payment of the tax or distribution of the estate (C. S., p. , Sec.).

Section 15 provides for a refund of tax erroneously paid (C. S., p. 5307, Sec. 547).

The act has been held by the Court of Errors and Appeal to show a legislative intent to "reach all transfers from a decedent to his successors whether they succeed to the whole estate as a universal succession or to the estate in New Jersey as a universal succession of the New Jersey executor or administrator or the singular succession of a devisee or legatee." (*Carr* v. *Edwards, 84 N. J. L., p. 667.*)

It is "imposed * * * on the right of inheritance—on the beneficiary—for the privilege of succeeding to the property and is measured by the clear market value of the property transferred, ascertained by deducting from the gross value of the residue all lawful charges, exemptions and costs of winding up the estate." (*In re Christie's Estate, 101 Atl., p. 64, Sawter* v. *Shoenthal, 83 N. J. L. 449.*)

It is a tax on the transfer of property which is the subject of a legacy, not a tax on the legacy itself. (*Dixon* v. *Russell, 79 N. J. L. 490.*)

It is payable out of the legacies themselves, not out of the residue. (*Parrott* v. *Rogers, 86 N. J. Eq. 311.*)

But its payment is a proper allowance to the executor on his account, and should appeal thereon. (*Wyckoff* v. *O'Neil, 72 N. J. Eq. 880.*)

The act in the form outlined above is the final result of a course of legislation comprising three revisions and numerous amendments, which had its origin in the original Inheritance Tax Act of

1892. This original act imposed a mere collateral legacy tax and the tax imposed by the succeeding acts of 1893 and 1894, preserved the same character. (*Neilson* v. *Russell, 76 N. J. L. 655.*)

By appropriate change of language of the first section (first introduced in the 1906 amendment of the 1894 Act, and later re-enacted in the 1909 Act) the character of the tax was changed to that of a succession tax, so far at least as concerns the estates of non-resident decedents within the state. (*Sawter* v. *Shoenthal, 83 N. J. L. 499; Carr* v. *Edwards, 84 N. J. L. 667.*)

The language, so construed, was incorporated in the amendment of the first section of the 1909 Act, made by the Act of 1914 (P. L. 1914, p. 261), which constitutes the first section of the act now under consideration.

A new feature was introduced by this amendment, however, that of different rates of taxation predicated upon the degree of relationship of the legatee or distributee, to the decedent.

With this new element added, the provisions for exemptions of individual legacies is retained from the act of 1909, and the provisions for deduction by the personal representative of the tax from the legacy or distributive shares, for refund of tax in case of after discovered debts, for taxation of bequests, etc., to executors, trustees, etc., only so far as they exceed reasonable compensation for their services, and most of the provisions for assessment and collection of the tax can be traced to the original Act of 1892 with but slight change.

Whatever the change as to the character or quality of the tax, the measure still remains the amount of the transfer to the legatee or other ultimate transferee, and the amount of tax is calculated on this amount at a rate determined by the

degree of relationship of the transferee to the decedent.

The only authorities for the deduction of debts or administration expenses which appear in the act today, are those which appeared in the act construed by Justice Swayze in *Nielson* vs. *Russell, supra.* Only by inference can it be gathered from the act that debts of the decedent or administration expenses of any character are to be deducted. The propriety of their deduction however, has never been doubted and it was the propriety of these very deductions which led Justice Swayze to the conclusion in that case that the net value of the legacy furnished the value on which the tax should be ascertained. As has been shown, the measure of the tax has in no wise been changed, except by the inclusion of legatees, etc., therefore exempt. This is shown also by the fact that in an *insolvent estate,* no tax is payable because no legacy has any net value by which it can be measured, and upon which it can be assessed.

A section (Section 26) first introduced in the Act of 1909, remains in force today without amendment. It provides that "the words 'estate' and 'property' wherever used in the Act, except where the subject or context is repugnant to such construction, shall be construed to mean the interest of the testator, intestate, etc., passing or transferred to the individual or specific legatee, devisee, etc., not exempt under the provisions of the Act, whether the property be situate within or without the State."

This is but another instance of the plain legislative intent to measure the tax by the value of the ultimate transfer to the legatee.

The state tax is imposed on the beneficiary on his right to inherit or take, and is measured by the "clear market value" of what he gets in posses-

sion (*Christie's Est.* 101 Atl. 64; *Sawter* v. *Schoenthal,* 83 N. J. L. 449). If he gets nothing, he pays nothing; if the estate is insolvent so that he gets no value, he pays nothing; if the value of the property left him be reduced by proper deductions he only pays on the "clear market value" of what he actually gets, that is, the reduced value.

Now the Federal Estate Tax of 1916 is expressly made a lien upon the whole gross estate of the decedent, except such part as may be used for payment of debts. Can it be doubted that in determining "the clear market value" of the property transferred, a deduction should be made of its amount? Why use the words "clear market value," unless to express a value from which had been first deducted all liens and incumbrances? It is submitted that the very words of the New Jersey Act, plainly authorize this deduction.

And as the Federal Estate Tax of 1916 is measured, not by the value of individual legacies, but by the entire value of a net estate arbitrarily set up, and is payable out of that estate generally, on what logical theory can a "net value" of a legacy be found without first deducting its *pro rata* amount of this tax?

It is submitted that the refusal to allow a deduction for the Federal Estate Tax, will result either in a tax measured by an amount greater than the standard by which this tax has always been measured in New Jersey, the net value of the legacies, or the calculation of a tax on that standard by a greater rate than provided by the statute itself.

The manner in which the Federal Estate Tax is to be calculated, the fund from which it is to be paid, the fact that it is made a lien on the whole estate, and the provision that the collector's receipt shall be a sufficient voucher in the accounting of the personal representative of the decedent

plainly show that Congress intended this tax to be an expense of administration, to be deducted as are funeral expenses, executor's and administrator's commissions, debts and other proper charges against the estate.

The Federal tax is calculated on the net gross estate left by decedent, on the whole of which the tax is made a lien, and takes no account of how the estate may be divided or partitioned.

Consequently, before it can be determined what there is to divide or partition, the Federal tax must be deducted in order to ascertain what there is to go to the legatee. This being so, it necessarily follows that the "clear market value" of what the beneficiary receives and by which the State tax is measured, can only be ascertained after the Federal tax is deducted.

The state tax is imposed on the beneficiary on his right to inherit or take, and is measured by the "clear market value" of what he gets in possession (*Christie's Est.* 101 Atl. 64; *Sawter* v. *Schoenthal,* 83 N. J. L. 449). If he gets nothing, he pays nothing; if what he became entitled to should have been seized by the Government so that he gets no value, he pays nothing; if the property left him has depreciated in value he only pays the "clear market value" of what he actually gets, that is, the depreciated value; if the Federal Government takes away through its power a part of what the testator intended the legatee should receive, the legatee nevertheless only pays upon what he receives.

We have shown that the New Jersey Succession Tax Act clearly contemplates the deduction of the burdens on the estate before the value of the succession on which the tax is to be computed can be ascertained, from which it logically follows that since the Federal Estate Tax is assessed on the

whole estate and made practically an administration expense it should be first deducted.

In attempting to apply the decisions in the various states their particular statutes must first be considered and then the condition of the state and federal law at the time of those decisions.

5. The New York and Massachusetts succession tax acts are substantially the same and both bear a close resemblance to the New Jersey succession tax act. The New York Act refers to the clear market value transferred and the Massachusetts Act refers to the value transferred. They are otherwise very little different.

The Massachusetts Act has been interpreted so as to allow deductions for the Federal Estate Tax and the New York Act so as not to allow a deduction for the Federal Estate Tax.

Of course neither of these Acts were passed in contemplation of the present Federal Estate Tax Act which was not adopted until 1916. They may have been passed in contemplation of the United States Act of 1898 which was a succession tax against the transferees and not on Estate tax against the Estate as is the Estate Act of 1916.

The New Jersey Transfer Act was adopted in 1909 and amended in 1914 so that there has been no interpretation of the Act of New York since the passage of the Federal Estate Tax Act of 1916 that would be binding in this case for the reason that the Federal Estate Tax Act was not in existence when the New Jersey State Transfer Act was adopted.

There is only one case in New York, Gihon's case decided in 1902 that had been decided prior to the passage of the New Jersey Transfer Tax Act, and this case referred to the United States Act of 1898.

The other cases in New York, Penfold's Estate decided in 1915 and Sherman's Estate decided in

1917, are both subsequent to the time the New Jersey Transfer Tax Act was adopted, so that the interpretation of these cases cannot be presumed to have been adopted by the New Jersey Legislature.

Bearing in mind the principle above stated, that no construction of similar acts by courts of foreign states should be adopted when the result will be a contortion of the terms of the act under consideration (Torrance *vs.* Edwards, supra) the following analysis of the New York case is submitted:

In *In re Bierstadt Estate, 166 N. Y. Supp., p. 168,* the New York Supreme Court refused to allow a deduction of the Federal Estate Tax in ascertaining the amount of the New York Inheritance Tax. The ground on which the decision is rested is that if the Act of 1916 is a tax upon transfer, like that imposed by the War Revenue Act of 1898, and not upon the property transferred, the deduction should not be allowed, and if on the other hand it is a tax upon property as was argued in that case, it is unconstitutional, being a direct tax not apportioned in accordance with the constitutional mandate.

In *Matter of Sherman, 179 App. Div. 497,* the Supreme Court of New York, while upholding the Federal Estate Tax as a general succession tax, yet holds the tax not deductible, on the theory that the State transfer tax is imposed on the clear market value of the property at the time of the transfer, and is due and payable at the death of the decedent, and is a tax upon the right to receive the estate, which the State appropriates at the moment of the owner's death. The conclusion reached is that a construction of the Federal Estate tax which would entitle it to deduction in determining the State tax, would be unconstitutional

as an interference with the power resting solely in the State.

Both of these cases are predicated on the earlier case of *Matter of Gihon, 169 N. Y. 443,* in which it was held that the War Revenue Act of 1898 was not deductible in calculating the New York State tax. The ground of this decision was that the Federal tax was a legacy tax and of exactly the same nature as the State Tax, a tax not on property but on succession, a tax on the legatee for the privilege of succeeding to the property.

It is difficult to reconcile the New York decisions. In the Gihon case the court said (p. 505) "the amount of the tax is measured by the sum or property received by the legatee. (*Matter of Hoffman,* 143 N. Y. 327; *Matter of Westurn,* 152 *id.* 93)" and (p. 507) "Bearing in mind the cardinal principle that the transfer tax is to be measured by the amount the legatee is legally entitled to receive, * * * I see no reason why the rule which permits the commissions of executors and administrators to be deducted should not apply equally as well to commissions of trustees." In the *Matter of Hamlin,* 185 A. D. 153, the court said, referring to the federal act we are now considering (p. 156) "The act names it an 'estate tax' * * * and it is a charge against the estate like any other debt or claim." In the *Matter of Ogden,* 103 Misc. 529, the court said (p. 532) "* * * to ascertain the taxable assets in the state, debts due domestic creditors and expenses of administration here should be deducted from the value of the taxable assets in the proportion which such assets bear to the entire assets in this state." In *Matter of Parker,* 185 A. D. 300, the court said (p. 303) "In respect to legacies which are not contingent, the tax is assessed against the individual legatees, who are made personally re-

sponsible therefor * * * Matter of Ogden (103 Misc. Rep. 529) * * * 'When the transfer is taxed against the person who receives the property, the rate of taxation is determined by his relationship to the decedent, but the particular grade in that rate at which the property is to be taxed is dependent upon the value of the property transferred.'' How the courts can consistently continue to hold that the Federal Estate Tax should not be deducted, in other words to maintain the *Sherman* decision is not understood.

The *Sherman* case is rested also on the decision of the New York Courts in the matter of *Penfold,* 216 N. Y. 168, which held that a succession tax levied on property of a decedent, resident of New York, at the time of his death, by a foreign state, was not deductible as an administration expense.

None of the New York cases above referred to, except *Matter of Gihon,* were decided prior to the last amendment of our succession tax act. So far as the refusal to deduct foreign succession taxes is concerned, we are advised that it is directly contrary to the practice of the New Jersey Comptroller's Office.

In Massachusetts, foreign inheritance taxes are allowed as administration expenses. (See *Hooper* v. *Shaw,* 176 Mass. 190; *Bliss* v. *Bliss,* 221 Mass. 201; *Welsh* v. *Treas. Gen.* 223 Mass. 87.) The same rule is applied in Pennsylvania. (See *Van Biel's Estate,* 101 Atl. Rep. 316.) Also in Connecticut. (See *Corbin* vs. *Baldwin,* 101 Atl. Rep. 834, at 839.) The deduction of such taxes as expenses of administration is submitted to be the more logical rule. They are charges which the executors must pay in order to get in the property, and whatever the nature of the tax, the effect is a reduction of the clear market value of

the property on which they are assessed or by which they are measured.

It is submitted that the ground of the decision in *In Re Bierstadt, supra,* begs the question. The Federal Estate Tax is essentially different from the War Revenue Act of 1898, it presupposes a deduction from the entire estate, and while it is payable at the expiration of one year from the death of the testator, it attaches at the moment of the decedent's death, thereby reducing the clear market value of the estate for distribution. The same distinction will apply to the *Gihon* case.

As we have already shown, the *spirit and construction* of the New Jersey Act has been to measure the tax by the net value of the transfer to the legatee or other beneficiary.

Perhaps it is true that the legislature has power to impose a tax of such character and measured in such manner that the Federal Estate Tax would not be entitled to be first deducted, but it is respectfully submitted that the origin and history of the New Jersey Act show no such legislative intent, but rather an intent to allow by way of deduction, any proper cost or charge incurred or payable by the personal representative out of the estate.

That it was the intent of Congress to make the Federal Estate Tax such an administration charge is shown by the manner in which the tax is to be calculated, the fund out of which it is payable, and particularly by the provision to the effect that the Collector of Internal Revenue's receipt given to the personal representative, shall be a proper voucher for payment of the tax in any court in which he is required to account.

POINT II.

Whether the Federal Estate Tax be construed as a tax upon the decedent's estate, or as a tax upon the exercise of general succession by the personal representatives, this amount is deductible before the New Jersey succession tax is ascertained.

(a) *Construing the Federal tax as a tax upon the estate.*

This is the view taken by the Vice Ordinary in his opinion.

He first discusses the power of Congress to impose a tax on the death of a person and concludes that transmission of property on death is universally recognized as a subject of taxation, that while the power to regulate successions was exclusively the state's the United States possessed the right to tax such usual subject of taxation.

He then proceeds to discuss the character of the tax imposed by the Federal Estate Tax Law, analyzing the act and pointing out that the tax is to be paid before distribution and that the collector's receipt shall entitle the personal representative to credit and allowance for the amount paid on settling his accounts. He concludes that the closing words of section 208 "It being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent, the tax shall be paid out the estate before its distribution," are unmistakable in their purport that the tax is imposed on the transmission of the estate by death and not on the succession resulting from death, and is payable out of the residue of the estate as a whole.

On death there are two devolutions of property, (1) from the decedent to the personal representative and (2) from the personal representative to the legatee or devisee (*Parrott* v. *Rogers,* 86 N. J. Eq. 311, 313; *Carr* v. *Edwards,* 84 N. J. L. 667, 670). The federal tax is on the first of these and the New Jersey tax on the second.

They are both in the same general field of taxation but can exist side by side and without interfering one with the other if construed as above.

The Vice Ordinary says "Conceiving then, the state of the law to be that the Federal tax is imposed upon the estate" (meaning transmission of the estate) "and that the Transfer Inheritance Tax is levied upon the succession, it becomes at once apparent that the clear market value of the property transferred from the dead to the living, is the value of the estate after all lawful charges against it, including taxes, are satisfied."

The reasoning of his opinion is sound, convincing and logical and his conclusions such as to reconcile apparently conflicting claims.

If it be suggested that the New Jersey Law was passed before the Federal Statute and therefore could not have contemplated the deduction of the federal tax the answer is complete that under the New Jersey law the expenses of administration are deducted and transfer taxes paid in other states and both of these items are or may have been increased since the passage of the law; that the practice recognizes that charges on the estate itself are to be deducted before it can be known what part of it is distributable.

If the view taken by the Vice Ordinary be adopted the Federal Tax and the New Jersey Tax can stand without conflict and, if other states would adopt the New Jersey rule of permitting the deduction of transfer taxes paid to other

states and to the Federal Government, each state would confine itself to the property actually not theoretically within its jurisdiction, friction would be avoided and no injustice done.

(b) *Construing the Federal tax as a tax on the general succession of the personal representative to the decedent's estate.*

In this view Congress by its legislation levied a tax on the general transfer of the decedent's property from the decedent to his personal representative. It is a general succession tax. It is thus differentiated from the War Revenue Act of 1898, which was held, in *Knowlton* v. *Moore,* 178 U. S. p. 41, to be a legacy tax.

The constitutionality of the 1898 Act was upheld by the United States Supreme Court as an exercise of its taxing power by Congress, in effect an excise tax.

Knowlton v. *Moore, supra.*
United States v. *Perkins,* 163 U. S. 625.
Murdock v. *Ward,* 178 U. S. 139.

The theory of the decision of *Knowlton* v. *Moore,* is that the power to regulate successions rests in the States and forms the basis of the State Inheritance Tax Statutes. The power of the Federal Government is a power to tax the exercise of the privilege of succession granted by the States.

Notwithstanding certain dictum in several of the later United States Supreme Court cases, and notably in the case of *Snyder* v. *Bettman,* 190 U. S. 249, suggesting that the power of Congress to tax inheritance is co-extensive with that of State Legislators, it is respectfully submitted that the theory of *Knowlton* v. *Moore,* above referred to,

is the true theory upon which this power of the United States rests.

There seems to be no logical argument for the position that the right to regulate successions was ever delegated by the States to the Federal Government, nor can any authority, by which this power can be exercised by the Federal Government be shown.

If, then, the War Revenue Act of 1898 is constitutional as an excise tax on the exercise of the right of successions of the legatee granted by the State, it is respectfully submitted that the Estate Tax of 1916 can be as well sustained as an excise tax on the exercise of the right of general succession of the personal representative to the estate of the decedent granted in the same manner.

The constitutionality of the Act has been sustained on this theory in the matter of *Sherman,* 179 App. Div. (N. Y.), 497, and while we do not agree with the court's conclusion which refuses to allow the Federal tax as a deduction in calculating the New York Inheritance tax, we submit that so much of the opinion as refers to the nature and constitutionality of the Federal Estate tax is founded on sound reasoning.

In submitting that the entire scheme of the New Jersey Act precludes a determination against the deduction of the Federal Tax, attention is called at the outset to the distinction between the case at bar and the cases of *Snyder* v. *Bettman,* 190 U. S., 249, holding that a legacy to a municipality was subject to the Federal Inheritance Tax Act of 1898, and the case of *U. S.* v. *Perkins,* 163 U. S., 625, holding that a legacy to the United States was subject to the New York Inheritance tax. In both of these cases, the legatee, although a sovereign body, took its legacy, not by virtue of sovereignty, but by the act of the testator, and in

both cases the legacy itself bore the tax, that is to say, the tax was deducted from it.

In the case at bar the tax is imposed in each instance as an exercise of the sovereign power of the State on one hand, and the Federal Government, on the other. The State's power to lay its tax, arises from its power to regulate successions, while that of the Federal Government arises from the general power to tax, and amounts in effect to an excise tax. There seems to be no question then that, if the amount of the Federal tax cannot be deducted from the value of the estate before the State tax is assessed, the amount of the State tax on the amount paid to the Federal Government, by way of Federal tax, cannot be deducted from the Federal tax itself, but must be paid by the legatee under the will.

The Court, in *Knowlton* v. *Moore,* 178 U. S., 41, said, (p. 58):

> "All courts and all governments, however, as we have already shown, conceive that the transmission of property occasioned by death although differing from the tax on property as such, is nevertheless, a usual subject of taxation. Of course, in considering the power of Congress to impose death duties, we eliminate all thought of a greater privilege to do so than exists as to any other form of taxation, as the right to regulate successions is vested in the states and not in Congress."

In *Snyder* v. *Bettman,* 190 U. S., 249, the Court, referring to the foregoing case, said, (p. 252):

> "This case must be regarded as definitely establishing the doctrine that the power to tax inheritances does not arise solely from the power to regulate the descent of property, but from the general authority to impose taxes upon all property within the jurisdiction of the taxing power. It has usually hap-

> pened that the power has been exercised by the same government which regulates the succession to the property taxed; but this power is not destroyed by the dual character of our government, or by the fact that under our Constitution the devolution of property is determined by the laws of the several States."

Under this view of the Federal act the subject of taxation is the passing to the personal representative of the decedent's whole estate, and the tax is the measure of the net value of this interest. The tax is then as truly an expense of administration as is any other expenditure which must be paid by the personal representative and should be deducted in assessing the estate tax in the same manner as the other administration expenses.

Resume.

We submit, therefore, that the decision of the Vice-Ordinary should be affirmed for the following reasons:

1. Because the Federal tax is a tax either upon the transmission of the whole net estate to the personal representative or upon the whole net estate itself and is payable out of the whole estate and before distribution and the amount is to be allowed to the Executor or Administrator in his accounts.
2. The New Jersey Transfer Tax Act expressly provides that the measure of the tax shall be the clear market value of the interest passing to the legatee or devisee.
3. Because the question being one of first impression in New Jersey and the decisions in the courts of other states not being precedents in the New Jersey courts, the New Jersey courts should affirm a decision which accords with the more

logical view of the two systems of taxation, which moreover is accepted in a large number of states, and not range New Jersey on the side of the few states which have held the contrary and less logical view.

Respectfully submitted,

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