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a

Notice of Appeal.

(Filed Oct. 23, 1926.)

New Jersey Supreme Court

10

HENRY BENTE, Prosecutor-Appellant,	}	On Certiorari.
v.		Notice of Appeal.
NEWTON A. K. BUGBEE, Com- ptroller of the Treasury of the State of New Jersey, Defendant-Appellee.		Grounds of Appeal.
		20

To

EDWARD L. KATZENBACH,
Attorney General of New Jersey,
Attorney for Defendant-Appellee.

Sir:

PLEASE TAKE NOTICE that Henry Bente, prosecutor in the above named case, appeals to the Court of Errors and Appeals from the judgment entered in this cause on the following ground, viz.:

1. Because the Supreme Court erred in giving judgment for the defendant, instead of for the prosecutor.

Very truly yours,

J. EMIL WALSCHEID,
Attorney for Prosecutor-Appellant.

40

Notice of Appeal.

(Filed Oct. 23, 1926.)

NEW JERSEY SUPREME COURT.

10

MARGARETHA BENTE,
Prosecutor-Appellant,

v.

NEWTON A. K. BUGBEE, Comptroller of the Treasury of the State of New Jersey,
Defendant-Appellee.

On Certiorari.

Notice of Appeal.

Grounds of Appeal.

20

To

EDWARD L. KATZENBACH,
Attorney General of New Jersey,
Attorney for Defendant-Appellee.

Sir:

30

PLEASE TAKE NOTICE that Margaretha Bente, prosecutor in the above named case, appeals to the Court of Errors and Appeals from the judgment entered in this cause on the following ground, viz.:

1. Because the Supreme Court erred in giving judgment for the defendant, instead of for the prosecutor.

Very truly yours,

J. EMIL WALSCHEID,
Attorney for Prosecutor-Appellant.

40

Writ No. 1.

THE STATE OF NEW JERSEY.

New Jersey, ss.

10

To: NEWTON A. K. BUGBEE, Comptroller
(L. S.) of the Treasury of the State of New
Jersey. GREETING:

We being willing for certain reasons, to be certified of a certain appraisal and assessment by Newton A. K. Bugbee, Comptroller of the Treasury of the State of New Jersey, made on the 19th day of August, 1924, assessing a tax of \$1,208.80 under color of the transfer inheritance tax, upon a judgment at law in the Hudson County Circuit Court, against The Trust Company of New Jersey, as executor of the estate of Charles Steinberg, deceased, obtained by Henry Bente on May 19, 1924, for the sum of Fifteen thousand (\$15,000.00) Dollars;

20

Do command you that the appraisal and assessment and all proceedings taken thereon or pursuant thereto, made or pretended to be made, together with all proceedings had and done by the said Newton A. K. Bugbee, Comptroller of the Treasury, leading up to the making of said appraisal and assessment, and all things touching or concerning the same, as they may appear of record before you by whatsoever name the same may be called therein, to our Supreme Court of Judicature at Trenton, on the 25th day of October, inst., you do certify and send, together with writ, that therein may be done what of right and according to law ought to be done.

30

40

Return to Writ No. 1.

Witness, WILLIAM S. GUMMERE, Esquire, Chief Justice of our Supreme Court of Judicature at Trenton, this 14th day of October, 1924.

EDWARD J. KELLEHER,
Clerk.

10 J. EMIL WALSCHEID,
Attorney.

A true copy.
EDWARD J. KELLEHER.

Endorsement on Writ No. 1.

Allocatur

Let this writ issue—file Oct. 11/24.

20 JAMES F. MINTURN,
J. S. C.

Return to Writ No. 1.

NEW JERSEY SUPREME COURT.

30 HENRY BENTE,
Prosecutor,

v.

NEWTON A. K. BUGBEE, Comptroller of the Treasury of the State of New Jersey,
Defendant.

On Certiorari.

Return to Writ.

40 I, Newton A. K. Bugbee, pursuant to the command of within writ and for a return thereto, do

hereby annex copies of all papers relating to the transfer or inheritance tax levied against Henry Bente, an individual, as within I am commanded.

Witness my hand and seal this twenty-third day of October, A. D. nineteen hundred and twenty-four.

10

NEWTON A. K. BUGBEE,
Comptroller of the Treasury,
of the State of New Jersey.

166069

STATE OF NEW JERSEY

20

DEPARTMENT OF COMPTROLLER OF THE TREASURY
TRANSFER INHERITANCE TAX BUREAU
TRENTON

Aug. 19, 1924.

Trust Co. of N. J., Executor of the Estate of Charles Steinberg, late of Hudson County.

30

Kappes and Hills,
17 Bergenline Ave.,
Town of Union, N. J.

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

40

Return to Writ No. 1.

	laws pertaining thereto, amounting to	\$4,252.98
		277.72
		<hr/>
	Int. 10% from Nov. 21, 1923, to June 28, 1924	4,530.70
		1,868.98
10		<hr/>
	Paid June 28, 1924	2,661.72
	Bal. due, with int. 10% per annum from June 28, 1924, to date of payment.	
	(Care of burial plot, Evergreen Cemetery	120.00)
	(Henry A. Bente	1,208.80)
20	(Margaretha Bente	1,200.00)
	(Residuary estate	1,724.18)

JOS. A. K. BOYLE,
Comptroller.

Decedent died Nov. 2, 1922.

30 If paid subsequent to Nov. 2, 1923, add interest at rate of 10% per annum from said date to date of payment.

C

Return this statement to this office with certified check for amount due. Make checks payable Treasurer, State of New Jersey.

(Copy)

STATE OF NEW JERSEY

DEPARTMENT OF COMPTROLLER OF THE TREASURY

TRANSFER INHERITANCE TAX BUREAU

10

ASSESSMENT

Estate of Charles Steinberg of Hudson County.

Late Resident of Hoboken. Date of Death Nov. 2, 1923.

Amount of Estate:

Personal	\$54,279.50	20
Real	5,200.00	
Total	<u>\$59,479.50</u>	
Debts, Expenses, &c.	6,117.20	
Net Estate for Distribution	<u>53,362.30</u>	
Exempt Interests	200.00	30
Taxable Interests	<u>\$53,162.30</u>	
Will Tax 8%	\$4,252.98	

40

Return to Writ No. 1.

Beneficiaries and Bequests		Value of Devise or Bequest	Rela- tion- ship	Exempt	Taxable
	1 Payment of debts				\$1,500.00
10	2 Care of burial plot—Ever- green Cemetery				120.00
	4 Care of burial plot—Grove Church Cemetery			\$200.00	
	Henry A. Bente		None		15,110.00
					1,208.80
	5 Clothing, jew. etc.	\$110.00			
	Judgment	15,000.00			
		<u>15,110.00</u>			
20	Margaretha Bente		None		15,000.00
					1,200.00
	Judgment	15,000.00			
	Residuary estate taxed at the rate of 8% in the absence of data establishing the names and relationship of beneficiaries entitled there- to	21,552.30			21,552.30
30					1,724.18
				<u>\$200.00</u>	<u>\$53,162.30</u>
					\$4,252.98

Return to Writ No. 1.

I, Charles Steinberg, of the City of Hoboken, County of Hudson and State of New Jersey, do hereby make and publish this my last Will and Testament as follows:

1. All my just debts and funeral expenses are to be paid as promptly as possible. 10

2. I give and bequeath to "The Evergreen Cemetery" or their successors or assigns, a corporation of Brooklyn, Kings and Queens Counties, State of New York, the sum of Fifteen Hundred Dollars (\$1500.00/100) as a perpetual fund, the yearly interest derived therefrom by them to be expended in the maintenance and proper upkeep forever, of the plots No. 24 and No. 24½ adjoining each other in Section "Solitude" in said Cemetery. 20

3. I further order that above lots in Evergreen Cemetery, Brooklyn, Nos. 24 and 24½ located in Section "Solitude" cannot be sold or otherwise disposed of by any of my heirs or next of kin and the same shall remain, and be used in perpetuity, as the burial place of my immediate and direct branch of the "Steinberg" family.

4. I also give and bequeath to the "Grove Church Cemetery" or their successors or assigns of North Bergen, County of Hudson, State of New Jersey, the sum of Two Hundred Dollars (\$200.00/100) as a perpetual fund, the yearly income, derived from same, to be applied to the maintenance and upkeep in perpetuity of the grave No. 105, in said Cemetery, in which are buried the bodies of my uncle and aunt, Charles and Elizabeth Schlimbach. 30

5. To my friend Henry A. Bente, of 734 Washington Street, City of Hoboken, County of Hudson, 40

Return to Writ No. 1.

State of New Jersey, I give and bequeath ~~the sum of fifteen thousand (\$15,000) dollars and~~ all my personal effects such as clothing, jewelry, books and other articles having only personal value.

10 6. ~~To Margarethe Bente of 734 Washington Street, City of Hoboken, County of Hudson, State of New Jersey, wife of Henry Bente of the same place bequeath the sum of fifteen thousand (\$15,000) dollars.~~

20 7. The residue of my estate, I give and bequeath to the following, to be divided into eight (8) equal parts and distributed as follows: five (5) parts to the descendants of my aunt Louise (Steinberg) Merz, Hilden, Rhenisk Prussia, Germany; one (1) part to the descendants of my aunt (Steinberg), Wegmanne Nümnen near Grafrath, Kreiss, Solinger, Reg Bez, Düsseldorf, Rhemish, Prussia, Germany, and (1) part to the descendants of my Uncle Jacob Steinberg, New York City, New York, U. S. American, and one (1) part to the descendants of my Aunt Ernstine (Schlimbach) Steinbrück, Coburg, Saxe, Coburg, Gotha, Germany.

30 8. Should any of the above branches of my family relations be extinct such portion of my estate as would apply to such branch or branches, shall be divided among the remaining branches in such proportions as each branch is provided for in my above bequests.

40 9. And I further order that if any of the above named beneficiaries, contest or obstruct the fulfillment of any paragraph of my last will and testament, then his or her share in the estate is forfeited and reverts to the general fund of the estate.

Return to Writ No. 1.

10. I hereby nominate and appoint The Trust Company of New Jersey Branch at Hoboken, New Jersey, executor of this my last will and testament.

IN WITNESS WHEREOF, I have hereto set my hand and seal this 15th day of November, 1920.

CHARLES STEINBERG.

10

Signed, published and declared by the said Charles Steinberg, to be his last will and testament in the presence of us, who were present at the same time, and subscribed our names, as witnesses in the presence of the testator.

Charles Lohmann, 1224 Bloomfield St., Hoboken, N. J.

C. A. Lohmann, 1224 Bloomfield St., Hoboken, N. J.

20

June 28, 1924.

\$1,868.98

RECEIVED from the executor of the estate of Charles Steinberg, deceased, late of Hudson County, the sum of ONE THOUSAND EIGHT HUNDRED SIXTY EIGHT DOLLARS AND NINETY-EIGHT CENTS (\$1,868.98) for payment on account of Transfer Inheritance Tax and interest that may be chargeable against the estate of the above named decedent.

30

Treasurer.

Countersigned,

Comptroller.

KAPPES and HILLE,
17 Bergenline Ave.,
Town of Union, N. J.

40

C

July 24, 1924.

J. Emil Walscheid, Esq.,
 Dispatch Building,
 Town of Union, N. J.

10 Dear Sir:

Your letter of the 22d instant in re estate of Charles Steinberg, deceased, late of Hudson County, N. J., received.

In accordance with the report of Mr. Theodore Rurode, Special Investigator, the judgments held by Henry Bente and Margaretha Bente against the estate have been determined subject to a Transfer
 20 Tax. The completion of the assessment of the taxes chargeable against the estate is being withheld pending the receipt of an appraisal of real property situate in Monmouth County, N. J. The tax chargeable against the interest of the said persons will, however, be computed at the rate of eight per cent.

Very respectfully,

30

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

By
 State Supervisor of the Transfer
 Inheritance Tax Bureau.

FG:S

40

J. EMIL WALSCHEID,
 Counsellor at Law,
 Dispatch Building,
 Town of Union, N. J.
 Telephone 1008 Union.
 HENRY VOGLER.

July 22nd, 1924. 10

Office of State Comptroller,
 State House,
 Trenton, N. J.

Attention of Mr. Kelly.

In re: Estate of Charles Steinberg.

Gentlemen: 20

In the above entitled matter, I appeared before Mr. Rurode, a Special Investigator, with Mr. Henry Bente and Mrs. Margaretha Bente, each a holder of a judgment for \$15,000.00 against this estate, some days ago. Mr. and Mrs. Bente, at that time, were examined by Mr. Rurode.

At the time of the examination I asked Mr. Rurode to advise me of the time when he forwarded his conclusions in the premises and have received a letter from Mr. Rurode advising me that he has done so. 30

As I am interested for Mr. and Mrs. Bente in the action to be taken by the Comptroller in connection with the Inheritance Tax to be assessed in so far as these two judgments are concerned, will you not be good enough to advise me of whatever decision is made in the premises.

Very truly yours,

J. EMIL WALSCHEID. 40

JEW :W

THEODORE RURODE
WILLIAM S. RURODEAttorneys & Counsellors at Law
1 Exchange Place
Jersey City, N. J.

10

July 17th, 1924.

Comptroller of the Treasury,
Inheritance Tax Department,
Trenton, N. J.

Estate of Charles Steinberg.

Dear Sir:

20 Proceedings in the matter of the above estate were referred to me with directions to ascertain whether the claims for \$30,000 in favor of Mr. and Mrs. Bente were taxable gifts.

The schedules show that the Bentes obtained judgments for services rendered. This is not the fact. Their claims were based upon a promise made by the decedent to leave each of them \$15,000 by his will. The Will contained clauses effectuating this promise, but the bequests were revoked by erasure, and the Will probated as modified.

30 As it is a general rule that a Will executed pursuant to a contract cannot be revoked so as to relieve the testator of his promise, and that such promises may be enforced, suits based on such promise were instituted, and judgments obtained thereon, as will appear by the copy of the pleadings in the case of Margarethe Bente herewith returned, of which pleadings those in the case of Henry Bente are of the same tenor and effect, mutatis mutandis.

40 If the decedent had performed his contract to

leave each of the Bentes \$15,000 by his last Will and Testament, the estate or interest which they took would have been subject to the tax, and it makes no difference that he failed in his promise, for the law in that case enforces the contract, and in fact the devolution of the property takes place under the Will, and such devolution is subject to the transfer tax. Re: Kidds Estate, 188 N. Y., 274, 80 N. E. Rep., 925; Clark v. Treasurer &c. (Mass.), 115 N. E. Rep., 416. 10

All papers are herewith returned, together with proofs and a copy of the pleadings.

Very truly yours,

THEODORE RURODE,
Special Investigator.

ENCLS.

20

In the Matter
of
The Estate of CHARLES STEIN-
BERG, late of Hudson County.

30

Hearing in the matter of the estate of Charles Steinberg held before me as Special Investigator, this 16th day of July, 1924, in the presence of J. Emil Walscheid, attorney for Henry A. Bente and Margaretha Bente.

MARGARETHA BENTE, being duly sworn.

Q. You are the wife of Henry Bente? A. Yes, sir. 40

Return to Writ No. 1.

- Q. Where did you live in November, 1920? A. 734 Washington Street.
- Q. Hoboken? A. Yes, sir.
- Q. With your husband? A. Yes, sir.
- Q. You knew Charles Steinberg in his lifetime? A. Yes.
- 10 Q. Are you related to him? A. No, sir.
- Q. Is your husband related to him? A. No, sir.
- Q. You knew him in November, 1920, didn't you? A. Yes, he was living with me then.
- Q. How long had you known him? A. About 20 years.
- Q. How long had he lived with you? A. From April 16th, 1920 until May 6th, 1922.
- Q. When he died? A. No, he died November 2nd, 1922.
- 20 Q. Did he reside with you up to that time? A. Up to May 6th of that year.
- Q. Where did he die? A. He died in St. Mary's Hospital.
- Q. Was he taken from your house to the hospital? A. No, sir, we had to move and he went to board with Miss Pustkuchen at 932 Hudson Street until we got our place where we are living now, and while he was living at that place he was taken sick and went to the hospital.
- 30 Q. How old was Mr. Steinberg at the time of his death? A. Sixty.
- Q. What caused his death? A. Cirrhosis of the liver.
- Q. Was Mr. Steinberg a married man? A. No, sir.
- Q. Bachelor? A. Yes, sir.
- Q. What business was he in? A. Cigar salesman but he retired in October, 1920.
- Q. He had been a cigar salesman? A. Yes, but
- 40 he had retired.

Q. You say he went to live with you and your husband? A. Yes, in April 16, 1920.

Q. Will you tell us the circumstances and the reason he went to live with you? A. He was looking for a place and Mr. Bente told him that we had a room, so he said he would come down and take the room.

10

Q. Did you agree upon any board which he was to pay? A. No, just told him he could do as he liked. He gave me \$7 a week.

Q. Did he actually give you \$7 a week? A. Yes, sir.

Q. In the beginning? A. Yes, sir.

Q. Can you remember when he came to live with you? A. April 16, 1920.

Q. How long did he continue to pay you \$7 a week? A. Until shortly before he drew up his will, and then he gave me \$20 for a couple of weeks. He said he wasn't paying enough and he gave me \$20 a week. Then he asked me if I would give up my position and I did December 4, 1920, and give him a home and do his work, and I did up until the time he died.

20

Q. Was he in bad health? A. No, sir, but he wanted some one to be around all the time.

Q. Why? A. I don't know.

Q. Did he tell you why? A. He didn't say why.

30

Q. He asked you to give up your position? A. He did.

Q. That was in the latter part of 1920? A. That was Dec. 4, 1920.

Q. When you gave up your business? A. Yes, sir. He told me if I would give up my position and give him a home for the rest of his life, he would leave me \$15,000.

Q. By his will? A. Yes, sir.

Q. Was your husband there when he said that? A. Yes, sir.

40

Q. Did he say anything about your husband? What he was going to do for him? A. He said he would do the same for him, would give him \$15,000.00. That he would give us each \$15,000.

Q. What was your husband to do? A. Give him a home for the remainder of his life.

10 Q. Was he to pay board just the same? A. We didn't take any more money.

Q. Pursuant to that promise the will was drawn? A. Yes, sir.

Q. Did you see that Will? A. Yes, sir.

Q. Did your husband see it? A. Yes, it was drawn up in my dining room.

Q. Who drew it up? A. Mr. Steinberg himself.

20 Mr. Walscheid states that the last Will and Testament of Charles Steinberg was duly probated in Hudson County and contained the following clauses:

30 "5. To my friend Henry A. Bente, of 734 Washington Street, City of Hoboken, County of Hudson, State of New Jersey, I give and bequeath the sum of Fifteen thousand (\$15,000.00) Dollars and all my personal effects such as clothing, jewelry, books and other articles having only personal value.

"6. To Margarethe Bente of 734 Washington St., City of Hoboken, County of Hudson, State of New Jersey, wife of Henry Bente of the same place bequeath the sum of Fifteen thousand (\$15,000) Dollars."

40 Q. Did the Will provide the \$15,000 for yourself and your husband? A. Yes, sir.

Q. Did you see it executed? A. No, sir.

Q. You saw Mr. Steinberg write the Will out?

A. Yes, sir.

Q. But you didn't see it executed? A. No, sir.

Mr. Walscheid states that the clauses 5 and 6 above quoted were mutilated as follows: In paragraph 5 the words "the sum of Fifteen thousand (\$15,000) Dollars and" had had lines drawn through them. The whole of paragraph 6 had lines drawn through it at the time the Will was offered for probate.

10

The Will was received for probate with the mutilation, the effect being that the bequests to Margarethe Bente and Henry Bente were revoked as legacies under the Will.

20

Q. Did you bring suit against the executor of Charles Steinberg, for this \$15,000 after the Will was probated? A. Yes, sir.

Q. Who was your attorney? A. Mr. Walscheid.

Q. Did you recover a judgment against the executor? Did you get a verdict in your favor? A. Yes, sir.

Mr. Walscheid states that the judgment had not as yet been paid but no appeal has been taken and there are no exceptions on the record, and the executors are awaiting the action of the Comptroller in this matter in order to pay these claims. That this likewise applies to the claim of Henry Bente for \$15,000.

30

Mr. Walscheid agrees to furnish the Special Investigator with a complete copy of the pleadings in the case of Margarethe Bente against the executors of Charles Steinberg,

40

and states that the pleadings in the case of Henry Bente are exactly similar to the pleadings in the case of Margarethe Bente. Both verdicts were recovered May 16, 1924, and judgments entered the next day.

- 10 Q. After Mr. Steinberg went to live at this Hudson Street address because as you say you had to move, did he visit you, and did you visit him? A. We stopped down at Meyer's Hotel for a month and he used to come down two or three times a week, and then I got rooms with Mr. Steinberg in Miss Pustkuchen house, 932 Hudson St. We lived there from June 3rd until the 1st of August, 1922.

By Mr. Walscheid:

- 20 Q. That was during the time that the new apartment was being made ready? A. Yes, sir.

By Mr. Rurode:

Q. You hadn't up to that time obtained an apartment permanently? A. No, sir.

Q. In other words the apartment you intended to occupy was being renovated and gotten ready for occupancy? A. Yes, sir.

- 30 Q. Why was there such a delay in getting into your new apartment? A. It was very hard to get houses at the time. The housing situation was very bad, and we couldn't get a place.

Q. Why did you give up the apartment in which your formerly resided with Mr. Steinberg. A. We had to move on account of them altering the place.

Q. Did you receive notice that you had to get out? A. Yes, sir.

- 40 Q. Did you immediately begin to look for a new apartment? A. Yes, sir. Mr. Steinberg, Mr. Bente and myself went out to look for a place.

Q. And you had difficulty because of the housing situation to get an apartment? A. Yes, sir.

Q. When did you move into your new apartment? A. August 1, 1922.

Q. He didn't die until November 2, 1922. Why didn't he move with you? A. He was waiting for the cooler weather on account of climbing up three flights of stairs, and then too, the painting wasn't all finished. There were seven rooms to be fixed.

10

Q. How long was Mr. Steinberg in the hospital? A. He was about twenty-four hours in the hospital. He went there Wednesday morning and he was dead Thursday the next day.

Q. Did you see him? A. Yes, sir. I made arrangements for Mr. Steinberg in the hospital.

Q. You made arrangements for him to go there? A. No, I made arrangements in the hospital. He was in the public ward and I had him taken out.

20

Q. He was taken in the hospital as a charity patient and you immediately went there and had him transferred to the charge ward? A. Yes, sir, and when the Elks found out he was ill, then the Elks took care of him.

Q. Did Mr. Steinberg at any time after he drew this Will which you saw, refer to the Will again to you? A. He always told me I was well provided for.

30

Q. Tell me again what he promised to do for you in case you took care of him? A. He promised me \$15,000.

Q. How? A. In case anything happened to him, I was worth \$15,000. He would leave me \$15,000 and Mr. Bente \$15,000.

Q. By his Will? A. Yes, sir, by his Will.

Q. And you saw it written out? A. Yes, sir.

Q. And he promised to leave you \$15,000 and your husband \$15,000? A. Yes, sir.

40

Q. Did you see that Will after it had been mutilated by striking out the bequests to you and your husband? A. No, I did not.

Q. Did Mr. Steinberg ever tell you at any time that he had mutilated his Will and revoked the provisions to you and your husband of \$15,000 each?

10 A. No, sir. He always told me he left me \$15,000 and Mr. Bente \$15,000. Even a couple of days before he died he told me he had left us that. I went up to see him.

Q. He wasn't sick then, was he? A. No, sir.

Q. Where did he live then? A. 932 Hudson Street.

Q. With whom? A. Miss Pustkuchen.

Q. Was anybody with you when he told you that? A. Mr. Bente.

20 Q. Did Mr. Steinberg tell you where his Will was? A. No, he did not tell us where he kept his Will but he left a letter for Mr. Bente. That is the only information.

Q. Do you know where his Will was found? A. In the trunk. In his own trunk. I wasn't there at the time.

Q. Who took the Will? A. I don't know. I wasn't there when he took the Will.

30 Examination by Mr. Walscheid:

Q. This arrangement whereby Mr. Steinberg agreed to give you \$15,000 by his Will if you gave up your position, and took care of him for life, do you know when that was made? A. It was drawn up on a Saturday evening—the Saturday before November 15, 1920. The Will was executed on Monday. It was drawn up on a Saturday evening at my house.

40 Q. Who was present? A. Mr. Bente and I and Mr. Steinberg.

Q. And he wrote out the Will in your presence?
A. Yes, sir.

Q. And after he made that agreement with you, did he pay any more board to you after that? A. No, sir.

Q. After that he lived with you without paying board? A. Yes, sir.

10

Examination by Mr. Rurode:

Q. Only up to the time you had to get out of your apartment? A. May 6th, 1922.

Q. Approximately a little over a year and a half?
A. He was two years and one month with us from the beginning.

Q. But from the time he stopped paying board, it was about a year and a half, wasn't it? A. Yes, sir.

20

Examination by Mr. Walscheid:

Q. On May 6th, 1922, when you had to move, was there any agreement between you and Mr. Steinberg as to whether this arrangement was to be continued or to be taken up again? A. He always said he was coming back.

Q. When? A. As soon as we were settled.

30

Q. Did he help you pick out this new place? A. He was the one who suggested taking the place.

Q. Did you have a room for him? A. Two rooms, front room and bedroom.

Q. And you got possession of the new place on August 1st, 1922? A. Yes, sir.

Q. Did you take any of his property up to the place when you moved? A. Some of his stuff went up with ours.

40

HENRY BENTE, being duly sworn.

Examination by Mr. Rurode :

Q. Mr. Bente, you heard the testimony of your wife? A. Yes, sir.

10 Q. Are the facts with reference to Mr. Steinberg and the \$15,000 as your wife states? A. Yes, sir.

Q. How long did you know Mr. Steinberg? A. Over forty years.

Q. Did you see the Will executed? A. Yes, sir.

Q. Were you present when the Will was found after his death? A. No, sir.

Q. Did Mr. Steinberg ever tell you where the Will was kept? A. He left a letter of information addressed to me. The Will was in the tin box of the trunk. That was in the letter.

20 Q. And have you got that letter? A. No, sir, I gave it to Mr. Berger, the trust officer of the Trust Company of New Jersey.

Q. Can you remember what that letter stated? A. I can. He said that I should notify the undertaker A. J. Volk & Company, and that the Will was in the tin box in the trunk, and that he had a plot in the Greenwood Cemetery, and that his uncle and aunt were buried in the Grove Church Cemetery.

30 Q. How did you get that letter? A. Miss Pustkuchen gave it to me. He always carried it in his pocket and told her if anything happened to him, to give me the letter.

Q. Was the letter dated? A. There was no date on it. It was just a letter addressed to me.

Q. This Pustkuchen was the proprietress of the rooming house where he was living? A. Yes, sir.

Q. And she gave you the letter after his death? A. Yes, sir, she telephoned to me at business that he was taken to the hospital.

40 Q. How long after his death did you get the letter? A. The night he died.

Q. Did you go to the trunk to look for the Will?

A. No, sir, I did not because I had no right to I thought. He always told me to notify Mr. Berger of the Trust Company who was the executor, and I went to Mr. Berger's house and told him about it and handed him the letter.

Q. You don't know who went to the trunk to look for it? A. I suppose Mr. Berger did. He went down the next morning. 10

Mr. Walscheid states that at the time the case was tried in the Hudson County Circuit Court, there was testimony to the effect that continuedly during the whole period of time the decedent was separated temporarily from the Bentes, that he said his separation was temporary and that he was going back to them in the Fall when the cool weather set in; that he had made an arrangement with the Bentes to take care of him during his lifetime, and one witness testified that on the Saturday before he died, he said he was going back home to the Bentes. 20

Mr. Walscheid states that testimony to this effect was given by several witnesses.

THEODORE RURODE (Signed),
Special Investigator. 30

Summons.

New Jersey, ss.

10 (L. S.) THE STATE OF NEW JERSEY, to THE
TRUST COMPANY OF NEW JERSEY, as
executor of the Last Will and Testa-
ment of Charles Steinberg, deceased.

20 YOU ARE SUMMONED to answer the annexed
complaint of Margaretha Bente, in an action at
law in the Hudson County Circuit Court. And
take notice that unless you file your answer to
said complaint with the Clerk of our Hudson
County Circuit Court within twenty days from the
date of service upon you of this writ and the an-
nexed complaint, the plaintiff may proceed with
the suit and judgment may be entered against you.

WITNESS, Luther A. Campbell, Judge of our
Hudson County Circuit Court, at Jersey City, this
third day of July, A. D. one thousand nine hun-
dred and twenty-three.

30 (Signed) J. J. McGOVERN,
Clerk.

(Signed) J. EMIL WALSCHEID,
Attorney.

40

Complaint.

HUDSON COUNTY CIRCUIT COURT.

<p style="text-align: center;">MARGARETHA BENTE, Plaintiff,</p> <p style="text-align: center;">v.</p> <p style="text-align: center;">THE TRUST COMPANY OF NEW JERSEY, as executor of the Last Will and Testament of Charles Steinberg, deceased, Defendant.</p>	}	<p style="text-align: center;">Action at Law.</p>	10
---	---	---	----

Plaintiff, residing at No. 627 Washington Street, in the City of Hoboken, in the County of Hudson and State of New Jersey, says that:

20

FIRST COUNT.

1. On the fifteenth day of November, 1920, plaintiff was married to one Henry A. Bente and with her husband maintained a home in the City of Hoboken, in the County of Hudson.

2. On the fifteenth day of November, 1920, plaintiff, besides attending to her household duties in her home, was regularly employed in a position outside of her home in which she was regularly paid a salary of forty (\$40.00) dollars per week and upwards.

30

3. On the 15th day of November, 1920, Charles Steinberg entered into an agreement with Henry A. Bente, husband of plaintiff, whereby the said Henry A. Bente undertook to furnish to the said Charles Steinberg, until the death of the said Charles Steinberg, a home in the home of the said Henry A. Bente and of this plaintiff.

40

4. On the 15th day of November, 1920, Charles Steinberg did undertake, promise and agree to and with the said plaintiff that if she, plaintiff, would thenceforth give up her said position, in which she was then employed, and would thereafter devote all of her time and attention to the management and maintenance of the home of the said Henry A. Bente and of the said plaintiff, and in the said home would thereafter and until the death of the said Charles Steinberg take care of the needs of the said Charles Steinberg as a member of the family and would, in case of illness, nurse and take care of the said Charles Steinberg in the said home, that he, the said Charles Steinberg, would immediately upon the death of the said Charles Steinberg cause to be paid to the plaintiff the sum of Fifteen Thousand (\$15,000) Dollars, and that he, the said Charles Steinberg, would immediately make his Last Will and Testament providing therein for the payment to the plaintiff of the said sum of Fifteen Thousand (\$15,000) Dollars by and through a legacy for said sum of Fifteen Thousand (\$15,000) Dollars in said Last Will and Testament to be contained.

5. Plaintiff, in consideration of the premises, thereupon undertook, promised and agreed to and with the said Charles Steinberg forthwith to give up her said position in which she was then employed, and thereafter devote all of her time and attention to the management and maintenance of the home of the said Henry A. Bente and of the said plaintiff, and from thenceforth and until the death of the said Charles Steinberg in the home of the said Henry A. Bente and of the said plaintiff to take care of the needs of the said Charles Steinberg as a member of the family, and, in case

of illness, to nurse and take care of the said Charles Steinberg in the said home.

6. Plaintiff at all times during the life of the said Charles Steinberg fully performed all things by her to be performed under the terms of said undertakings, promises and agreements exchanged between the said Charles Steinberg and plaintiff and hereinbefore set out, whereby plaintiff became entitled to have from the estate of the said Charles Steinberg, upon the death of the said Charles Steinberg, the sum of Fifteen Thousand (\$15,000) Dollars. 10

7. Charles Steinberg died at the City of Hoboken, in the County of Hudson on the second day of November, 1922, leaving a Last Will and Testament wherein he appointed The Trust Company of New Jersey, the defendant, executor of his said estate, which said Last Will and Testament was admitted to probate by the Surrogate of the County of Hudson on November 20th, 1922. 20

8. The said defendant qualified as such executor and took up itself the burden of administering said estate.

9. The said Charles Steinberg did not, in and by his said Last Will and Testament, provide for the payment to the plaintiff of said sum of Fifteen Thousand (\$15,000) Dollars. 30

10. On March 4th, 1923, plaintiff served upon The Trust Company of New Jersey, as executor of the Last Will and Testament of Charles Steinberg, deceased, a written claim claiming payment of said sum of Fifteen Thousand (\$15,000) Dollars hereinbefore referred to. 40

11. On April 5th, 1923, the defendant thereupon served upon plaintiff a written notice that it disputes the claim of plaintiff amounting to Fifteen Thousand (\$15,000) Dollars against the estate of Charles Steinberg, deceased, and plaintiff thereupon and within three months from the time of services of such notice of dispute upon her instituted this suit.

SECOND COUNT.

1. Paragraph 1 of the First Count is hereby repeated.

2. Paragraph 2 of the First Count is hereby repeated.

20 3. Paragraph 3 of the First Count is hereby repeated.

4. Paragraph 4 of the First Count is hereby repeated.

30 5. Paragraph 5 of the First Count is hereby repeated, and the said Charles Steinberg, in pursuance of the undertakings, promises and agreements thus made and exchanged between the said Charles Steinberg and plaintiff thereupon and on the 15th day of November, 1920, made, published and declared his Last Will and Testament in and whereby he, among other things bequeathed to plaintiff the sum of Fifteen Thousand (\$15,000) Dollars in words as follows:

40 "6. To Margaretha Bente, of No. 730 Washington Street, City of Hoboken, County of Hudson and State of New Jersey, wife of "Henry Bente of the same address, I do give

Complaint.

“and bequeath the sum of Fifteen Thousand
“(\$15,000) Dollars.”

6. Paragraph 6 of the First Count is hereby repeated.

7. Charles Steinberg died at the City of Hoboken, in the County of Hudson, on the second day of November, 1922, leaving a Last Will and Testament hereinbefore referred to and therein appointed The Trust Company of New Jersey, the defendant, executor of said estate, which said Last Will and Testament was admitted to probate by the Surrogate of the County of Hudson on November 20th, 1922.

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8. Paragraph 8 of the First Count is hereby repeated.

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9. Paragraph 10 of the First Count is hereby repeated.

10. Paragraph 11 of the First Count is hereby repeated.

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The plaintiff will demand upon the First Count the sum of Fifteen Thousand (\$15,000) Dollars besides interest and costs.

The plaintiff will demand upon the Second Count the sum of Fifteen Thousand (\$15,000) Dollars besides interest and costs.

(Signed) J. EMIL WALSCHEID,
Attorney for Plaintiff.

40

Schedule "D"—Annexed to Foregoing Complaint.

State of New Jersey.
Transfer Inheritance Tax
Resident Decedent.

Schedule "D."

- 10 If notes, brokerage accounts or other claims are secured by collateral, describe the collateral pledged, with its value as of the date of death of the decedent and state whether or not said collateral is included among the assets disclosed in Schedule "B". If collateral is not pledged, state after each loan "no collateral pledged".

	Debt or Claim of	Nature of Same	Amount	CAUTION (Do not write in this Space)
20		Funeral expenses	\$490.31	\$490.31
		Administration expenses (estimated)	350.00	350.00
	Kappes & Hille	Counsel Fees	3,000.00	3,000.00
		Executor's or Administra- tor's Commissions	1,356.99	1,356.99
		(Commissions must not be estimated and claimed unless a final account is to be filed with the Surrogate.)		
30		(Detail other debts)		
	Gertrude Pustkuchen	Judgment entered in N. J. Supreme Court, May 1, 1924, on verdict in suit for personal services, nursing, etc.	750.00	750.00
40		Taxed costs	49.04	49.04

Schedule "D"—Annexed to Foregoing Complaint.

			CAUTION (Do not write in this Space)
Debt or Claim of	Nature of Same	Amount	
Henry A. Bente	Judgment filed in Hudson County Clerk's Office, May 20, 1924, on verdict in action for contract for legacy of \$15,000 under promise to furnish decedent a home for term of his natural life	15,000.00	15,000.00
	Taxed costs on same	73.48	73.48
Margaretha Bente	Judgment on verdict in action to give up lucrative position and devote time, service, nursing and care to decedent for term of his natural life, entered in Hudson County Clerk's Office on May 20th, 1924	15,000.00	15,000.00
	Taxed costs on same	47.38	47.38
			36,117.20
			\$6,117.20

Answer.

HUDSON COUNTY CIRCUIT COURT.

10

MARGARETHA BENTE,
Plaintiff,

v.

THE TRUST COMPANY OF NEW
JERSEY, as executor of the
Last Will and Testament of
Charles Steinberg, deceased,
Defendant.

Action at
Law.

20

Defendant, The Trust Company of New Jersey,
as executor of the Last Will and Testament of
Charles Steinberg, deceased, having its principal
office in the City of Hoboken, in the County of
Hudson and State of New Jersey, says that:

FOR ANSWER TO FIRST COUNT.

30

1. It has no knowledge or information as to the
statements in paragraphs one and two and there-
fore denies the same.

2. It denies paragraphs three, four, five and six.

3. It admits paragraphs seven, eight, nine, ten
and eleven.

FOR ANSWER TO SECOND COUNT.

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1. It makes the same answers to paragraphs
one, two three, four, five and six, as made to said
paragraphs in the first count.

2. It admits that said Charles Steinberg died at the City of Hoboken, Hudson County, on November 2nd, 1922, leaving a Last Will and Testament which was duly admitted to probate by the Surrogate of the County of Hudson on November 20th, 1922, but denies the other allegations contained in paragraph seven.

10

3. It admits paragraphs eight, nine and ten.

OBJECTIONS IN POINT OF LAW FIRST
SEPARATE DEFENSE.

Defendant will object that the complaint discloses no cause of action.

20

SECOND SEPARATE DEFENSE.

Defendant will object that the causes of action in the complaint herein are inconsistent and that one or the other count should be struck out and does hereby give notice to the plaintiff that it will at or before the trial move for the striking out of the said complaint.

KAPPE & HILLE, 30
Attorneys of Defendant.

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Reasons, Writ No. 1.

(Filed November 25, 1924.)

NEW JERSEY SUPREME COURT.

10

HENRY BENTE,
Prosecutor,

v.

NEWTON A. K. BUGBEE, Comp-
troller of the Treasury of the
State of New Jersey,
Defendant.On Certiorari
Reasons.

20

The prosecutor above named hereby states the following reasons for vacating and setting aside the proceedings brought into court by the writ of certiorari in the above entitled cause.

30

1. The defendant, Newton A. K. Bugbee, Comptroller of the Treasury of the State of New Jersey, was without jurisdiction to impose the transfer inheritance tax upon a certain judgment at law obtained by the prosecutor, Henry Bente, against the Estate of Charles Steinberg, deceased, herein brought up for review.

2. The imposition of the said transfer inheritance tax was wholly illegal, erroneous and unlawful for divers other reasons.

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J. EMIL WALSCHEID,
Attorney for Prosecutor.

Writ No. 2.**THE STATE OF NEW JERSEY.**

New Jersey, ss.:

To: NEWTON A. K. BUGBEE, Comptroller 10
of the Treasury of the State of New
[L. S.] Jersey. GREETING:

We being willing for certain reasons, to be certified of a certain appraisal and assessment of Newton A. K. Bugbee, Comptroller of the Treasury, of the State of New Jersey, made on the 19th day of August, 1924, assessing a tax of \$1,200.00 under color of the transfer inheritance tax, upon a judgment at law in the Hudson County Circuit Court, 20
against The Trust Company of New Jersey, as executor of the estate of Charles Steinberg, deceased, obtained by Margaretha Bente on May 19, 1924, for the sum of Fifteen thousand (\$15,000) Dollars;

Do command you that the appraisal and assessment and all proceedings taken thereon or pursuant thereto, made or pretended to be made, together with all proceedings had and done by the said Newton A. K. Bugbee, Comptroller of the Treasury, leading up to the making of said appraisal and assessment, and all things touching or 30
concerning the same, as they may appear of record before you by whatsoever name the same may be called therein, to our Supreme Court of Judicature at Trenton, on the 25th day of October, inst., you do certify and send, together with writ, that therein may be done what of right and according to law ought to be done.

Witness, WILLIAM S. GUMMERE, Esquire, Chief 40

Return to Writ No. 2.

Justice of our Supreme Court of Judicature at
Trenton, this 14th day of October, 1924.

EDWARD J. KELLEHER,
Clerk.

10 J. EMIL WALSCHEID,
Attorney.

A true copy.

EDWARD J. KELLEHER,
Clerk.

20

Endorsement on Writ No. 2.

Allocatur

Let this writ issue—file October 11/24.

JAMES F. MINTURN,
J. S. C.

30

Return to Writ No. 2.

The return to writ No. 2 is the same as the re-
turn to writ No. 1, except that same is made in the
matter of Margaretha Bente v. Newton A. K. Bug-
bee, Comptroller of the Treasury of the State of
New Jersey.

40

**Stipulation as to Return and
Argument of Writs.**

NEW JERSEY SUPREME COURT.

<p style="text-align: center;">HENRY BENTE, Prosecutor,</p> <p style="text-align: center;">v.</p> <p>NEWTON A. K. BUGBEE, Comptroller of the Treasury of the State of New Jersey, Defendant.</p>		<p>On Certiorari Suit No. 1.</p>	10
<p style="text-align: center;">MARGARETHA BENTE, Prosecutor,</p> <p style="text-align: center;">v.</p> <p>NEWTON A. K. BUGBEE, Comptroller of the Treasury of the State of New Jersey, Defendant.</p>		<p>On Certiorari Suit No. 2.</p> <p>Stipulation.</p>	20

IT IS HEREBY STIPULATED AND AGREED that the writs above mentioned be argued as one writ and that on the printing of the State of the Case to be submitted on the argument of said writs, the return to the writ filed in the case of Margaretha Bente as prosecutor, need not be printed in the State of the Case as submitted for argument and that the decision rendered in the case argued, shall be accepted as the decision in the other. 30

Dated, February 13th, 1925.

J. EMIL WALSCHEID,
Attorney for Prosecutors.

EDWARD L. KATZENBACH,
Attorney for Defendant. 40

Reasons, Writ No. 2.

(Filed November 25, 1924.)

NEW JERSEY SUPREME COURT.

10

MARGARETHA BENTE,
Prosecutor,

v.

NEWTON A. K. BUGBEE, Comp-
troller of the Treasury of the
State of New Jersey,
Defendant.

On Certiorari
Reasons.

20

The prosecutor above named hereby states the following reasons for vacating and setting aside the proceedings brought into court by the writ of certiorari in the above entitled cause.

30

1. The defendant, Newton A. K. Bugbee, Comptroller of the Treasury of the State of New Jersey, was without jurisdiction to impose the transfer inheritance tax upon a certain judgment at law obtained by the prosecutor, Margaretha Bente, against the Estate of Charles Steinberg, deceased, herein brought up for review.

2. The imposition of the said transfer inheritance tax was wholly illegal, erroneous and unlawful for divers other reasons.

40

/s/ J. EMIL WALSCHEID,
Attorney for Prosecutor.

**Stipulation as to Pleadings in
Supreme Court Action.**

It is further stipulated that the pleadings and rule for judgment in the case of Henry Bente v. The Trust Company of New Jersey, as executor, etc., are as follows:

10

Summons.

“New Jersey, ss.

THE STATE OF NEW JERSEY, to THE
TRUST COMPANY OF NEW JERSEY, as
(Seal) executor of the Last Will and Testa-
ment of Charles Steinberg, deceased.

26

YOU ARE SUMMONED to answer the annexed complaint of Henry A. Bente, in an action at law in the Hudson County Circuit Court. And take notice that unless you file your answer to said complaint with the Clerk of our Hudson County Circuit Court within twenty days from the date of service upon you of this writ and the annexed complaint, the plaintiff may proceed with the suit and judgment may be entered against you.

30

WITNESS, Luther A. Campbell, Judge of our Hudson County Circuit Court, at Jersey City, this third day of July, A. D. one thousand nine hundred and twenty-three.

J. J. McGOVERN,
Clerk.

J. EMIL WALSCHEID,
Attorney.”

40

Complaint.

“HUDSON COUNTY CIRCUIT COURT.

10	<p style="text-align: center;">HENRY A. BENTE, Plaintiff,</p> <p style="text-align: center;">v.</p> <p>THE TRUST COMPANY OF NEW JERSEY, as executor of the Last Will and Testament of Charles Steinberg, deceased, Defendant.</p>	} Action at Law.
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20 Plaintiff, residing at No. 627 Washington Street,
in the City of Hoboken, in the County of Hudson
and State of New Jersey, says that:

FIRST COUNT.

1. On the fifteenth day of November, 1920, plain-
tiff was married to one Margaretha Bente and with
his wife maintained a home in the City of Hoboken,
in the County of Hudson.

30 2. On the fifteenth day of November, 1920,
Charles Steinberg did undertake, promise and
agree to and with the plaintiff that if he, plaintiff,
would thenceforth and up to the time of the death
of the said Charles Steinberg furnish to the said
Charles Steinberg a home in the home of the plain-
tiff, that he, the said Charles Steinberg, would im-
mediately upon the death of the said Charles
Steinberg cause to be paid to the plaintiff the sum
of Fifteen Thousand (\$15,000) Dollars and that
40 he, the said Charles Steinberg, would immediately
make his Last Will and Testament providing there-

Complaint.

in for the payment to the plaintiff of the said sum of Fifteen thousand (\$15,000) Dollars by and through a legacy for said sum of Fifteen Thousand (\$15,000) Dollars in the said Last Will and Testament to be contained.

3. Plaintiff, in consideration of the premises, thereupon undertook, promised and agreed to and with the said Charles Steinberg to furnish to the said Charles Steinberg, until the death of the said Charles Steinberg, a home in the home of plaintiff. 10

4. Charles Steinberg died at the City of Hoboken, in the County of Hudson, on the second day of November, 1922, leaving a Last Will and Testament wherein he appointed The Trust Company of New Jersey, the defendant, executor of his said estate, which said Last Will and Testament was admitted to probate by the Surrogate of the County of Hudson on November 20th, 1922. 20

5. Plaintiff, at all times during the life of the said Charles Steinberg fully performed all things by him to be performed under the terms of said undertakings, promises and agreements exchanged between the said Charles Steinberg and plaintiff and hereinbefore set out, whereby plaintiff became entitled to have from the estate of the said Charles Steinberg the said sum of Fifteen Thousand (\$15,000) Dollars. 30

6. The said Charles Steinberg did not, in and by his Last Will and Testament, provide for the payment to the plaintiff of the said sum of Fifteen Thousand (\$15,000) Dollars.

7. On March 4th, 1923, plaintiff served upon The Trust Company of New Jersey, as executor of the 40

Complaint.

Last Will and Testament of Charles Steinberg, deceased, a written notice of the claim, claiming payment of said sum of Fifteen Thousand (\$15,000) Dollars hereinbefore referred to.

- 10 8. On April 5th, 1923, the defendant thereupon served upon plaintiff a written notice that it disputes the claim of plaintiff amounting to Fifteen Thousand (\$15,000) Dollars against the estate of Charles Steinberg, deceased, and plaintiff thereupon and within three months from the time of service of such notice of dispute upon him instituted this suit.

SECOND COUNT.

- 20 1. Paragraph 1 of the First Count is hereby repeated.

2. Paragraph 2 of the First Count is hereby repeated.

- 30 3. Plaintiff, in consideration of the premises thereupon undertook, promised and agreed to and with the said Charles Steinberg to furnish to the said Charles Steinberg, until the death of the said Charles Steinberg, a home in the home of plaintiff, and the said Charles Steinberg, in pursuance of the undertakings, promises and agreements thus made and exchanged between the said Charles Steinberg and plaintiff, thereupon on the fifteenth day of November, A. D. 1920, made, published and declared his Last Will and Testament in and whereby he, among other things, bequeathed to plaintiff the sum of Fifteen Thousand (\$15,000) Dollars in words as follows:

- 40 5. To my friend, Henry A. Bente, 730

Washington Street, City of Hoboken, County of Hudson and State of New Jersey, I give and bequeath the sum of Fifteen Thousand (\$15,000) Dollars and all my personal effects, such as clothing, jewelry, books and other articles having only personal value.'

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4. Charles Steinberg died at the City of Hoboken, in the County of Hudson, on the second day of November, 1922, and the Last Will and Testament of the said Charles Steinberg, containing the bequest hereinbefore set out, was admitted to probate by the Surrogate of the County of Hudson on November 20th, 1922.

5. Plaintiff, at all times during the life of the said Charles Steinberg, performed all things by him to be performed under the terms of the said undertakings, promises and agreements exchanged between the said Charles Steinberg and plaintiff and hereinbefore set out, whereby plaintiff became entitled to have from the estate of the said Charles Steinberg the said sum of Fifteen Thousand (\$15,000) Dollars.

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6. In and by said Last Will and Testament the said Charles Steinberg did appoint The Trust Company of New Jersey, the defendant, executor of his Last Will and Testament; said defendant, on November 20th, 1922, qualified as such executor and entered into and is now discharging its duties as such executor.

30

7. On March 4th, 1923, plaintiff served upon The Trust Company of New Jersey, as executor of the Last Will and Testament of Charles Steinberg, deceased, a written notice of claim, claiming

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payment of said sum of Fifteen Thousand (\$15,000) Dollars.

10 8. On April 5th, 1923, the defendant thereupon served upon plaintiff a written notice that it disputes the claim of plaintiff amounting to Fifteen Thousand (\$15,000) Dollars against the estate of Charles Steinberg, deceased, and plaintiff thereupon and within three months from the time of service of such notice of dispute upon him instituted this suit.

The plaintiff will demand upon the First Count the sum of Fifteen Thousand (\$15,000) Dollars besides interest and costs.

20 The plaintiff will demand upon the Second Count the sum of Fifteen Thousand (\$15,000) besides interest and costs.

J. EMIL WALSCHEID,
Attorney for Plaintiff."

Answer.

"HUDSON COUNTY CIRCUIT COURT.

30 HENRY A. BENTE,
Plaintiff,

v.

THE TRUST COMPANY OF NEW
JERSEY, as executor of the Last
Will and Testament of Charles
Steinberg, deceased,
Defendant.

Action at
Law.

40 Defendant, The Trust Company of New Jersey,
as executor of the Last Will and Testament of

Charles Steinberg, deceased, having its principal office in the City of Hoboken, in the County of Hudson and State of New Jersey, says that:

FOR ANSWER TO FIRST COUNT.

1. It has no knowledge or information as to the statements in paragraph one and therefore denies the same. 10
2. It denies the second paragraph.
3. It denies the third paragraph.
4. It admits the fourth paragraph.
5. It denies the fifth paragraph.
6. It admits the sixth paragraph.
7. It admits the seventh and eighth paragraphs. 20

SECOND COUNT.

1. For answers to paragraphs one and two of the Second Count, defendant makes the same answer as made in the said paragraphs of the First Count.

2. It denies the third paragraph.

3. It admits that said Charles Steinberg died at the City of Hoboken, Hudson County, on November 2nd, 1922, leaving a Last Will and Testament which was duly admitted to probate by the Surrogate of the County of Hudson on November 20th, 1922, but denies the other allegations contained in paragraph four. 30

4. It denies paragraph five.

5. It admits paragraphs six, seven and eight. 40

Objections in Point of Law.**FIRST SEPARATE DEFENSE.**

10 Defendant will object that the complaint discloses no cause of action.

SECOND SEPARATE DEFENSE.

20 Defendant will object that the causes of action in the complaint herein are inconsistent and that one or the other count should be struck out and does hereby give notice to the plaintiff that it will at or before the trial move for the striking out of the said complaint.

KAPPES & HILLE,
Attorneys for Defendant.”

30 Said suit was duly tried in the Hudson County Circuit Court before Judge Henry E. Ackerson, Jr., and a jury, and resulted in a verdict for the plaintiff in the sum of Fifteen Thousand Dollars (\$15,000), upon which verdict the following rule for judgment was entered:

40

Rule for Judgment.

"HUDSON COUNTY CIRCUIT COURT.

<p style="text-align: center;">HENRY A. BENTE, Plaintiff,</p> <p style="text-align: center;">v.</p> <p>THE TRUST COMPANY OF NEW JERSEY, as executor of the Last Will and Testament of Charles Steinberg, deceased, Defendant.</p>	}	Action at Law.	10
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This action having been tried before Judge Henry E. Ackerson, Jr., with a jury in the presence of counsel of the respective parties on May 14th and May 15th, A. D. 1924, and the jury having returned a verdict in favor of the plaintiff for Fifteen Thousand (\$15,000) Dollars damages, 20

IT IS ORDERED that judgment final be entered in favor of the plaintiff, Henry A. Bente, and against the defendant, The Trust Company of New Jersey, as executor of the Last Will and Testament of Charles Steinberg, deceased, for the sum of Fifteen Thousand (\$15,000) Dollars, and the plaintiff's costs to be taxed. 30

Rule actually entered this 15th day of May, A. D. 1924, on Motion of J. Emil Walscheid, Attorney for Plaintiff."

It is against this judgment in the sum of Fifteen Thousand Dollars (\$15,000) that the Comptroller has levied an inheritance tax of \$1,200.00, which inheritance tax is herewith brought up for review. 40

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Opinion of Supreme Court.

(Filed Aug. 6, 1926.)

HENRY BENTE,
Prosecutor,

v.

10

NEWTON A. K. BUGBEE, Com-
ptroller of the Treasury of the
State of New Jersey,
Defendant.

MARGARETHA BENTE,
Prosecutor,

v.

20

NEWTON A. K. BUGBEE, Com-
ptroller of the Treasury of the
State of New Jersey,
Defendant.

Argued May 6, 1925. Decided August 6, 1925.

Wills—Inheritance Tax—Testator Entered into a
Contract with Plaintiffs to Leave a Certain 30
Sum to Them in His Will in Consideration of
a Home During the Remainder of His Life—
Upon His Death the Bequests Were Found to
Have Been Crossed Out of the Will—Judg-
ment on the Contract was Awarded Plaintiffs
—State Thereupon Assessed an Inheritance
Tax Which is Here Contested on the Ground
That the Act Does Not Contemplate Taxation
of Judgments—Held, That Judgment was Not
on Contract to Recover for Services Rendered, 40

Opinion of Supreme Court.

but for the Fulfillment of the Contract to Leave the Stipulated Sum in the Will, That Such Sum Would Include the Payment of the Tax by the Beneficiary.

On Writs of certiorari.

10

Before—

Justices TRENCHARD, KATZENBACH and LLOYD.

For the prosecutors, J. EMIL WALSCHEID.

For the defendant, EDWARD L. KATZENBACH and HARRY R. COULOMB.

PER CURIAM.

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The writs of certiorari in the above cases were allowed to review the action of the comptroller of the treasury of the State of New Jersey in imposing a transfer inheritance tax upon the amount of two judgments recovered by Henry Bente and Margaretha Bente against the Trust Company of New Jersey, executor of the last will and testament of Charles Steinberg. It was stipulated, as each case presents the same question, that the record in the case of Henry Bente should be presented to the court and the decision reached in this case should control the disposition of the Margaretha Bente case.

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The question presented is unique and interesting. Charles Steinberg, the decedent, was a man possessed of considerable means. He had been a cigar salesman and had retired from business. He desired a home. He entered into an agreement with Henry Bente and Margaretha Bente, husband and wife, who live in Hoboken, by which they agreed to furnish a home for him for the remainder of his

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life, provided he would leave to each of them in his will the sum of \$15,000. In accordance with this agreement, Mr. Steinberg, on November 15th, 1920, executed his will, in which he left to Henry Bente \$15,000 and his personal effects, and to Margaretha Bente the sum of \$15,000. He then took up his residence with Mr. and Mrs. Bente. They decided to move into a larger house. Mr. Steinberg temporarily took a room in the house of a Miss Pustkuchen. This arrangement appears to have been entered into by mutual consent. Mr. Steinberg did not again take up his residence with the Bentes. This was in part due to an illness which commenced in August, 1922, and in part due to the fact that he was waiting for cooler weather and the completion of the apartment of the Bentes. The new apartment was on the third floor. There was no elevator service. This was another reason for not resuming his residence with the Bentes. On November 1st, 1922, Mr. Steinberg became worse. He was taken to a hospital on that day and died on the following day. When his will was opened it was discovered that there was a line drawn through the bequests to Henry Bente and Margaretha Bente. In the bequest to Margaretha Bente the whole clause was eliminated. In the bequest to Henry Bente only the \$15,000 item was eliminated. The clause bequeathing his personal effects to Henry Bente was not erased. Mr. and Mrs. Bente then each presented a claim to the executor of the Steinberg estate for the sum of \$15,000. Notice was given to each of them that the claim was contested. Suits were instituted by Mr. and Mrs. Bente in the Hudson County Circuit Court. Each recovered a judgment of \$15,000 against the executor of Mr. Steinberg's will. The comptroller of the treasury then assessed a trans-

fer inheritance tax upon the sums represented by the judgments.

10 Counsel for the prosecutors contends that these judgments cannot, under the provisions of the Inheritance Tax Act, be taxed. The argument advanced is that the act enumerates in its title the methods for the transfer of property to which the scope of the act is limited; that these methods are eight in number and are the transfers of property by (1) devise, (2) bequest, (3) descent, (4) distribution, (5) gift, (6) deed, (7) grant, (8) bargain and sale; that a judgment at law is not a transfer of property and does not fall within any of the classifications above set forth, and, therefore, the act cannot be made to apply to a judgment at law. It is further insisted that the body of the act contains further limitations upon its scope, which prevents the proposed tax falling within the purview of the body of the act.

20 The prosecutors present as their first point that the comptroller was without jurisdiction to impose a tax because the tax levied against judgments recovered to obtain debts due and owing by the estate of the decedent which is not a transfer of property within the meaning of the act. The argument of the prosecutors is plausible and ingenious, but overlooks, we think, one important element, namely, that the agreement between the Bentes and Steinberg contained the provision that the bequests were to be embodied in the will of Steinberg, and had they remained in the will the amounts bequeathed would have been subject to the inheritance tax. The effect of the judgments, it seems to us, was merely to restore the status as it would have been had the erasures of the bequests set forth in the will not been made. The judgments could not have been obtained for the sums mentioned had it

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not been for the agreement by which the amount the Bentes were to receive was to be bequeathed to the Bentes for the services they were to render to Steinberg. The agreement was not to pay to each \$15,000 at the death of Mr. Steinberg, but to leave to each a bequest for that amount. The reasonable value of the services rendered were doubtless below the amount which were recovered in the acts at law. This recovery was possible because of the form which the contract took. The judgments were the medium by which it was possible to carry into effect the terms of the agreement between Steinberg and the Bentes. The contract, if carried out, in its original form would have resulted in a tax against the bequests. It seems illogical that the mere change of the vehicle by which the contract is consummated should exempt the Bentes from the payment of a tax which they would have had to pay if Steinberg had not made the erasures in his will. The effect of the judgments was not to set aside the will, but to convert those who would receive, by reason of the erasures, the bequests originally intended for the Bentes into trustees for the Bentes to the extent of such bequests. We do not see how the Bentes are entitled to receive more as a result of what occurred than they would have received as legatees under the will if the contract as originally made had been executed by leaving in the will the bequests originally made. The rights of the Bentes could arise no higher than those which they obtained under the agreement as made. If the argument advanced in behalf of the prosecutors is accepted the Bentes would obtain an advantage, namely, exemption from the imposition of the tax, which they would not have obtained had the agreement been carried out as planned and intended by the parties. It is conceded that if no

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erasures in the will had been made the legacies would be subject to the tax. The obtaining of judgments was a method of procedure to establish the contents of the will as originally drafted. The effect of the judgments was to restore the original provisions of the will. Under the will the bequests were taxable. We think they are taxable in the manner proposed by the state and fall within the provisions of the title and body of the act as property transferred by bequest.

The prosecutors also contend that the tax is levied upon a service rendered by the prosecutors and for that reason is untaxable. In other words, it is not a succession tax. The theory of a succession tax is payment to the state for the privilege of exercising the right of testamentary disposition, etc. The prosecutors advance the argument that the consideration paid by the Bentes, namely, the board and lodging to be furnished Steinberg, takes their cases out of the class of taxable cases and places them in the same position as where, for example securities have been transferred to a woman under a prenuptial marriage settlement. Cases to this effect are cited upon the brief presented for the prosecutors. This argument, we think, overlooks a very essential feature of the contract made in the cases under consideration. The element overlooked is that while the Bentes were to furnish during the lifetime of Steinberg a home for him, payment was to be in the form of bequests to be made in his will. Payment was contingent upon the death of Steinberg. This provision takes the agreement out of the ordinary class of agreements for services rendered which, if reduced to a judgment, would be exempt from taxation. If the plaintiffs in the actions instituted had not been able to introduce in evidence the will with its erasures

showing the contract to make bequests, in consideration of the services to be rendered by them, the judgments for \$15,000 each would not have been obtainable. If the prosecutors had sought relief in equity by asking to have the cancellations made in the will expunged and the bequests in the will as originally drafted restored, it could not be gainsaid that the bequests would not be subject to the tax. The adoption of another route (the judgments) to enforce the carrying out of the agreement, cannot, in our opinion, close the door to the state exercising the right of taxation, which it concededly would have had had Mr. Steinberg not attempted to erase the testamentary provision made to carry out the contract with the prosecutor. 10

We have not commented upon the numerous cases cited in the briefs, as all present a state of facts differing in some measure from the facts of the cases under consideration. The principles involved in the cases cited we feel we have applied to the instant case. 20

The taxes assessed by the comptroller are affirmed with costs.

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Rule for Judgment.

(Entered, Sept. 17, 1926.)

NEW JERSEY SUPREME COURT.

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MARGARETHA BENTE,
Prosecutor,

v.

NEWTON A. K. BUGBEE, Comptroller of the Treasury of the State of New Jersey,
Defendant.

On Certiorari

Rule for Judgment.

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The Court having inspected the proceedings returned with the certiorari in this cause, the reasons assigned for reversal and having heard the argument of counsel thereon and considered the same DOES ORDER that said proceedings be in all things affirmed with costs.

Entered September 17th, 1926, on motion of Edward L. Katzenbach, Attorney General of New Jersey, Attorney for Defendant.

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Rule for Judgment.

(Entered, Sept. 17, 1926.)

NEW JERSEY SUPREME COURT.

<p style="text-align: center;">MARGARETHA BENTE, Prosecutor,</p> <p style="text-align: center;">v.</p> <p style="text-align: center;">NEWTON A. K. BUGBEE, Com- ptroller of the Treasury of the State of New Jersey, Defendant.</p>	}	<p style="text-align: center;">On Certiorari</p> <p style="text-align: center;">Rule for Judgment.</p>	<p>10</p>
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The Court having inspected the proceedings re- 20
turned with the certiorari in this cause, the reasons
assigned for reversal and having heard the argu-
ment of counsel thereon and considered the same
DOES ORDER that said proceedings be in all
things affirmed with costs.

Entered September 17th, 1926, on motion of
Edward L. Katzenbach, Attorney General of New
Jersey, Attorney for Defendant.

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Stipulation.

(Filed, Dec. 24, 1926.)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

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HENRY BENTE,
Prosecutor-Appellant,

v.

NEWTON A. K. BUGBEE, Com-
ptroller of the Treasury of the
State of New Jersey,
Defendant-Appellee.On Certiorari
on Appeal
Suit No. 1.

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MARGARETHA BENTE,
Prosecutor-Appellant,

v.

NEWTON A. K. BUGBEE, Com-
ptroller of the Treasury of the
State of New Jersey,
Defendant-Appellee.

Stipulation.

On Certiorari
on Appeal
Suit No. 2.

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IT IS HEREBY STIPULATED AND
 AGREED that the appeals above mentioned be
 argued as one appeal and that on the printing of
 the State of the Case and Briefs to be submitted
 on the argument of said appeals, the State of the
 Case and Briefs submitted in the case of Henry
 Bente as prosecutor-appellant shall be accepted as
 the State of the Case and Briefs as submitted for
 argument of the case of Margaretha Bente, prose-
 cutor-appellant, and that the decision rendered in

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Stipulation.

the case argued, shall be accepted as the decision in the other.

Dated, December 21st, 1926.

J. EMIL WALSCHEID,
Attorney for Prosecutors-Appellants. 10

E. L. KATZENBACH,
Attorney for Defendant-Appellee.

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[45245]

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The case argued shall be argued in the order in which the names of the parties are set out in this order.

Dated, December 21st, 1911.

J. EDWARD W. ALDRICH

Attorney for Respondent

W. E. ALLEN

Attorney for Petitioner

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New Jersey Court of Errors and Appeals

HENRY BENTE, <i>Prosecutor-Appellant,</i>	}	Suit No. 1.	10
<i>vs.</i>			
NEWTON A. K. BUGBEE, COMP- TROLLER OF THE TREASURY OF THE STATE OF NEW JERSEY, <i>Defendant-Appellee.</i>	}	On Certiorari. On Appeal from Supreme Court.	
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MARGARETHA BENTE, <i>Prosecutor-Appellant,</i>	}	Suit No. 2.	20
<i>vs.</i>			
NEWTON A. K. BUGBEE, COMP- TROLLER OF THE TREASURY OF THE STATE OF NEW JERSEY, <i>Defendant-Appellee.</i>	}		

Brief of Defendant-Appellee.

These are appeals by prosecutors in Certiorari from judgments of the Supreme Court (Trenchard, Katzenbach and Lloyd, JJ.) affirming a certain transfer inheritance tax assessed by the State of New Jersey against Henry Bente and Margaretha Bente. The objections alleged in each of the cases are identical, and said cases are, therefore, combined on the brief. 30

The assessment is charged by the appellants to be erroneous in the following respects:

1. Because, the defendant, N. A. K. Bugbee, Comptroller of the Treasury of the State of New Jersey, was without jurisdiction to impose the transfer inheritance tax upon certain judgments at law obtained by the prosecutors, Henry Bente and Margaretha Bente, against the estate of Charles Steinberg, deceased.
2. Because, the imposition of the said transfer tax was
10 wholly illegal, erroneous and unlawful for divers other reasons.

STATEMENT OF FACTS.

The records in this case disclose the fact that a transfer inheritance tax in the amount of \$1,208.80 was assessed against Henry Bente, and a tax in the amount of \$1,200 assessed against Margaretha Bente, and bill therefor rendered August 19, 1924. These taxes, together with
20 other taxes levied in this estate were finally adjusted on November 6, 1924, payment being made under protest.

It appears from the record that the said Henry Bente under date of May 15, 1924, obtained a judgment against the estate of Charles Steinberg in the sum of \$15,000, pursuant to a verdict rendered by the Hudson County Circuit Court. (Record, p. 47). Another judgment in a similar amount was obtained on the same date in the same court by Margaretha Bente, wife of the above named Henry Bente. Copies of summons, with
30 complaint attached, together with answer of The Trust Company of New Jersey as executor of the last will and testament of Charles Steinberg, deceased, the defendant in said action, have been submitted and form a part of the record (pp. 40-46).

It is further stated in the record that the pleadings in the case of Henry Bente, plaintiff, vs. The Trust Company of New Jersey as executor of the last will and

testament of Charles Steinberg, deceased, set forth the same state of facts as disclosed in the action of Margarethea Bente, plaintiff, vs. The Trust Company of New Jersey as executor of the last will and testament of Charles Steinberg, deceased, defendant. (Record, page 39).

Upon the basis of these judgments obtained by the said Henry Bente and Margaretha Bente against the estate of Charles Steinberg, deceased, the defendant, the Comptroller of the Treasury concluded, that in view of the circumstances under which said judgments were obtained, as disclosed by the bill of complaint attached to the record and shown by the testimony of Margaretha Bente and Henry Bente, as taken before Theodore Rurde, a Special Investigator of the Transfer Inheritance Tax Department, there was a taxable transfer of property involved, and therefore levied an assessment as above set forth. 10

ARGUMENT.

POINT 1. 20

The defendant had jurisdiction to impose the transfer inheritance tax in the present case.

The Comptroller of the Treasury in the present case levied a transfer inheritance tax pursuant to the provisions of Chapter 228, Laws of 1909, as amended; Chapter 151, Laws of 1914, as amended; Chapter 174, Laws of 1922. The Transfer Inheritance Tax Act of this State, as in effect at the time of the death of the said Charles Steinberg, has been held constitutional by our courts and the action of the Comptroller is therefore based upon proper authority and is a case in which he had jurisdiction and upon which he properly proceeded. 30

Howell v. Edwards, 88 N. J. Law 135.
Maxwell v. Bugbee, 89 N. J. Law 446, *aff'd*
 90 N. J. Law 707, *aff'd* 250 U. S. 525.
Carr v. Edwards, 84 N. J. Law 667.
Sawyer v. Edwards, 84 N. J. Law 764.

Chapter 228, Laws of 1909, as amended; Chapter 151, Laws of 1914, as amended; Chapter 174, Laws of 1922, provides as follows:

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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:

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

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Fifth: All taxes imposed by this act shall be at the rate of eight per centum upon the clear market value of such property, except as hereinafter provided, to be paid to the Treasurer of the State of New Jersey, for the use of said State, and all administrators, executors, trustees, grantees, donees or vendees, shall be personally liable for any and all such taxes until the same shall have been paid as hereinafter directed, for which an action of debt shall lie in the name of the State of New Jersey.

The Comptroller in the present case contends that the transfers to the said Henry Bente and Margaretha Bente were pursuant to an agreement between the decedent and said parties to make a will in their favor, and therefore,

in effect a transfer by last will and testament, subject to the provisions of the Transfer Inheritance Tax Act as enumerated under Section 1, Subsection 1.

POINT 2.

The judgment obtained by Henry Bente was pursuant to an agreement to make a will in his favor.

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The Bills of Complaint in the actions brought by Henry Bente and Margaretha Bente in the Hudson County Circuit Court against The Trust Company of New Jersey, as executor of the last will and testament of Charles Steinberg, deceased, were actions at law to recover damages and in substance to compel specific performance. The complainants, under the fourth paragraph of the first count of their bills, allege that the said Charles Steinberg would immediately upon his death cause to be paid to said plaintiffs the sum of \$15,000 each, and that he, the said Charles Steinberg, would immediately make a last will and testament providing therein for the payment to the plaintiffs of the sum of \$15,000 each, by and through a legacy for said sum of \$15,000 each in said last will and testament.

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The testimony of Margaretha Bente taken before a Special Investigator appointed by the Comptroller in order to determine the nature of the agreement between this decedent and said Henry Bente, discloses the fact that Charles Steinberg, pursuant to the agreement was to make a last will and testament whereby he was to leave \$15,000 to the said Margaretha Bente, and \$15,000 to Henry Bente. In this respect, attention is directed to her testimony at pages 15-16, which is as follows:

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A. Yes, sir. He told me if I would give up my position and give him a home for the rest of his life, he would leave me \$15,000.

Q. By his Will?

A. Yes, sir.

Q. Was your husband there when he said that?

A. Yes, sir.

Q. Did he say anything about your husband? What he was going to do for him?

A. He said he would do the same for him, would give him \$15,000. That he would give us each \$15,000.

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Again in her testimony at page 19, she says:

Q. Did Mr. Steinberg at any time after he drew this will which you saw, refer to the will again to you.

A. He always told me I was well provided for.

Q. Tell me again what he promised to do for you in case you took care of him.

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A. He promised me \$15,000.

Q. How?

A. In case anything happened to him, I was worth \$15,000. He would leave me \$15,000 and Mr. Bente \$15,000.

Q. By his will?

A. Yes, sir, by his will.

The fact is further proven by her testimony that in accordance with this arrangement the said Charles Steinberg did make a will. Mrs. Bente declares in her testimony that this instrument was prepared "On a Saturday evening—the Saturday before November 15, 1920," and that said will was executed on the Monday following. She states that the will was drawn at her house in the presence of Mr. Bente and herself and that the will was written out by the decedent himself. The record (page 16) discloses that under the fifth and sixth

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paragraphs of the will as originally prepared, the decedent provided as follows:

5. To my friend Henry A. Bente, of 734 Washington Street, City of Hoboken, County of Hudson, State of New Jersey, I give and bequeath the sum of fifteen thousand (\$15,000) dollars and all my personal effects such as clothing, jewelry, books and other articles having only personal value.

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6. To Margaretha Bente, of 734 Washington Street, City of Hoboken, County of Hudson, State of New Jersey, wife of Henry Bente of the same place, bequeath the sum of fifteen thousand (\$15,000) dollars.

Her testimony is to the effect, however, that she never saw the will executed and that Mr. Bente likewise never witnessed the execution of this instrument (record page 16) and the will as finally admitted to probate (record page 17) was mutilated to the following extent:

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In paragraph 5 the words "the sum of fifteen thousand (\$15,000) and" had lines drawn through them, and the whole of paragraph 6 had lines drawn through it.

Therefore, these bequests, as alleged to have been contained in the original instrument never became effective.

Under this state of facts the said Henry Bente and Margaretha Bente proceeded in an action at law in the Hudson County Circuit Court for damages against the representatives of the estate of Charles Steinberg, by reason of his failure to comply with the terms of the agreement. These actions resulted favorably to the complainants and they were awarded judgments in their behalf to the extent of \$15,000 each, the sum agreed upon.

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POINT 3.

Had the sums passed to prosecutors under the will pursuant to the agreement the transfers would have been taxable.

10 An examination of the facts as alleged in the Bills of Complaint in the action at law in the Hudson County Circuit Court and a survey of the testimony of Mrs. Margaretha Bente and Henry Bente, will clearly disclose the fact that the agreement between these parties and the decedent was simply to the effect that he would make a will in their favor to the extent of \$15,000 each. It was not an agreement to pay them \$15,000 each when he died, but on the other hand was an agreement to leave them \$15,000 each by will. The testimony of Margaretha Bente, as hereinbefore pointed out, clearly establishes this fact. Had the will been probated as originally prepared and Henry Bente and Margaretha Bente been entitled to 20 \$15,000 each as legatees under said will, there could be little question as to the right of the State to levy a transfer inheritance tax upon such bequests:

- *Matter of Kidd*, 188 N. Y. Rep. 274.
- *Clarke v. Treasurer & Receiver General*, 226 Mass. 301.
- *Hill v. Treasurer & Receiver General*, 227 Mass. 331.
- 30 — *Carter v. Craig*, 77 N. H. 200.
- *Richardson v. Lane*, 126 N. E. Rep. 44, 234 Mass. 403.
- *State v. Mollier*, 96 Kan. 514.
- *State v. Gerhards*, 99 Kan. 462.
- *Re Grogan's Estate*, 219 Pac. Rep. 87 (Cal.)
- *Ransom v. U. S.* 20 Fed. Cas. 296, No. 11574.
- *Turner v. Martin*, 7 DeG. M. & G. 429.

In the *Matter of Kidd*, Chief Justice Cullen speaking for the Court of Errors and Appeals of New York, with respect to this phase of the law, page 278, said:

“* * * The contract between the plaintiff’s mother and the deceased, which has been enforced by the judgment of the Supreme Court, was to bequeath and devise to his stepdaughter by will, either the whole property he might leave or a portion of it, dependent on the existence of other children. It was not a contract to convey, but a contract to make a will in her favor. Had the deceased performed his agreement and given her his property by will, the estate would have been subject to the tax.” 10

In the *Matter of Clarke v. Treasurer and Receiver General, supra*, the Supreme Court of Massachusetts, in disposing of a similar case, at page 304, said:

“It is plain that the will gives a legacy. The property passes to the housekeeper by reason of the will. The antecedent contract between the parties required the testator to make a will and therein ‘bequeath’ a definite sum with a rule for its increase by lapse of time. This contract was executed exactly according to its terms. The promise of this contract, if kept, does not give rise to a debt. * * * It simply creates an obligation to give a legacy by will. * * * 20

The Massachusetts Supreme Court, in finally disposing of this matter, held that the legacy passing by the last will and testament of the decedent, was subject to a transfer inheritance tax under the provisions of the Act. This being so, notwithstanding the fact that the legacy was based upon a contract to make a will. The agreement between the testator and the legatee was to the effect that 30

“within nine days of the date of this contract, he (testator) will make a will and therein bequeath to the said S. Elizabeth the sum of \$2,000 with the additional bequest of \$500, or a proportionate part thereof, for a fraction of a year for each and every year after April 1, 1907, until his decease.” Pursuant to that contract the decedent executed the will and the beneficiary became a legatee thereunder and succeeded to the property as such legatee. The Court held that the legacy was taxable since the Inheritance Tax Act referred to all transfers by will, regardless of the motive.

10 In the *Matter of Hill v. Treasurer and Receiver General, supra*, the Supreme Court of Massachusetts held that the acceptance by the widow of the testator of stocks and bonds in the amount of \$250,000, pursuant to the terms of a will, in full settlement of sums due her under an ante-nuptial agreement, was a taxable transfer of property passing by will, even though she might have taken under the ante-nuptial agreement and not have been sub-
20 ject to the tax. In disposing of the case the Court at page 335, said:

30 “The transfer and acceptance of these securities by Mrs. Hill was in fact and in law a legacy in payment of a debt. The inheritance tax law of the Commonwealth (St. 1909, C. 490, Part IV, Paragraph 1) applies to all cases where property or an interest therein passes by will. It is not confined to cases where property or an interest therein so passes as a gratuity. It includes cases where property or an interest therein passes by will in performance of an obligation resting upon the testator to devise or bequeath the property in question.”

The Court in rendering its decision in this case cited with approval the previous case of *Clarke v. Treasurer*

and Receiver General, 226 Mass. 301; *Matter of Gould*, 156 N. Y. 423; *Carter v. Craig*, 77 N. H. 200; *State v. Moeller*, 96 Kan. 514; *Matter of Kidd*, 188 N. Y. 274.

The same construction has been placed upon a similar statute by the Supreme Court of New Hampshire in the case of *Carter v. Craig*, 77 N. H. page 200. In that case the owner of a farm agreed to convey the same by will in consideration of support furnished to him and his wife during their life. The owner by his last will and testament, duly probated, devised this property in accordance with the agreement. It was held that the devisee was liable to the payment of a transfer inheritance tax. The Court in a per Curiam decision at page 201, said:

“The statute makes the passing of property by will subject to a tax when the beneficiary, as in this case, does not come within its exemptions. * * * It provides that “all property within the jurisdiction of the State, real or personal, or any interest therein, * * * which shall pass by will * * * to any person, absolutely or in trust, (except to the exempted class) shall be subject to a tax of five per cent. of its value for the use of the State.”

* * * The contract was to bequeath and devise the property to Stone. It was not a contract to convey, but to make a will in his favor; and French having made the will, and Stone having accepted its provisions and taken title to the property thereunder, the transmission was by will and is subject to the tax.” *Matter of Kidd* 188 N. Y. 274-276.

“It can make no difference that there was a valid consideration for the contract to transfer the property by will. The imposition of the tax is not limited to property passing gratuitously

by will, but extends to 'all property' so passing. If the Legislature had intended to limit the imposition of the tax to property passing gratuitously, it could easily have said so; but by providing that all property passing by will should be subject to the tax, it manifested an intention not to so limit it." *State St. Trust Co. v. Treasurer*, 209 Mass. 373; *Matter of Gould*, 156 N. Y. 473.

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In the case of *State v. Mollier*, *supra*, the Supreme Court of Kansas held that a will bequeathing all the property of a testator to his niece, in performance of a contract entered into between them many years before, by which she agreed to live with and care for him as long as he lived, involved a taxable transfer of property under the provisions of the Act of that State. The agreement between the testator and his beneficiary was to the effect that if she (the beneficiary) would make her home with him,

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act as his housekeeper and look after his welfare as long as he lived, he would make a will and bequeath to her all of his property. The contract upon her part was fully performed and the will was executed and duly probated, wherein she was named as his beneficiary. The Court held that the right of the State to tax bequests or devises by will is not limited to those gratuitously made, but reaches all such transfers, even though a consideration might be involved, citing as their authority for this conclusion *Matter of Gould*, *supra*. They stated that the provision, which is contained in most Inheritance Tax Acts throughout the country, to the effect that the tax should not apply to property acquired by bona fide purchase for full consideration in money or moneys worth had no application whatsoever to transfers by will, but referred to that class of cases wherein deeds of trust made to take effect in beneficial possession or enjoyment at or after death, or transfers of property in contemplation of death

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were involved. This, as will be seen from an examination of the numerous cases herein cited, is the recognized construction of the various taxing statutes by the several jurisdictions.

This case was followed by the *Matter of State v. Gerhards, supra*, a proceeding in which it appears that the testator by agreement entered into during his lifetime, guaranteed that his property would be left to certain beneficiaries. The Court at page 465 said:

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“The defendants have seen fit to take this property under the will, not under a contract nor as cestuis que trust. The State has the power to tax the right of succession—the right to take by will or by the Statutes of Descent and Distribution. (*The State v. Mollier, supra*, p. 519); and since the defendants have chosen to take title by the will of Christ Backus it is of no consequence that they might have secured it through some other mode of acquisition or through some altogether different legal right thereto.” 20

The Court of Errors and Appeals of New York in the *Matter of Gould*, 156 N. Y. 423, dealing with the question of devises and bequests based upon a valuable consideration at page 426, said:

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“The Statute reads: ‘A tax shall be and is hereby imposed upon the transfer of any property * * * when the transfer is by will.’ It will be noted that the imposition of the tax is not limited to property gratuitously given by will, but is extended to all property so transferred. Was not the property mentioned in this codicil transferred by will? Certainly it was, for the title to the bonds and stocks described in the codicil was taken away from the estate of Jay

Gould and vested in George J. Gould under and by virtue of the second codicil of the will and such property is, therefore, taxable under the express provisions of this statute. If Jay Gould did owe his son George \$5,000,000 for services, and we must assume that he did, he selected a method of payment which brought the transaction within the taxing provisions of the Statute. Whether this action was taken by Jay Gould for the purpose of absolutely securing to the State the tax, or because he wished to retain possession of all his property during his life, or for some other satisfactory reason, we need not inquire. The question of motive on the part of the testator is not for our consideration. We are now dealing with a taxing statute which undertakes to tax all property transferred by will and which is applicable to every transaction of that kind, whether advisedly or mistakenly entered upon and carried out.

“Neither the taxing officers nor the Courts are at liberty to hold that because Jay Gould might have paid his debt to his son George in such a manner as to have freed the property from the burden of a tax, therefore a different transaction, one upon which the statute expressly imposes a tax, shall be treated as the equivalent of the other and given the same effect. So far in the progress of this proceeding the question as to the right of the State to collect a tax upon the property has been disposed of by the Courts below as if the statute provided in terms that only property ‘gratuitously given by will’ should be taxed. But the statute does not so provide, and the duty of the Courts is to read it as it is written. * * * It matters not what the motive of a transfer by will may be, whether to pay a debt, discharge some moral ob-

ligation, or to benefit a relative for whom the testator entertains a strong affection, if the devise or bequest be accepted by the beneficiary, the transfer is made by will, and the State by the statute in question makes a tax to impinge upon that performance."

All of the foregoing cases are collected and fully discussed, *In re Grogan's Estate*, 219 *Pacific Reporter*, page 87. The salient points in the cases are recited and ably discussed by the Court. In fact, this decision contains a resume of practically all the important cases in this country with reference to this feature of inheritance taxation. In this case one Charles P. Grogan agreed with Grace Grogan, his wife, that the sum of \$3,000 yearly should be paid to her and that he, the said Charles P. Grogan would "provide in his last will and testament for the creation of a trust fund in substance as follows:

"Said will and testament to provide for the creation of a trust fund consisting of one-half of all the estate of said first party at the time of the death of said first party, provided said estate does not exceed \$100,000. * * * "

Charles P. Grogan died leaving a last will and testament survived by Grace Grogan, his wife. The State Comptroller levied a tax upon the alleged benefits passing to Grace Grogan under the will and from such assessment she appealed. The Court after a most thorough examination of all of the cases upon this subject, as is indicated by the opinion, determined that the transfer was in fact by the last will and testament of the decedent even though in accordance with the valid agreement entered into between the parties in their lifetime. In closing the opinion the Court states as follows:

"The statute here does not provide for a tax because some one has a right arising out of a debt or otherwise, but only when a transfer of property is brought about by means of a will is a tax imposed. It is a tax upon the vehicle carrying the right, rather than a tax upon the right itself. It is in effect a declaration of law that when a will is used as a means of conveyance of property, a tax must be paid for that privilege."

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This is in brief the contention of the Comptroller in the present matter.

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As pointed out in these cases the right of the State to tax in the case of property passing by last will and testament is not restricted solely to those instances in which the transfer is wholly donative and gratuitous, but reaches every case of a transfer by will, even though the motive for the transfer may have been the payment of a debt, the discharge of some moral obligation or to benefit a relative for whom the testator entertains a strong affection. The Inheritance Tax Act of this State specifically provides for the taxation of all transfers by last will and testament. The first section reads as follows:

"First. 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."

30

It makes no exception in those cases where consideration is involved, as is provided for where transfers made or intended to take effect in beneficial possession and enjoyment at or after death or in contemplation of death are involved. In the latter cases it is submitted that the statute provides, and it has been so construed by the Courts in numerous instances that the transfer must be of a gratuitous nature and not based upon a valuable con-

sideration, in order to subject it to a transfer inheritance tax, although it is respectfully submitted, this is not the fact in regard to transfers by will. The reported decisions in this respect are in accord.

POINT 4.

The mere fact that decedent failed to comply with his agreement and prosecutors were compelled to resort to a court of law for relief can in nowise effect the right of the State to levy and collect a tax on the property passing. 10

It being firmly established as above pointed out that these transfers, if they had been effectively carried out by the last will and testament of the decedent, would have been taxable, it seems necessarily to follow that the mere fact that the prosecutors were compelled to seek their relief under the agreement by means of an action at law for damages, could have no effect upon the right of the State to levy a transfer inheritance tax. The result of the judgments of the Hudson County Circuit Court was merely to carry into effect the terms of the agreement between the decedent and the said Henry Bente and Margaretha Bente. In other words, to place them in the same position as if they had been named in the last will and testament of the decedent as legatees according to the terms of the agreement. 20 30

The suits brought by the Bentes were not on quantum meruit for actual services rendered as referred to in the cases of:

Duvale v. Duvale, 54 N. J. Eq. 581.

Stone v. Todd, 49 N. J. Law 274.

Mulrooney v. O'Keefe, 121 Atl. Rep. 721.

but were actions at law to recover particular amounts based on a promise to leave a will in their favor:

Holcombe v. Griggs, 78 N. J. Law 186.

Stone v. Todd, *supra*.

As stated by the Court of Appeals in the *Matter of Kidd*, 188 N. Y. Reports, at page 279, the effect of such a judgment was not to set aside the will of the decedent but to convert the devisees under the will or the heirs at
 10 law or next of kin, as the case may require, into trustees for the beneficiaries under the original agreement.

This case follows the *Matter of Phalen v. United States Trust Company*, 186 N. Y., page 178, wherein Judge Werner said:

“This Court does not set aside the will, but makes the devisee, heir or executor trustee to perform the contract.”

20 As was stated by the Court in the case of *Clarke v. Treasurer and Receiver General*, 226 Mass., page 304:

30 “If the testator had failed to make a will giving the legacy required by his agreement, there would have been a breach of contract. The damages to which the housekeeper would have been entitled in an action against his estate to recover for that breach of contract would be measured by what she would have lost by his failure to make the legacy, namely, the amount of the legacy less whatever deductions lawfully ought to be made. If it had been the intention of the parties that the estate and not the legatee should pay the excise tax, that should have been made a condition of the contract and a provision of the will.”

Whether the suits in the Circuit Court be considered in the light of actions to compel specific performance or as

actions at law for damages, the result would be the same. The sum to be recovered in any event could only be equivalent to what the claimants would have been entitled to as legatees under the will, had the contract been properly carried out in accordance with its terms. In this particular respect the *Matter of Kidd, supra*, is identically in point and one of the cases upon which the Comptroller rests his conclusion. In the course of the opinion, at page 279, Chief Justice Cullen, speaking for the Court said:

“It does not affect the question of the liability of the estate to taxation that in consequence of the failure of the testator to carry out his promise Mrs. Dickinson was obliged to resort to a court for relief. The method by which a court of equity in a proper case (for there is not in all cases an absolute right for its enforcement) enforces an agreement of the character of the one before us, is well settled. It does not set aside the will, for in the present case such a judgment would do the plaintiff in the Supreme Court action no good; she was neither heir at law nor next of kin; but it converts the devisees under the will or the heirs at law or next of kin, as the case may require, into trustees for the beneficiary under the original agreement. * * * Therefore, the devolution of the property has, in fact, taken place under the will and such devolution is subject to the transfer tax.”

This decision, never reversed so far as is possible to determine, by the highest court of the State of New York, the State from which our Inheritance Tax Act in a considerable measure was borrowed, is entitled to consideration by the courts of this State.

Matter of Carr v. Edwards, 84 Law 221.
Hopper v. Edwards, 88 Law 471.
In re Christie's Estate, 87 Equity 303.

Counsel for appellants, in his brief, at page 25, states that the decisions in both *In re Kidd's Estate* and the *Matter of Gould* are no longer the law of New York. In order to prove this contention he cites the following cases:

In re Baker's Estate, 83 App. Div. 530; 178 N. Y. S. 575.

10 *In re Vanderbilt*, 184 App. Div. 661; 226 N. Y. 638.

In re Galot's Estate, 174 N. Y. S. 492; affirmed 176 N. Y. S. 905.

In re Schmoll, 191 App. Div. 435.

In re Orvis, 223 N. Y. 1.

20 It is the defendant's contention, of course, that these cases are clearly distinguishable from the facts in the *Matters of Kidd and Gould*, and, therefore, do not overrule said decisions. Conceding, however, for the present, that these cases do specifically overrule the decisions in the *Matter of Kidd* and the *Matter of Gould*, attention is called to the fact that as late as 1923 the *Matter of Gould* has been cited with approval by New York Courts in the cases of:

In re Baker's Estate, 200 N. Y. S. 900; 121 Misc. Reports 290.

In re Bolton's Estate, 200 N. Y. S. 326; 121 Misc. Reports 325.

30 In the *Matter of Grogan's Estate*, 219 Pac. Rep. 87, the Court in collecting the various cases in this country upon the subject stated that in New York there appeared to be two classes of cases and specifically referred to the *Matter of Baker* and the *Matter of Vanderbilt*, with a reference on the other hand to the *Matter of Kidd* and the *Matter of Gould's Estate*.

This case is fully referred to before in this memorandum, and it will be noted that the Court accepted the logic expressed in the *Matter of Kidd* and the *Matter of Gould*, and specifically repudiated the construction placed by the Courts of New York in the *Matter of Baker* and the *Matter of Vanderbilt*.

If, in fact, the decision *In re Baker's Estate* is opposed to the rule as established in the *Matter of Kidd* and the *Matter of Gould's Estate*, it is respectfully submitted that such decision has never been accepted with favor in any of the other jurisdictions. The *Matter of Baker* was decided in 1904, and the numerous cases hereinbefore referred to, decided during the years 1914, 1915, 1917 and 1923, have not accepted the decision *In re Baker's Estate*, but on the other hand have followed practically without exception the ruling in the cases of *Kidd* and *Gould*. 10

The above discussion is, of course, all based upon the assumption that the *Matters of Kidd and Gould* cannot be distinguished from those cases referred to in the defendant's brief at page 25. It is respectfully submitted, however, that such is not the fact and these cases are clearly distinguishable from the *Matter of Kidd* and the *Matter of Gould*, and also from the facts in the present case. 20

It will be remembered in the present matter that the agreement between the decedent and the prosecutors was to the effect that he would leave each of them \$15,000.00 by will. There appears to be no doubt whatsoever as to the arrangement, and their action for damages was based upon a breach of contract. 30

In Baker's Estate there was an ante-nuptial agreement involved, by the terms of which the decedent agreed that if the intended marriage should occur and his wife should survive him, he would provide by last will for the payment to her out of his estate the sum of \$20,000.00. Baker died on July 25th, 1901, intestate, leaving surviving him

his widow and a sister. In adjustment of the \$20,000.00 due to her under the ante-nuptial agreement, the widow accepted \$10,000.00 from an insurance policy upon the life of the decedent, which had been transferred to her by the decedent prior to his death in part satisfaction of the amount due under the contract, and the remaining \$10,000.00 was paid to her from the decedent's estate.

The particular question before the Court in that case was whether or not the decedent was ill at the time the
 10 ante-nuptial agreement was executed and the transfer therefore made in contemplation of death or whether the transfer by the ante-nuptial agreement was in fact intended to take effect in beneficial possession or enjoyment at or after death. The Court found that the decedent was not in contemplation of death at the time the agreement was made and further held that the agreement was not a transfer to take effect in beneficial possession or enjoyment at or after death, but was on the other hand in the nature of a debt of the decedent's estate. In that matter
 20 the widow did not take by will; neither did she take under the intestate laws. Her claim was purely by a transfer inter vivos, which was held not to have been made in contemplation of death. Under such facts, there clearly could be no tax. That is not the situation in the present case. Neither was it the situation in the *Matter of Kidd* and the *Matter of Gould*. In both of those cases it was held that the property substantially passed by will and was taxable under the Act.

In the Matter of Vanderbilt, 184, App. Div. 661,
 30 affirmed without opinion, 226 N. Y., page 638, there was another ante-nuptial agreement involved. That fact alone distinguishes that case from the present one and also from the decisions in the *Matter of Kidd* and the *Matter of Gould*. Mr. Vanderbilt, in fulfillment of the valid agreement which could have been enforced against his estate provided by his will that his wife, Margaret Emerson Vanderbilt, should be entitled to \$2,000,000.00 in

cash or in the discretion of the executors to any securities to be selected by them from his personal estate in full discharge of the provisions contained in the agreement. It appears that the wife accepted the provisions of the will in lieu of the terms of the agreement and the transfer was held non-taxable. The Comptroller objected to this finding and contended that if Mrs. Vanderbilt took under the Will the property so received by her was taxable. The Court in disposing of that case pointed out the fact that there were four means by which the ante-nuptial agreement provided for the payment of the sum due thereunder. Such was not the fact in the case of *Kidd* and the *Matter of Gould*, nor in the present case. There is only one provision in the present matter, and that is to make a Will. Even if it might be conceded, as above stated, that the *Matter of Vanderbilt* establishes a rule different from that in the *Matters of Kidd and Gould*, it is respectfully submitted that the same is contrary to the decisions in other jurisdictions and directly opposed by the *Matter of Hill v. Treasurer and Receiver-General*, 227 Mass. 331, and the decision of the Supreme Court of Kansas in the *Matter of the State v. Mollier*, 96 Kans. 514. 10 20

In the *Matter of Schmoll*, 191 App. Div. 435, another decision of the Supreme Court affirmed by memoranda by the Court of Appeals, it was determined that an ante-nuptial agreement whereby certain property was conveyed upon the death of the decedent was not subject to a tax. This agreement did not provide for the making of a will. In fact, the agreement by its very terms provided for the passing of the property. A will was proved, but the widow specifically refused to accept the provisions thereof and collected her share of the estate under the terms of the ante-nuptial agreement. This, of course, clearly distinguishes that matter from the present case. Her rights accrued under the ante-nuptial agreement, and such an agreement being in the nature of a contract was 30

based upon full valuable consideration and was held exempt.

In fact, the specific point involved in that case was whether or not the transfer was by a deed, grant, bargain or sale intended to take effect in beneficial possession or enjoyment at or after the date of death, which is entirely different from the present case, as pointed out in the brief of the defendant. Transfers when by deed, grant, bargain or sale intended to take effect in beneficial possession or enjoyment at or after death, must be proven to be gratuitous in nature and not based upon an adequate consideration.

In the Matter of Orvis, another case referred to by the prosecutors as being inconsistent with the rule established in the *Matters of Kidd and Gould*, *supra*, there was a transfer intended to take effect in beneficial possession or enjoyment at or after death. Involved in this case there was no question of a transfer by will, and it was held that the ownership, possession and enjoyment of the property did take effect upon the death of the testator, and was, therefore, taxable. The facts in that case are in no way connected with the present matter or the *Matter of Kidd* and the *Matter of Gould*.

It is urged and has hereinbefore been fully pointed out that the decisions of the highest courts of New York in the *Matter of Kidd* and the *Matter of Gould* are recognized throughout the country as the existing law in cases involving the exact point here presented.

A long line of cases following the rule as established in these two matters is set forth. In fact, the conflicting cases in New York upon this subject have been collected and discussed by the Court in *re Grogan's Estate*, *supra*, and the logic in the *Matters of Kidd and Gould* accepted.

The prosecutors throughout in their brief urge the question of consideration and that there was full value paid for the money received by them. It is respectfully submitted and fully substantiated by the cases referred to above that

the question of consideration is in no way involved.

The statute provides that any transfer by will is to be charged with a tax. This provision is not limited to gratuitous bequests or devises by will, but on the other hand, as pointed out in the long line of cases referred to, all transfers when carried into effect by such an instrument are made specifically taxable. The only reference which the statute has to gratuitous transfers as distinguished from those based upon full valuable consideration either in money or money's worth are those which are made in contemplation of death or intended to take effect in beneficial possession or enjoyment at or after death. 10

If the prosecutors' contention were accepted to the effect that if consideration can be proven, the transfer is to be held exempt, it would likewise result that if the decedent in the present matter had, in fact, carried out his contract and left the \$15,000.00 legacies to each of them under the will, they would not have been taxable, since in that event they could claim that such legacies were based upon a consideration and in pursuance of a valid contract. 20

It is respectfully submitted that such an argument is not founded upon the great weight of authority, and in fact has very few decisions in this country in its favor. Those directly opposing such a contention are fully referred to by defendant.

Referring again to the declarations in the prosecutor's brief that the *Matters of Kidd and Gould* have been overruled in New York, particularly by the cases of *Baker* and *Vanderbilt*, the defendant fails to understand this contention. The *Matter of Baker* was decided and finally approved by the Court of Appeals of New York in March of 1904. The *Matter of Kidd* was decided by the Court of Appeals in April of 1907. It will, therefore, be readily seen that the *Matter of Kidd* supersedes the decision in the *Matter of Baker*, and would in fact overrule any contrary rule established in that case. 30

It, therefore, remains that practically the only decision by the highest court of New York even opposed to the

present case is the *Matter of Vanderbilt*, and as hereinbefore stated, the decision of the Court in that case has not been generally accepted by other jurisdictions, and in fact is distinguishable from the present matter.

The Supreme Court in the instant case states defendant's views very clearly in the following language (See State of Case, p. 51) :

10 “The effect of the judgments, it seems to us,
was merely to restore the status as it would have
been had the erasures of the bequests set forth in
the will not been made. The judgments could not
have been obtained for the sums mentioned had
it not been for the agreement by which the amount
the Bentes were to receive was to be bequeathed to
the Bentes for the services they were to render to
Steinberg. The agreement was not to pay to each
\$15,000 at the death of Mr. Steinberg, but to
leave to each a bequest for that amount. * * *

20 The effect of the judgments was not to set aside
the will, but to convert those who would receive,
by reason of the erasures, the bequests originally
intended for the Bentes into trustees for the Bentes
to the extent of such bequests. We do not see
how the Bentes are entitled to receive more as a
result of what occurred than they would have re-
ceived as legatees under the will if the contract
as originally made had been executed by leaving
in the will the bequests originally made. * * *

30 The obtaining of judgments was a method of pro-
cedure to establish the contents of the will as
originally drafted. The effect of the judgments
was to restore the original provisions of the will.”

It is respectfully submitted that the various decisions hereinbefore referred to and fully discussed, are ample authority for the Comptroller's conclusion in the matter,

and, in fact, place a logical interpretation upon our Statute and provide a reasonable means for administering the intention of the Legislature as expressed thereby. As hereinbefore stated, had the will been executed pursuant to the terms of the agreement and the legatees succeeded to their legacies thereunder, without the necessity for resorting to a Court of Law for relief, there would have been no question as to the right of the State to tax. Certainly the prosecutors in this case should receive no greater rights by the failure of the decedent to properly carry out the contract than would have been vested in them had the same been duly executed. 10

The agreement in the present case, as was referred to by the courts in the cases of *Kidd, Clarke v. Treasurer and Receiver General*, and *State v. Gerhards*, was not to convey property at the time of the decedent's death, and no property in fact was conveyed by such agreement, but the provisions thereof were simply a promise by the decedent to make a will. The transfer, therefore, was to take effect by will and not by the agreement. 20

The moneys obtained under these judgments by the prosecutors were in fact pursuant to an agreement to make a will in their favor to that extent, and, therefore, subject to the provisions of the Transfer Inheritance Tax Act of this State, relating to taxable transfers of property by will.

Upon the authority of the above decisions, it is respectfully submitted that the Comptroller in assessing the tax in the present matter acted within his jurisdiction and that the assessment is wholly correct and that no error whatsoever has been committed in the levying thereof. 30

Appellee, therefore, respectfully urges that the judgments below sustaining the assessment of tax be in every respect affirmed.

EDWARD L. KATZENBACH,
Attorney-General of New Jersey,
Attorney for Defendant-Appellee.

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New Jersey Court of Errors and Appeals

HENRY BENTE, Prosecutor, v. NEWTON A. K. BUGBEE, Comp- troller of the Treasury of the State of New Jersey, Defendant.	On Certiorari Suit No. 1.
MARGARETHA BENTE, Prosecutrix, v. NEWTON A. K. BUGBEE, Comp- troller of the Treasury of the State of New Jersey, Defendant.	On Certiorari Suit No. 2.

BRIEF ON BEHALF OF PROSECUTORS.

Statement.

Two writs of certiorari were allowed, one to the prosecutor Henry Bente, to review the action of the Comptroller in levying a transfer inheritance tax *against a judgment*, recovered by the prosecutor Henry Bente, and the other to the prosecutrix

Margaretha Bente, against the Comptroller for levying a transfer inheritance tax *against a judgment*, recovered by the prosecutrix Margaretha Bente, both judgments being against The Trust Company of New Jersey, as executor of the Last Will and Testament of one Charles Steinberg.

The facts in the case of Henry Bente alone will be stated because it is stipulated by the Attorney General that the decision rendered in the case of Henry Bente,—the case to be argued,—shall be accepted as the decision in the Margaretha Bente case (p. 57).

A similar stipulation was made and carried out upon the argument of the writs of certiorari in the Supreme Court.

The facts in the case of Henry Bente, *as taken from the pleadings* upon which the judgment in the Henry Bente case is founded, are as follows:

The suit was instituted by Henry Bente upon a claim *sounding in debt* and which at common law would have been supported by an action in debt based upon a simple contract, to recover the sum of \$15,000.00 alleged to be due Henry Bente by reason of the *substantial and complete performance by him* of a contract. By this contract Henry Bente undertook, promised and agreed to furnish to Charles Steinberg until his death a home in the home of the said Henry Bente (p. 41, fol. 10), and the said Charles Steinberg, in consideration of the premises, undertook, promised and agreed *to cause to be paid to the said Henry Bente* the sum of \$15,000.00 immediately upon the death of the said Charles Steinberg (p. 40, fol. 39).

The complaint contains two counts, each being founded upon the simple contract which is set forth in Paragraphs 2 and 3 of the first count (p. 40, fol. 30; p. 41, fol. 10), and upon an allega-

tion of full and complete performance of that agreement by Henry Bente (Par. 5 of Complaint, p. 41, fol. 25). The sole difference between the two counts is that the first count charges, as one of the breaches of the contract, that Steinberg *did not*, by his last will and testament, *provide for the payment* to plaintiff of the sum of \$15,000.00 (Par. 6 of the first count of Complaint, p. 41, fol. 35); while the second count charges that Charles Steinberg did make a last will and testament containing a bequest of the sum of \$15,000.00 (Par. 3 of the second count of Complaint, p. 42, fol. 40); and that this last will and testament, *containing this bequest* (p. 43, fol. 14), was admitted to probate by the Surrogate of the County of Hudson (Par. 4 of the second count of Complaint, p. 43, fol. 10), but that the executor under the will refused to pay.

A copy of the will is made part of the return to the writ of certiorari and from the will it appears that plaintiff could *not* recover under the second count,—if the allegation that Steinberg actually made a will containing the bequest is an *essential* portion of that count—because an examination of Paragraph 5 of the will (p. 7, fol. 40) as probated discloses that the bequest of \$15,000.00 to Henry Bente was *deleted* and the fact therefore was, as stated in Paragraph 6 of the first count of the complaint, namely, that the “said Charles Steinberg did *not* in and by his last will and testament provide for the payment to the plaintiff of the sum of \$15,000.00” (p. 41, fol. 35).

The defendant in the action at law joined issue upon the complaint (pp. 44-45); the case was tried in the Hudson County Circuit Court and resulted in a verdict in the sum of \$15,000.00 in favor of Henry Bente (p. 46, fol. 27), whereupon judgment final was entered in favor of the plaintiff, Henry

Bente, and against The Trust Company of New Jersey, for the sum of \$15,000.00, besides costs of suit to be taxed (p. 47). It is against *this judgment* in the sum of \$15,000.00 that the Comptroller has levied a transfer inheritance tax of \$1,208.80 (see p. 6, fol. 15).

POINT I.

The Supreme Court erred in giving judgment for the defendant because the Comptroller was without jurisdiction to impose the tax since the subject of the tax does not come within the purview of the title of the tax act.

The tax is levied against a judgment of record, recovered *to make a debt* owing from the estate of a decedent.

The case arises under the "Transfer Inheritance Tax Act", C. S. 5301.

The title of the act is "An Act to *tax* the *transfer* of property, * * *, *by* devise, bequest, descent, distribution by statute, gift and grant, bargain and sale, in certain cases."

Upon well established principles of constitutional construction, the act in its operation must be *limited by the scope of the title*. The body of the act must, therefore, be limited in its scope to provisions for the imposition of taxes upon the *transfer* of property, and must further be limited to transfers of property *by the methods set out and enumerated in the title of the act*.

The methods for the transfer of property to which the scope of the act is limited and which

are enumerated in the title of the act are eight in number. They are:

1. The transfer of property by devise.
2. The transfer of property by bequest.
3. The transfer of property by descent.
4. The transfer of property by distribution by statute.
5. The transfer of property by gift.
6. The transfer of property by deed.
7. The transfer of property by grant.
8. The transfer of property by bargain and sale.

The methods of transfer thus enumerated are all expressed in technical language; the technical meaning and limitation of each method is well defined, is well known to the bench and bar, and unless a transfer falls within one of the enumerated classes, the transfer inheritance Tax Act *does not reach the transaction and there can be no tax.*

And the fact that these phrases enumerating the methods of transfer which are the basis of the imposition of transfer inheritance taxes are words of strict legal significance and that the scope of the act *is* limited to taxes imposed upon transfers by these strictly construed methods of transfer, is part of the history of our legislation upon this branch of taxation.

The title of the act originally was "An Act to tax intestate's estates, gifts, legacies and collateral inheritance in certain cases." It was held that this title did not express a purpose to tax real estate *devised*, and that the provisions of the body of the act for that purpose were invalid.

Grossman v. Hancock, 58 N. J. L., 139.

A judgment at law is *not* even a transfer of property.

A judgment at law does not fall within any of the classifications of method of transfer set out in the title of the act; consequently the act,—no matter what may be contained in its body,—cannot be made to apply to a judgment at law.

The Supreme Court, in dealing with this point, says:

“The argument of the prosecutor is plausible and ingenious, but overlooks we think, one important element, namely, that the agreement between the Bentes and Steinberg contained the provision that the bequests were to be embodied in the will of Steinberg, * * *. The effect of the judgments, it seems to us, *was merely to restore the status as it would have been had the erasures of the bequests set forth in the will not been made*” (p. 51, fols. 28-40).

The Supreme Court also says:

“The effect of the judgments was to *restore the original provisions of the will.*”
(p. 53 f. 1)

A will can, of course, only speak as of the date of the death of the testator. It does not *become a will until the death of the testator occurs*. The will in this case was admitted to probate *without the bequests* of \$15,000.00 to Henry Bente, evidently under the law as laid down in *Smith v. Runkle*, 97 Atl., 296, affirmed 86 N. J. E., 257. The presumption therefore is that the erasures were made by the testator and that in making the same, *he intended to alter his will in a manner permitted by law*.

The testator in this case, therefore, died *without actually having made the bequest of \$15,000.00 to*

Henry Bente. To give to the judgment in this case the effect of *restoring* the status as it would have been had the erasures of the bequests set forth in the will not been made, is to make a will for the decedent; is to make a bequest for the decedent where he intended that none should be made; is to make a bequest and last will for the decedent without having decedent observe in so far as this bequest is concerned, the formalities required by law in the execution and publication of his last will and testament. Truly this runs counter to the decisions in this state which hold that will must be executed *exactly* in the manner prescribed by statute.

The scope of the act is by its title limited to "transfers" of property. The word "transfer", as used in the title is synonymous with "passing", "change of title", "change of possession"; it is used to indicate a change of title or a change of beneficial ownership, in which event the tax may, under certain conditions, be assessed.

Dixon v. Russel, 78 N. J. L., 296, page 299;
See also Section 26 of Act, C. S., 5311.

But assuming for a moment that the comptroller, knowing the estate to be solvent, has a right to assume that the judgment will be paid either voluntarily or upon execution issued and that the tax is really levied against the sum of Fifteen thousand (\$15,000.00) Dollars thus recovered by the judgment-creditor, can it be said that money thus recovered is a transfer of property *by the methods prescribed by the title of the act* in question. I submit not.

All of the methods of transfer enumerated in the title,—and in the body of the act,—deal with the *voluntary alienation by decedent* of his prop-

erty as distinguished from *involuntary* alienation. Payment of a judgment *against the estate* of decedent *upon execution issued* or in obedience to the sentence of the law as contained in the judgment itself, is certainly *not* a *voluntary* but an *involuntary* alienation. Nor can it be said, in this case, to be an alienation *by the decedent*.

The assessment of a tax upon a judgment at law is therefore not justified by the title of the Transfer Inheritance Tax Act.

Grossman v. Hancock, 58 N. J. L., 139;
See also Sect. 26, C. S., 5311.

POINT II.

The Supreme Court erred in giving judgment for the defendant because the Comptroller was without jurisdiction to impose the tax since the subject of the tax does not come within the scope of the body of the tax act.

Section One of the act, as amended,—Section 1, Chapter 174, Laws of 1922, page 293,—provides for the imposition of the tax and the *power* to levy the tax in this case must be found in the various subdivisions of this section.

An examination of this section will disclose that:

Subdivision one applies to transfers by *will* made by a resident of the state.

Subdivision two does *not* apply to the facts in hand because it applies *only* to property having its legal situs in this state, where the decedent at time of his death is a non-resident of this state.

Subdivision three is applicable to both resident

and non-resident decedents and to *that extent* is applicable to the case at bar.

Subdivision four deals with estates in expectancy and is not applicable.

Subdivision five relates to the transfer of property or accounts, etc., held jointly; it creates a presumption of fact regarding the ownership of such property. It does not apply to the instant case.

The *pertinent* language of section one of the act (L. 1922, p. 294) to be examined, therefore is:

“1. A tax shall be and is hereby imposed upon the *transfer* of any property * * *, except as hereinafter provided, in the following cases:

FIRST.—*When the transfer is by will* * * *.

SECOND.—* * *.

THIRD.—When the transfer is *of* property, * * * by deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death. Every *transfer* by deed, grant, bargain, sale or gift, made within two years prior to the death of the grantor, vendor or donor, of a material part of his estate, or in the nature of a final disposition or distribution thereof, *and without an adequate valuable consideration*, shall *in the absence of proof to the contrary*, be deemed to have been made in contemplation of death within the meaning of this section.

FOURTH.—* * *.

FIFTH.—* * *.”

The Supreme Court was of the opinion that the instant case presents a transfer of property by will, even though the bequest to the prosecutor was

deleted and the will as probated contained no provision for the payment of \$15,000.00 to the prosecutor, and it based this conclusion upon its finding that—

“the agreement between the Bentes and Steinberg contained the provision that the bequests were to be embodied in the will of Steinberg, and *had they remained* in the will the amounts bequeathed *would have been subject* to the inheritance tax” (p. 51, fol. 30).

It is the contention of the prosecutor that the Supreme Court erred in this finding; that Subdivision one, applying to transfers by will, does not apply to the facts in the instant case.

In the case at bar the Hudson County Circuit Court has, by its solemn judgment, *established the fact* that the decedent in this case *was indebted* to the prosecutor *at the time of decedent's death*, in the sum of Fifteen thousand (\$15,000.00) Dollars, and this finding is a *finality* which cannot be collaterally assailed and which must be *accepted* as a finality by the comptroller. The matter is *res judicata*.

There *is no will* in this case making any bequest to the prosecutor and hence Subdivision one, providing for a tax against either a bequest or a devise in the event of a will cannot apply.

The Supreme Court, in dealing with this point, says:

“The judgments could *not* have been obtained for the sums mentioned had it not been for the agreement *by which* the amount the Bentes were to receive *was to be bequeathed* to the Bentes for the services they were to render to Steinberg. The Agreement was *not*

to pay to each \$15,000.00 at the death of Mr. Steinberg, *but to leave to each a bequest for that amount.* The *reasonable value* of the services rendered were doubtless *below* the amounts which were recovered in the action at law. *The recovery was possible* because of the *form* which the contract took" (p. 52, fols 1-13.) (Italics mine.)

In criticism of the foregoing excerpt, I beg to submit that the real agreement made by Steinberg *was* to pay to each of the Bentes the sum of \$15,000.00 *at the time of the death* of Mr. Steinberg. The agreement is thus set up in the complaint of Margaretha Bente (p. 26, fols. 18-20) and in the complaint of Henry Bente (p. 40, fols. 37-40). And upon this allegation the defendant joined issue with the result that a judgment was rendered which established *as a fact* that *this was* the promise of Steinberg.

In each case it is alleged that Steinberg *in consideration* of the promise of the plaintiff to that suit, *promised* "to cause to be paid to the plaintiff therein the sum of \$15,000.00 *immediately upon the death* of the said Charles Steinberg. The consideration underlying each agreement was not services, but a *promise for a promise*; the services rendered were rendered *in performance* of the *promises* made by Margaretha Bente and Henry Bente, and the will was executed by Steinberg *in performance of his promise* and the right of these prosecutors to obtain the judgments in their respective actions at law was *in no way dependent upon the fact* that the agreement by which the amounts the Bentes *were to receive* provided that these amounts *were to be bequeathed to them.* The judgments could have been

recovered even if the pleadings had not mentioned the bequests and if there had been no evidence of bequests. The allegation and the proof of the bequests was merely *evidenciary* of the promise to pay which had been made by Steinberg.

In fact, if an actual bequest *had* been a condition precedent to a right of recovery, the Bentes could *not have obtained their judgments* for, as a *matter of law, no bequests were made to them* by the will which was admitted to probate.

Nor does the right of the Bentes to a recovery depend upon the *value* of the services rendered by them. The measure of damages recoverable for non-performance of a contract to bequeath or devise property is *dependent* on the form of the action. In an action for damages for breach of contract, where the contract has been fully performed by plaintiff, the measure of damages is *the amount agreed to be paid under the terms* of the contract. In an action for breach of contract, *fully performed* by plaintiff, where the *payment* is to be made by a specific devise or bequest, the measure of damages is the value of the property agreed to be devised or bequeathed, and *not* the value of the services rendered or other consideration furnished by the promise.

40 Cyc., 1073;

VanHouten v. VanHouten, 89 N. J. L., 301;

Holcomb v. Griggs, 78 N. J. L., 186, 188;

Andrews v. Brewster, 9 N. Y. Supp., 114, affirmed 124 N. Y., 433;

In re Baker's Estate, 82 N. Y. S., 390, 391; affirmed 178 N. Y., 575;

In re Vanderbilt, 172 N. Y. S., 511, 515;

In re Galots' Estate, 174 N. Y. S., 492, affirmed 176 N. Y. S., 905.

Nor is there any reason why a contract to bequeath a certain sum should not give rise to an action for damages if broken, as certainly as a contract to pay the same sum in the contractor's life or at the moment of the contractor's death.

Stone v. Todd, 49 N. J. L., 274; ^{2231, 62 L. ed. 1094,}
 In re Simmons, 247 ~~U.S.~~ ²³⁷, citing
 VanHouten v. VanHouten, 89 N. J. L.,
 301; Krell v. Codrona, 154 Mass., 454;
 Sylvester's Case, 79 Eng. Reprint, 1248.

Nor will the adequacy of the consideration be inquired into. The consideration was *a promise for a promise* and a promise is usually considered adequate consideration for a promise; sufficient to support an action at law.

But the plaintiffs at law in these cases pleaded *performance* on their part (p. 27, f. 3, etc.; p. 41, f. 25, etc.); the defendant joined issue thereon; the judgment established such performance as *res judicata* and, under such circumstances, the adequacy of the services rendered could not have been inquired into upon the trial of the law action.

Burt v. Brownstone Realty Co., 95 N. J. L., 457, 461.

Why then should the alleged inadequacy of the services rendered be allowed to furnish a ground for collateral attack upon these judgments, especially since the adequacy of consideration, if considered at all, must be judged, not as of the time of the death of Steinberg, but rather as of the time of the making of the contract when none of

the parties could foretell just when Steinberg would die or how long the servitude of the Bentes would last.

The Supreme Court also said:

“The effect of the judgments was not to set aside the will but to convert those who would receive, by reason of the erasures, the bequests originally intended for the Bentes, into trustees for the Bentes to the extent of such bequests” (p. 52, f. 22).

The quotation from the opinion just above set out is undoubtedly *good equity*. It represents the result which would obtain upon bill filed for specific performance. But the prosecutors *did not have to go into equity*; the facts of the case entitled them to their action at law in which they were entitled to recover the *full value* of the property agreed to be paid, i.e., the full amount of the legacies.

I submit that Subdivision one of Section one of the tax act providing for the imposition of a tax when the transfer is by will does not apply to the case at bar and that the reasons advanced by the Supreme Court in its opinion, in support of that contention, do not in fact support the same.

Nor can the assessment of the tax be justified under subdivision three of Section one.

This subdivision, in so far as pertinent, provides for the assessment of a tax:

“When the transfer is of property * * *
by deed, grant, bargain, sale or gift made in
contemplation of the death of the grantor,
vendor or donor, or intended to take effect in
possession or enjoyment at or after such death.
Every transfer by deed, grant, bargain, sale

or gift, made within two years prior to the death of the grantor, vendor, or donor of a material part of his estate, or in the nature of a final disposition or distribution thereof, and without an adequate valuable consideration, shall in the absence of proof to the contrary be deemed to have been made in contemplation of death within the meaning of this section."

It should be noted that this section is limited to transfers by deed, grant, bargain, sale or gift and does not apply to transfers by will.

There is in this case no transfer of property by deed, grant, bargain, sale or gift.

There is in this case no transfer of property made in contemplation of the death of the grantor, vendor or donor.

There is in this case no transfer of property intended to take effect in possession or enjoyment at or after death of the grantor, vendor or donor.

The only thing there really is in this case is a *contract* between decedent and prosecutor, whereby prosecutor for the sum of Fifteen Thousand (\$15,000.00) Dollars, *agreed to be paid* (Case, p. 40, fol. 37) by decedent at the time of his death, agreed to render certain services to decedent for the rest of decedent's life; the *performance* of that contract by prosecutor; the *failure* of decedent to *provide for the payment* agreed upon and an adjudication by a competent court that decedent or his estate is *indebted* to prosecutor for the service thus rendered in the sum of Fifteen Thousand (\$15,000.00) Dollars.

POINT III.

The Supreme Court erred in giving judgment for the defendant because the Comptroller was without jurisdiction to impose the tax since the judgment against which the tax was levied represented a debt owing by decedent, and the tax imposed is merely a premium upon the devolution of property resting upon the right of the state to limit the right of testamentary disposition or of intestate succession; a legacy tax or a succession tax.

a. The judgment against which the tax was levied is a debt of the decedent owing at the date of death.

Section 1 of the Transfer Inheritance Tax Act, C. S. 5305, as amended by L. 1922, page 283, section 1 (found at p. 295, L. 1922), contains this provision:

“All taxes imposed by this act shall be at the rate of eight per centum upon the *clear market value of such property*, * * *. In determining the clear market value of such property the following deductions and no others shall be allowed:

*Debts of the decedent owing at the date of death * * *.”*

In the case at bar the Hudson County Circuit Court, has, by its solemn judgment, *established* the fact that the decedent in this case *was indebted to the prosecutor* at the time of decedent's death, in

the sum of Fifteen Thousand (\$15,000.00) Dollars. The judgment itself is *not* property transferred or to be transferred and in fixing the clear market value of any property to be transferred within the limitations of the Transfer Inheritance Tax Act and by the methods prescribed by that act the *debt represented by this judgment must be deducted from the clear market value of such property.*

This judgment represents a debt which by the express provisions of the statute is deductible and therefore is not taxable.

This provision of the act does not appear in the statute until 1922 and seems not to have been judicially construed. The question arises, does this judgment represent *a debt* within the meaning of this language? I submit it does.

The word "debt" ordinarily has a very broad meaning.

In *New Jersey Insurance Co. v. Meeker*, 37 N. J. L., 282, at page 290, Mr. Chief Justice Beasley said:

"A creditor, according to the definition of Bouvier, 'is he who has a right to require the fulfillment of an obligation or contract'. In this large sense it means more than the person to whom money is owing. Webster's explanation of the word is 'A person to whom a sum of money or other thing is due by obligation, promise, or in law'. This description has scope enough to embrace the duty where non-observance constitutes the gravamen of the present suit. Also, the words 'debt' and 'debtor' have a similar amplitude of meaning. 'The word "debt"' says Burrill, in his law dictionary, 'is of large import, including not only debts of record of judgment, and debts by specialty, but also obligations arising under

simple contract, to a very wide extent, and in its popular sense includes all that is due to a man under any form of obligation or promise'. And Sir Edward Coke, in commenting on the word debitum, in the statute of Merton, ch. 5, says: 'Debitum signifieth not only debt, for which an action of debt doth lie, but here in this ancient act of parliament, it signifieth generally any duty to be yielded or paid'. The same extent of meaning is ascribed to this term by Chief Justice Tilghman, in *Frazer v. Tunis*, 1 Binney's Rep., 254; and the judgment in the recent case of *Bide v. Harrison*, L. R. 17 Eq., 76, is to the same effect, it being there held that a bequest of '*all and every sum or sums of money due to me at my decease*', included damages recovered in an action by the executor for a breach of covenant committed in the lifetime of testator. The following are likewise pertinent authorities: Ram on Assets (2nd ed.) 3, 4, 5; Toller on Executors, 282; Wentworth on Executors, 284; 2 Williams on Executors, 915."

With respect to the judicial construction of statutes of this kind, it may be pertinent to illustrate the attitude of the New York courts in construing similar statutes.

In the Matter of Kean, 108 Misc. Rep., 538 N. Y. S., 789, the court said:

"The special tax laws relating to the taking of property for the support of government are always construed against the government (Matter of Wadsworth, 100 Misc. Rep., 439, 166 N. Y. Supp., 716), and the state has the burden of proving that property is subject to

a tax (Matter of Enston, 113 N. Y., 174, 21 N. E., 87, 3 L. R. A., 464)."

In the Matter of Thorne, 44 App. Div., 8, 60 N. Y. Supp., 419, the court said:

"The right to impose the tax must rest upon evidence sufficient in probative force to bring it (clearly) within the statute, and must establish a case from which the law clearly authorized its imposition."

That the judgment in the case at bar represents a debt owing by the Estate cannot be questioned; for that was the very thing litigated and decided by the action at law which resulted in this judgment.

I therefore submit that the debt represented by this judgment is not taxable.

b. *Any tax assessed against the adjudication in this case is really a tax to be ^{levied} upon the services rendered by prosecutor to decedent in his lifetime. It is not a legacy tax; it is not a succession tax.*

And yet our courts have held that:

"The tax imposed under this act is a premium or privilege upon the devolution of property, resting fundamentally upon the sovereign right of the state to withhold and hence to limit, the right of testamentary disposition or of intestate succession; that it is a legacy or succession tax. Wyckoff v. O'Neil, 72 N. J. E., 880; Neilson v. Russell, 76 N. J. L., 655; Parrot v. Rogers, 86 N. J. E., 311."

In re Diehls Executor, 88 N. J. E., 310, page 312;

In re Baker's Estate, 82 N. Y. Supp., 390, page 391.

Whatever rights prosecutor has in the premises and whatever duties are imposed upon the estate of the decedent in this case arise out of a contract, *out of decedent's agreement to pay, based upon a valuable consideration* and any tax to be lawfully assessed against the *proceeds* or *gains* resulting from the performance of such contract must of necessity be assessed under an act having that *object in view* and cannot be assessed under an act providing merely for a succession tax.

The comptroller, however, assessed this tax upon the recommendation of his special investigator. It may, therefore, be well to examine these recommendations for the purpose of finding the justification for the action of the comptroller.

Mr. Rurode in his letter to the comptroller says:

“The Schedules show that the Bentes obtained judgments for services rendered. This is not the fact” (p. 12, fol. 23).

The Bentes certainly recovered their judgments because they had contract providing for the payment of specific amounts of money for services to be rendered by them. They pleaded these contracts and in their pleadings alleged full performance of their contracts, i. e. *that they had rendered all the services called for by their contracts*. Judgment went for the Bentes for the full amount of their claims under these pleadings. Whether the Bentes obtained judgments for services rendered is, therefore, I submit, a matter controlled by the judgment record which is made part of the return in this case. Mr. Rurode's opinion cannot change the fact that the judgments were recovered and so long as the judgments stand unimpeached, they are conclusive upon everybody,—even upon Mr. Rurode, the special investigator.

Mr. Rurode, in his letter to the comptroller, however, further finds:

“If the decedent had performed his contract to leave each of the Bente’s Fifteen thousand (\$15,000.00) Dollars by his Last Will and Testament, the estate or interest which they took *would have been subject to the tax*, and it makes no difference that he failed in his promises, for the law in that case enforces the contract and in fact the devolution of the property takes place *under the will* and such devolution is subject to the transfer of tax. Re Kidd’s Estate, 188 N. Y., 274, 80 N. E. Rep., 925; Clark v. Treasurer, Mass., 115 N. E. Rep., 416” (p. 12, fol. 40).

And the Supreme Court, in its opinion followed Mr. Rurode, for it says:

“The contract, if carried out in its original form, would have resulted in a tax against the bequests” (p. 52, fol. 16).

I submit that even if Steinberg had fully carried out his contract in its original form, had not revoked the bequests, and if his will had been probated with the bequests therein contained, that no inheritance tax could have been levied against the legacies, first because they represented *a debt owing by the decedent*, and secondly, because they represented *payment for services rendered to decedent* in his lifetime.

The debt of record against which the tax is levied is founded upon a form of contract recognized by our law.

VanHouten v. VanHouten, 89 N. J. L.,
301.

And the prosecutor recovered on his contract as a *creditor* of decedent's estate.

Stone v. Todd, 49 N. J. L., 274, page 281.

The pleadings allege an agreement for the payment of Fifteen thousand (\$15,000.00) Dollars upon a consideration which has at all times been deemed a valuable consideration. The pleadings allege full performance by prosecutor of the services which constituted the consideration for the promise to pay Fifteen thousand (\$15,000.00) Dollars.

The judgment affirms that these services were fully rendered and that therefore the estate is indebted to the prosecutor Fifteen thousand (\$15,000.00) Dollars.

The presence of an adequate valuable consideration is therefore established beyond contradiction.

The effect of consideration upon transfer in relation to taxability of such transfers under laws providing for succession taxes has been often considered; although until recently no statutory reference has been made to the subject. In New Jersey such reference appears for the first time in subdivision Third of section 1 as amended in 1922.

California prior to statutory exemption excepted all transfers for an adequate valuable consideration from the operation of its act.

In re Reynolds, 169 Cal., 600.

In New Jersey I have found only one case dealing with the point. The court there says:

"Let us now turn to the question of consideration. It is clear, I think, from the history and purpose of the legislation on the subject that

by this taxing statute the Legislature intended to tax only transfers of a donative nature, and, so far as I know or can recollect, there has never been any attempt made in this state to levy a tax on any contrary theory. Under subsection third of section 1, if the transferor received a consideration of substantially equal value to the property transferred by him, his transfer would not be deemed taxable. Likewise, if a decedent gave property by will to a man from whom he had in his lifetime received property of equal value in consideration of his promise to make the testamentary gift in question, the testamentary 'gift' would probably not be deemed taxable."

In re Huggins Estate, 96 N. J. E., 275, page 281 bottom.

In every case in this state prior to the case of in re Huggins, supra, where the subject of consideration has been discussed, it has been impliedly recognized that the existence of consideration would exempt the estate from tax. See in re Bottomly, 92 Eq., 202; in re Hall, 94 Eq., 398; Wolf v. Comptroller, 90 Eq., 221.

The cases cited by Mr. Rurode, namely in re Kidd's Estate, 188 N. Y., 274, and Clark v. Treasurer, 226 Mass., 301, are under different statutes and do not apply.

In the case of in re Kidd's Estate, supra, the question of consideration was not considered by the court, the transfer tax was properly assessed under the terms of the will and the court held that "the devolution of the property has, in fact, taken place *under the will* and such devolution is subject to the transfer tax." It is submitted that no such result could have been reached under our statute if for no other reason, because of our constitutional

limitations upon the enactment of statutes which would *prevent* the assessment of a tax upon a mere *devolution of property* under an act bearing a title affecting, as has been heretofore shown, only transfers of property brought about by *eight* specific *methods* of transfer.

In the case of *Clark v. Treasurer*, supra, the questions decided again arose *under the terms of the will*. There the contract before the court was construed a contract to make a legacy. The legacy was made, the question of consideration was not passed upon but the judgment of the court was that "there are no words of exception or limitation in the statute which indicate any legislative purpose to exempt from its sweeping provisions a legatee standing as the one at bar.

The court in that case there said:

"The question is not raised by this record whether a legacy ostensibly *given for the purpose of discharging a lawful debt is subject to excise*. The rights of a legatee are *not* those of a creditor because the contract she made has been performed and she has become a legatee. But it has been held in numerous cases that a *legacy* in discharge of a debt is subject to a legacy tax. *Matter of Gould*, 156 N. Y., 422; *State v. Mollier*, 96 Kan., 514; *Carter v. Craig*, 77 N. H., 200; *Leavell v. Arnold*, 131 Ky., 426; *Turner v. Martin*, 7 DeG. M. & G., 427; *Matter of Kidd*, 188 N. Y., 274."

Dealing now with the New York cases just cited from the *dictum* of *Clark v. Treasurer*, supra:

Matter of Kidd, 188 N. Y., 274, has already been adverted to; *Matter of Kidd*, 188 N. Y., 423, dealt with a statute containing no limitations. The court quoted the statute as follows:

“A tax shall be and is hereby imposed upon the transfer of any property * * * when the transfer is by will, and said: ‘It will be noted that the imposition of the tax is not limited to property *gratuitously* given by will but is extended to *all* property so transferred.’”

Matter of Gould, 156 N. Y., 423, page 427.

But both in re Kidd’s Estate, *supra*, and Matter of Gould, *supra*, are no longer the law of New York.

In re Baker’s Estate, 82 N. Y. S., 290; 178 N. Y., 575;

In re Vanderbilt, 172 N. Y., 511; 226 N. Y., 638;

In re Galot’s Estate, 174 N. Y. S., 482; affirmed 176 N. Y. S., 905;

In re Schmoll, 181 N. Y. S., 542;

In re Orvis, 233 N. Y., 1.

I will append excerpts from the cases just cited showing the change in the law of our sister state.

“It will doubtless be conceded that the respondent’s claim is not one which is dependent for its validity upon a deed or grant of any kind, and, furthermore, that it is not testamentary in its character, although it did not become due and payable until after the death of her husband. It was simply the outgrowth of a contract entered into between the decedent and the claimant which was founded upon a perfectly good and valuable consideration, and one which is regarded with favor by the law, and will generally be enforced in accordance with the intention of the parties. *Johnston v. Spicer*, 107 N. Y., 185 (13 N. E., 753); *Peck v. Vandemark*, 99 N. Y., 29 (1 N. E., 41);

White v. White, 20 App. Div., 560 (47 N. Y. Supp., 273). It would seem to follow, therefore, that a claim arising from such a source is in the nature of a debt against the estate, and as such enforceable like any other debt (Hege-man v. Moon, 131 N. Y., 462 [30 N. E., 487]; Warner v. Warner, 18 Abb. N. C., 151); and, if this is its character, we do not see why it should be subject to taxation under the Transfer Tax Law any more than if it were a debt represented by a bond or note. The tax imposed by the statute in question is a tax on the right of succession, and not on the property itself (Matter of Dows, 167 N. Y., 227 [60 N. E., 439], 52 L. R. A., 433, 88 Am. St. Rep., 508); and a payment of an obligation dependent upon a valuable consideration is not a succession in any sense (Goodrich, P. J., in Matter of Miller, 77 App. Div., 473, 481 [78 N. Y. Supp., 930, 934])."

In re Baker's Estate, 82 N. Y. S., 390, at page 391.

"The learned counsel for the comptroller argues that, if any testamentary provision was made in the will for the satisfaction of the obligation of the ante-nuptial agreement, Mrs. Vanderbilt would take under the provisions of the will, and not by virtue of the agreement. He therefore distinguishes the case of Matter of Baker, 83 App. Div., 530, 82 N. Y. Supp., 390, affirmed on opinion below, 178 N. Y., 575, 70 N. E., 1094, from the case at bar. * * *

In the case at bar, Mrs. Vanderbilt's right to receive these securities did not grow out of the will; its source was in the ante-nuptial agreement, and the obligation could have been en-

forced against the estate had there been no will. It rested upon a valuable consideration, which was executed by the marriage. *The mere fact that the method of the payment and satisfaction of the obligation was directed by the will did not change the inherent character of the obligation.*"

In re Vanderbilt, 172 N. Y. S., 511 at page 515.

"The transfer of the real estate by the will of decedent was in payment and satisfaction of an obligation incurred by him in his lifetime. It was not a gift or a gratuity, but was founded on a contract made for a valuable and adequate consideration. *Although effected by the will of decedent, the transfer was not liable to the tax.* Matter of Baker, 83 App. Div., 530, 82 N. Y. Supp., 390, affirmed 178 N. Y., 575, 70 N. E., 1094; Matter of Vanderbilt, 184 App. Div., 661, 172 N. Y. Supp., 511."

174 N. Y. Supp., 492. In re Galot's Estate, affirmed 176 N. Y. S., 905.

"It seems to me that the Surrogate was in error in thus holding the property received by the children to be subject to the tax, and that the Surrogate's assumption that because the transfer to the children came within the classification of the statute, as 'intended to take effect in possession or enjoyment at or after such death,' it was therefore taxable. Recent decisions of the courts of this state have established the law that transfers arising upon a valuable and adequate consideration, although within the classification of the statute, are not within the intendment of it, and are not tax-

able. Matter of Orvis, 223 N. Y., 1, at bottom of page 6, 119 N. E., 88, at page 89 (3 A. L. R., 1636) ; Matter of Baker, 83 App. Div., 530, 82 N. Y. Supp., 390, affirmed 178 N. Y., 575, 70 N. E., 1094.

There can be no question that, as to decedent's estate, the two-thirds thereof which his widow received was not subject to taxation, because it was received by her pursuant to the ante-nuptial agreement upon a good and sufficient consideration paid and furnished by her."

In re Schmoll, 181 N. Y. Supp., 542, at page 546.

"Transfers resting upon a valuable and adequate consideration, although within the classification of the statute, are not within the intentment of it and are not taxable. * * * The taxability does not depend upon fraud or an attempt to evade the statute; nor does it depend upon the purpose or inducement of the transfer; nor does it depend upon the form given the transfer. * * * The measure determining the liability or freedom from liability to the tax is the nature, the essence, the effect of the transfer. If, in truth, it, in effect, bestows, under the statutory conditions, a bounty or benefaction, and is not a transfer for money's worth, it is taxable."

In re Orvis, 233 N. Y., 1, at page 6.

And in re Orvis, 233 N. Y., 1, was cited in our Prerogative Court in Wolff v. Comptroller, 90 N. J. Eq., 221, page 225.

And that the case of In re Kidd's Estate, supra, is generally considered as superseded will appear from an examination of 7 A. L. R., 1055, where in

an excellent review of the subject the case commentator says:

“The theory of *Re Baker* however, is consistent with *Re Vanderbilt* (1918), 194 App. Div., 661, 172 N. Y. Supp., 511, affirmed without opinion in (1919) 226 N. Y., 638, 123 N. E., 893, and *Re Orvis* (N. Y.), *supra*, so that if there is any conflict between *Re Baker* and *Re Kidd*, the former is the law, as established by the latest decisions.”

The existence of a valuable consideration such as services rendered, I therefore submit, does exempt the contract and judgment in this case from the intendment of the act.

Conclusion.

It is respectfully submitted that the judgment of the Supreme Court should be reversed and that the assessment of the transfer inheritance tax levied in this case be set aside.

February Term, 1927.

Respectfully submitted,

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