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INHERITANCE TAXATION OF TRANSFERS NOT TAKING PLACE AT DEATH

BY HARRY W. KROEGER

I. PRELIMINARY CONSIDERATIONS

The law of property recognizes as transfers taking place at death the passing of property by will or descent. Did governments confine the incidence of their various so-called inheritance taxes[1] to such transfers, no constitutional problems would arise respecting the transfers subject to the tax. On the other hand, were the incidence of the tax so confined, the efficacy of the tax would be much reduced. It would not require even an astute lawyer to point out the manner in which inheritance taxes could be circumvented without sacrifice to the owners of property of the advantages of testamentary disposition.

To prevent circumvention of the inheritance tax laws, governments have sought to extend the purview of their taxing statutes beyond transfers taking place at death as known to the law of property, and have imposed the tax upon certain types of transfers not taking place at the death of the owner. The at-

[1] The term "inheritance tax" is employed with a feeling of apology. Philologically the word "inheritance" connotes devolution by intestate succession, and seems inappropriate to apply to a class of transfers which embraces not only transfers by will but certain transfers *inter vivos* which have been held subject to the tax. On the other hand no other current expression is entirely satisfactory. It seems preferable to reserve the terms "succession tax" and "estate tax," respectively, in order to distinguish between the type of legislation, enacted by most of the states, which imposes the tax on the privilege of the beneficiary to succeed to the property, and the type of legislation, exemplified by the Federal Estate Tax Law, which imposes the tax on the privilege of transmitting the property.

tempted extensions may be embraced under four heads, to include: (1) transfers with powers of revocation reserved, (2) transfers with possession and enjoyment of the property postponed to the death of the donor, (3) transfers made in contemplation of death, and (4) transfers made by virtue of powers of appointment. How far these extensions are, or are not, so arbitrary and confiscatory as to violate the due process clauses contained in the Fifth and Fourteenth Amendments of the Federal Constitution is the topic of this paper.

Viewed from the angle of general taxation, it will be readily observed that the inclusion of transfers not taking place at death in a scheme of inheritance taxation, involves the transposition of such transfers from the potential field of gift taxation into the field of inheritance taxation. The particular governmental authority imposing the inheritance tax may not have a gift tax. But this of itself would not justify subjecting to inheritance taxation such transfers *inter vivos* as bear no kinship to inheritances.

Underlying the decisions relating to inheritance taxation are two fundamental theories: the first, that inheritance is a privilege and not a natural right,[2] the second, that an inheritance tax is a tax upon that privilege and not a tax upon property passing in inheritance.[3] In these theories lies not only the justification for the tax, but also the justifications for the classification and discrimination in inheritance taxation, held to be not violative of the equal protection and due process clauses.[4] One of the discriminations so justified is that of progressive or graduated taxation.[5]

While it had been suggested by Mr. Justice McReynolds, in *Schlesinger v. Wisconsin*,[6] that graduated taxation could not

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[2] Magoon v. Illinois Trust and Savings Bank (1898) 170 U. S. 283; Knowlton v. Moore (1900) 178 U. S. 41 (federal succession tax of 1898).

[3] *Supra*, note 2. New York Trust Co. v. Eisner (1921) 256 U. S. 345. For a recent statement of the theory, see Stebbins v. Riley (1925) 268 U. S. 137, 141.

[4] c. f. Magoon v. Illinois Trust and Savings Bank, *supra*, note 2; Billings v. Illinois (1903) 188 U. S. 97; Maxwell v. Bugbee (1919) 250 U. S. 525; Stebbins v. Riley, *supra*, note 3.

[5] *Supra*, note 2.

[6] (1926) 270 U. S. 230, l. c. 240.

properly be laid on all gifts, nor upon any gift without testamentary character, the law appears to be fixed to the contrary in *Bromley v. McCaughn.*[7] That case, which involved the gift tax provisions of the Revenue Act of 1924, characterized the gift tax as one laid upon the exercise by an owner of property of a single one of those powers incident to the ownership, namely, the power to give the property owned to another. Thus, the tax is not a direct tax upon property but an excise upon a particular use of it. As such, the tax was held not violative of the provisions of the Federal Constitution forbidding unapportioned direct taxation by the United States, and also not violative of the due process clause, contained in the Fifth Amendment, even though the tax be a progressive or graduated tax. The characteristics of gift taxation are thus assimilated to the characteristics of inheritance taxation.

Let us now assume that governmental authority should attempt to measure a tax imposed at the death of the owner by the value of the property which passes by virtue of his will or intestate succession, plus the value of all property which he may have given away at any time during his life, whether subject to reservations or not, and whether in contemplation of death or not. The effect of such tax under a scheme of progressive or graduated taxation would be to impose a larger aggregate tax than could or would be exacted if the property passing at death were separately taxed and the gifts made during lifetime were separately taxed.

It has never been seriously contended that such a conjunctive tax could be sustained. In fact, the thing has been attempted only in the classes of transfers herein discussed. To the extent, however, that total inclusion of gifts with transfers taking place at death in a single scheme of taxation would be invalid, the partial inclusions herein discussed would be invalid unless they bear a kinship to inheritance which justifies their transposition

[7] (1929) 50 Sup. Ct. 46; cf. Blodgett v. Holden (1927) 275 U. S. 142, and Untermeyer v. Anderson (1928) 276 U. S. 440, where the opinions were confined to a consideration of the retrospective operation of the Revenue Act of 1924. Congress had attempted by that act, which was not approved until June 2, 1924, to tax gifts made at any time during that year. As to gifts made prior to the effective date of the act, the court declared the tax invalid.

from the class of gifts generally into the class of transfers taking place at death.

It will be submitted in the course of this paper that the transposition of any class of gifts *inter vivos* into the field of inheritance taxation must be justified, as has been suggested by Mr. Justice McReynolds, in *Schlesinger v. Wisconsin*, by their testamentary character. To include a gift not having testamentary character, would subject it to rates of taxation which have no relation to the value of the gift, but are determined by the value of other property subjected properly to such taxation.

By a disposition having testamentary character there must be meant something both more and less than a disposition made with testamentary intent. The absence of such intent will be found to be immaterial in the face of the rule, which will be presently examined, that gifts subject to revocation may be subjected to inheritance taxes. The presence of such intent would not matter if the gift were in every respect absolute and made without contemplation of immediate death from a presently existing condition. Probably what Mr. Justice McReynolds meant by the expression "testamentary character" was objective and not subjective, *viz.*, if the disposition, by reason of surrounding circumstances or in accordance with its own terms, accomplishes substantially the same *result* as would have been accomplished by a will, it has testamentary character. If a disposition have such character its inclusion by governmental authority within the same class with transfers taking place at death, for purposes of taxation, would not be wholly arbitrary.

Before proceeding to an examination of the specific classes of dispositions *inter vivos*, which governments have sought to subject to inheritance taxation, an additional foreword should be interposed respecting the treatment of the two types of inheritance taxes. Mr. Justice Stone in the opinion in *Stebbins v. Riley*[8] said:

> "There are two elements in every transfer of a decedent's estate; the one is the exercise of the legal power to transmit at death; the other is the privilege of succession. Each as we have seen is the subject of taxation."

[8] *Supra*, note 3, l. c. 144.

Depending upon whether the tax is upon the privilege of transmission by the decedent, or upon the privilege of the various beneficiaries to succeed to the property, it is called an estate tax or a succession tax. Despite the fact that there is some incoherence between the estate tax and the succession tax cases, it seems clear that for every transmission by a decedent to a beneficiary there is a succession by the beneficiary, and if in any given instance an estate tax is held constitutionally permissible, a succession tax ought to be held valid when a similar state of facts appears. Therefore, throughout this paper estate tax cases and succession tax cases are grouped under the same headings.

II. Transfers With Powers of Revocation Reserved

The earliest case in the Supreme Court of the United States on the subject of powers of revocation in inheritance taxation, was *Bullen v. Wisconsin.*[9] There a fund had been placed by a resident of Wisconsin in trust with a Chicago trust company for the donor's widow and children, the donor reserving a general power of revocation and the disposition of the income of the trust estate during his life. Upon the death of the donor, the state assessed a succession tax on the trust estate contending that the general power of disposition reserved by the donor was equivalent to a fee for the purposes of taxation. The latter contention was sustained by the Supreme Court of Wisconsin and the constitutionality of such a tax was sustained by the Supreme Court of the United States. The opinion of the Court by Mr. Justice Holmes is based wholly upon the reserved power of revocation. It was said:[10]

> The ultimate limitations would operate unless revoked, which they were not. But Bullen as has been seen, reserved an absolute power of control over all of his gifts, and exercised it during his life by a revocation, (followed, to be sure, by a reconveyance upon the same terms) and by taking all the income of the fund. The words of Lord St. Leonards apply with full force to the present attempt to escape the Wisconsin inheritance tax:— "To take a distinction between a general power and a limitation in fee is to grasp at a shadow, while the substance escapes."

[9] (1916) 240 U. S. 625.

[10] *Supra*, note 9, l. c. 630.

In connection with the *Bullen* case, the recent case of *Saltonstall v. Saltonstall*[11] should be considered. The facts there presented were as follows: One Peter C. Brooks, a resident of Massachusetts, on various dates between 1905 and 1907 transferred certain property upon trusts reserving a life estate in the income, and providing for termination in whole or in part by the donor acting with the concurrence of one of the trustees. In 1919 the trust was altered so as to provide for the accumulation of the income during the donor's lifetime. The applicable succession tax statute of Massachusetts was enacted in 1909, containing a provision for the taxation of transfers of property passing by failure of appointment. A later statutory amendment, enacted in 1916, reached transfers "made or intended to take effect in possession or enjoyment after death." The Supreme Judicial Court of Massachusetts affirmed the power of the state to tax with respect to the trust property on the death of Mr. Brooks, basing its decision upon the reservation of the power of revocation (this being regarded as equivalent to a power of appointment, the failure to exercise which brought the case within the 1909 statute), and also upon the postponement of the possession and enjoyment of the beneficiaries until after the death of the donor. In affirming the decision of the state court, the United States Supreme Court, speaking through Mr. Justice Stone, based its decision almost exclusively upon the reservation of the power:[12]

> . . . the gift taxed is not one long since completed, but one which never passed to the beneficiaries beyond recall, until the death of the donor; and the value of the gift at that operative moment, rather than at some later date, is the basis of the tax.
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> . . . A power of appointment reserved by the donor leaves the transfer, as to him, incomplete and subject to tax. Bullen v. Wisconsin, 240 U. S. 625. The beneficiary's acquisition of the property is equally incomplete whether the power be reserved to the donor or another.

Bullen v. Wisconsin and *Saltonstall v. Saltonstall* attain this result: So long as a transfer is subject to be defeated, prior to the donor's death, whether by power reserved to the donor or

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[11] (1928) 276 U. S. 260.

[12] *Supra*, note 11, l. c. 271.

given to a third person, a constitutionally taxable succession occurs at the time of the donor's death. According to the general rules of property law, the title of the trustee and the rights of the beneficiaries of a revocable trust take effect as of the time the trust settlement is made. Yet the technical rules of vestiture cannot be invoked to impose a constitutional limitation on state power. If in practical effect, a disposition *inter vivos* be tentative until the death of the donor, and if it become final and indefeasible only when the event of death occurs, then the donor has made a disposition which practically accomplishes the same result as if he had embraced his disposition in the form of a will. Such a disposition may fairly be considered as having testamentary character. Differently stated, at the moment of the donor's death, the rights under the deed of settlement become fixed, and this fixation of rights is a proper object of succession taxation. It is consistent with such a theory to hold, as the court in the *Saltonstall* case did hold, that the value of the property at the time of the donor's death is the measure of the tax, for at that time the fixation of rights occurs.

The limits of the rule of the *Bullen* and *Saltonstall* cases are expressed in *Reinecke v. Northern Trust Company*,[13] a case which arose under the estate tax provisions of the Revenue Act of 1921. This case involved two trusts by the terms of which the settlor reserved the income for life and the power at any time to revoke. The case also involved four other trusts made by the same settlor by the terms of each of which life interests in the income were created terminable five years after the settlor's death, or on the death of the respective life beneficiaries, whichever should take place first, with remainders over. The settlor retained right of supervision of the investment of each of the trusts and the power exercisable jointly with the respective beneficiaries to alter, change or modify. Upon the settlor's death the Commissioner of Internal Revenue in fixing the amount of the estate for tax purposes included the value of the corpus of all of the trusts mentioned. His authority for so doing was asserted to be Section 402 of the Revenue Act of 1921 which directed the inclusion in the gross estate of a decedent for tax purposes of all property of which the decedent made a transfer "in-

[13] (1929) 278 U. S. 339.

tended to take effect in possession or enjoyment at or after his death." Suit was brought to recover the tax exacted with respect to the trust property. The Court followed its earlier decisions so far as the two trusts were concerned but declared the tax invalid as to the other four. In the course of its consideration of the latter it held that where the power of revocation or alteration was dependent upon the consent of the beneficiary, the transfer was as complete, as if there had been an absolute gift. The fact that the donor's death determined the shifting of interests from life tenant to remainderman was regarded as immaterial, and it was said that the character of estates created did not affect their taxability, as long as the entire beneficial interest of the settlor had passed under the deed of settlement.

It is of interest to note that the Supreme Court has in the three cases cited sustained a tax on gifts subject to revocation under three different sources of taxing authority, *viz.*: (a) where there was a general succession tax statute and by the rule of construction of the supreme court of the state a reserved power of disposition was considered the equivalent of a fee; (b) where the taxing statute contained a provision for the inclusion of transfers passing by failure of appointment; and (c) where the taxing statute prescribed the inclusion of transfers taking effect in possession or enjoyment at or after death. It does not follow, however, from the fact that a transfer *inter vivos* with power of revocation reserved to the donor is constitutionally taxable, that a governmental authority has properly exercised the taxing power. Thus it has been held by state courts that the mere reservation of a power of appointment does not make a transfer taxable under the postponement of "possession or enjoyment,"[14] nor under the "contemplation of death,"[15] clauses of the various state statutes. These decisions, it is submitted, are unaffected by the *Saltonstall* case, for they concern the interpretation of the statutes, not their constitu-

[14] Nickel v. State (1919) 43 Nev. 12, affirmed (1921) 256 U. S. 222; Re Massery (1899) 28 App. Div. 580, 159 N. Y. 532; In re Patterson (1911) 146 App. Div. 286, 204 N. Y. 677; Re Miller (1923) 236 N. Y. 290, 237 N. Y. 524; Re Dolan (1924) 279 Pa. 582. But see Re Bostwick (1899) 160 N. Y. 489.

[15] People v. Northern Trust Company (1919) 289 Ill. 475, 124 N. E. 662, 7 A. L. R. 709.

tionality. In such matters, of course, the decisions of the state courts are final.[16]

The rule affirming the constitutional power under inheritance tax statutes to tax gifts subject to revocation has been extended to include insurance policies, by the terms of which the insured reserves the right to change beneficiaries, in the recent case of *Chase National Bank v. United States.*[17]

III. Transfers With Possession or Enjoyment Postponed Until Upon or After Death

Inheritance tax statutes frequently contain provisions subjecting to such taxation as part of a decedent's estate property transferred by the decedent subject to postponement of enjoyment or possession until upon or after his death. As observed in the course of our discussion of transfers subject to revocation, the latter have sometimes,[18] but not always,[19] been held taxable by virtue of those statutory provisions. Under this subdivision of our subject, however, we shall treat postponement of possession and enjoyment as referring to an absolute gift subject to reservations by the donor of some estate in the property rather than of a mere power.

Were there total lack of authority on the subject, it might be well contended that a tax imposed at the death of the donor upon interests already vested but then coming into the possession of the beneficiaries, would not be a proper object for succession taxation. It is difficult to discern what operative event occurs, at the time of the donor's death, to effect a disposition akin to testamentary disposition. In the power of revocation case death terminates the right of the donor to substitute a testamentary disposition for the disposition made *inter vivos,* and the failure to make such substitution is tantamount to the dying will of the donor that his settlement stand. But in the instance now contemplated, the very effect of the settlement is to pass irrevocably the interests acquired by the beneficiaries, and the act of transfer divests the donor of all power to make testamentary disposition of the property transferred. From the moment of the transfer, it is the creditors of the beneficiary, and, in the

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[16] Nickel v. State (1921) 256 U. S. 222.

[17] (1929) 278 U. S. 327.

[18] *Supra,* note 13.

[19] *Supra,* note 14.

absence of fraud in the transfer, not the creditors of the donor, who may proceed against the property. Because the possession or enjoyment of the property by the beneficiaries is postponed until the death of the donor, it cannot be said that this effects the transfer to them any more than such postponement until the death of the King of England or until thirty years after the gift.[20]

That a transfer *inter vivos* with reservation of a life interest is subject to a succession tax upon the death of the donor was determined in *Keeney v. New York*,[21] where a New York tax was sustained as to property transferred *inter vivos* upon a revocable trust in which the donor reserved a life interest. Unlike Mr. Justice Holmes in *Bullen v. Wisconsin*, Mr. Justice Lamar in the *Keeney* case treated the problem entirely from the standpoint of the postponement of "enjoyment and possession" clause of the New York statute:

> In the present instance, and so far as the 14th Amendment is concerned, the state could put transfers intended to take effect at the death of the grantor in a class with transfers by descent, will, or gifts in contemplation of death of the donor, without, at the same time, taxing transfers intended to take effect on the death of some person other than the grantor, or on the happening of a certain or contingent event.

Nowhere in the opinion does the court say that a taxable succession takes place upon the death of the donor, but the opinion gives one the impression that the court treats gratuitous transfers generally as taxable and affirms the right of the state to make a classification based upon the reservation of a life interest in the donor. May it be said that the real incidence of the tax is the transfer at the time of the gift, and not a succession taking place at the death of the donor? That because this type of gift tax and the succession tax have a statutory purpose in common, the collection may be made at the time of the donor's death?

Nichols v. Coolidge,[22] a case under the estate tax provisions of the Revenue Act of 1919, will, it is believed, throw light on

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[20] Cf. Shukert v. Allen (1927) 273 U. S. 545.
[21] (1912) 222 U. S. 525.
[22] (1927) 274 U. S. 531.

the subject. A husband and wife, prior to the enactment of a federal estate tax law, conveyed property upon trusts, income to be paid to themselves during their joint lives and to the survivor of them during his or her life, corpus thereafter to be distributed to their children or the representatives of the children. In 1917 the donors relinquished their life interests in the trust. The Act contained a postponement of "possession or enjoyment" provision applicable, by its terms, to conveyances made before as well as after the enactment. Under this provision the government collected a tax at the death of Mrs. Coolidge, including in its computation of the gross estate the value of the property belonging to the trust estate, and the executors sued to recover such portion of the tax as was measured by the value of the trust property. The Supreme Court declared that portion of the tax invalid. The contention of the government that the gifts with reservation of life interests were testamentary in effect and might be properly treated as taxable on the death of the owner, was disposed of by the Court as follows:[23]

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

The court thereupon declared that so far as the statute related to transfers made prior to its passage, it is "arbitrary, capricious and amounts to confiscation." The opinion concluded with the following remarks:[24]

> Whether or how far the challenged provision is valid in respect of transfers made subsequent to the enactment, we need not now consider.

The case might conceivably have turned on the proposition that the relinquishment by the donors of their life estates removed the transfer from the operation of the postponement of possession or enjoyment clause of the statute. This proposition was, however, not discussed by the Supreme Court, and, inasmuch as the District Court[25] treated the transfer as one intended to take effect in possession or enjoyment at or after

[23] *Supra,* note 22, l. c. 540.
[24] *Supra,* note 22, l. c. 543.
[25] Coolidge v. Nichols (D. C. D. Mass. 1925) 4 F. (2d) 112, l. c. 116.

death within the meaning of the Act of 1918, the Supreme Court must be presumed to have acquiesced in such treatment and to have rendered its decision upon the assumption that the case fell within the statute.[26] Such being the case, the only possible interpretation of the decision is that where a gift *inter vivos* constitutes a complete gift of the remainder interests, the operative moment of transfer is, for taxing purposes, as for purposes of title, at the date of the settlement. If it were otherwise, what difference would it make whether the settlement was before or after the enactment of the statute? So interpreted the case is consistent with *Saltonstall v. Saltonstall,* for, where the donor has reserved a power of revocation, his death and not the donation has the operative effect of making the transfer absolute, and it would be immaterial whether the taxing statute had existed at the time of the donation or not.

But what becomes of *Keeney v. New York*? To uphold both the *Nichols* case and the *Keeney* case, it is necessary to say (1) that the incidence of the tax under the postponement of "possession and enjoyment" clauses is not at the time of the donor's death but at the time of the gift, (2) that a tax on the gift and a tax on the inheritance may be conjunctively imposed, because there is a statutory purpose common to both types of taxation, (3) provided that if the gift antecedes the enactment of the taxing statute, the transfer is free of the burden. Such a construction of the case is forced to say the least.

It will be noted that the court in *Nichols v. Coolidge* does not seek to avoid the constitutional issue by giving a narrow construction to the postponement of "possession and enjoyment" clause. It assumes that that statute meant to affect cases where the remainders, though vested, "fell in" at the death of the

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[26] That the Supreme Court's decision would stand, irrespective of the relinquishment feature of the case, would seem to be confirmed by Cleveland Trust Company v. Routzahan (D. C. N. D. Ohio 1925) 7 F. (2d) 483, (C. C. A. 6, 1927) 22 F. (2d) 1009. In that case there was involved a transfer subject to life estates reserved by the donor, and there was no relinquishment of the life estates. The District Court considered Coolidge v. Nichols, which had then been decided by the District Court in Massachusetts, and distinguished it on the ground that the relinquishment of the life estates in the Coolidge case effected a completed transfer. However, the Circuit Court of Appeals reversed the judgment of the District Court, upon the authority of Nichols v. Coolidge, as decided by the Supreme Court of the United States.

donor. Nor does the court invoke the doctrine of "unapportioned direct taxes." Its decision is based on the "arbitrary" nature of the tax, a vice under the "due process" clause of the Fifth Amendment. If a given tax imposed by the United States be arbitrary under the Fifth Amendment, a similar tax imposed by a state ought to be arbitrary under the Fourteenth Amendment, and it seems that *Nichols v. Coolidge,* and any extensions of its doctrine, ought to control state inheritance tax cases even to the extent of cutting in upon *Keeney v. New York,* unless it can be said that there is a substantial difference in nature between the estate tax and a state succession tax.

The opinion in the *Saltonstall* case distinguishes that case from the *Coolidge* case on the further ground that the tax in the former is on succession while the tax in the latter is on transmission. It is rather difficult to comprehend a distinction between a transmission tax and a succession tax which would warrant a difference in the rule as to taxation of completed gifts (though life estates be reserved). For, if the transmission is complete, so also is the vestiture in the beneficiaries. But let us speculate. If the distinction continues to be recognized, there is a possibility that it will be held that a transfer *inter vivos,* made *after* the enactment of the statute, is not taxable under the federal estate tax law merely because the donor reserved a life estate, for the authority of *Keeney v. New York* would not extend to transmission taxes.

Before proceeding with any further prognosis, however, an additional thought should be introduced. Assuming that the operative moment of transfer (in the case of a settlement with life interest reserved) is, for estate tax purposes, the date of the settlement, the *valuation* of the property subject to the settlement should be as of that date and not as of the date of the donor's death. Consistently with *Nichols v. Coolidge,* the Supreme Court ought to hold unconstitutional that provision of the estate tax law[27] which includes the value *at the time of a donor's death* of property transferred to take effect in possession or enjoyment at or after his death.[28] Support for such a contention

[27] U. S. Compiled Statutes, §6336-5/8 b-§6336-5/8 h, 26 N. S. C. 1094 *et seq.*

[28] See discussion of this feature in note (1926) 40 HARV. L. REV. 118 which appeared before the decision of Nichols v. Coolidge.

may be found in the concurring opinion of Judge Hand in *Frew v. Bowers*.[29]

This matter of the time of valuation has not been decided by the Supreme Court, and it would not be at all surprising to observe further extension of the constitutional limitations of Congressional power. Should such extension take place, *Keeney v. New York* would probably be circumvented, as it was dismissed from discussion in the *Saltonstall* case, on the basis of the distinction between transmission and succession taxes. Whether the distinction be valid or not, it would remain true that according to the present reasoning of the Supreme Court, the successions taxed by the states under the postponement of "possession and enjoyment" clauses of their taxing statutes are not testamentary successions.

Keeney v. New York is probably, so far as it relates to succession taxes, *stare decisis*. About it has grown a vast deal of state law dealing with what constitutes postponement of "possession or enjoyment."[30] Yet it should be recognized that the tax imposed under the authority of that case is in fact a discriminatory gifts tax, and not a tax upon a transfer of testamentary character. If the case cannot be overruled as to succession taxes, it is to be hoped that its authority will not prevail in transmission tax cases.

IV. TRANSFERS IN CONTEMPLATION OF DEATH

Inheritance tax statutes generally provide that property transferred by a donor in contemplation of death shall be subjected, along with property passing under his will or by intestate succession, to the tax. When transfers are construed to be in contemplation of death is largely a question of fact, and the cases are as various as the particular facts involved.[31] It will be found, however, that the decisions are unanimous in confining the scope of the phrase "contemplation of death," as employed in the statutes, to transfers made at a time when circumstances are present making death a proximate consideration. The

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[29] (1926) 12 F. (2d) 625.

[30] See note (1927) 49 A. L. R. 864, 874-86.

[31] For exhaustive analysis of the cases, see a series of notes in the American Law Reports, (1920) 7 A. L. R. 1028, (1922) 21 A. L. R. 1335, (1926) 41 A. L. R. 989, (1926) 43 A. L. R. 1229.

phrase is not construed to refer to transfers made by a man in general contemplation of his mortality. Were it otherwise, the taxation of a gift *inter vivos* would be made to depend upon the subjective, and therefore uncertain, test of motive, and practically every gift to a natural object of bounty would be subject to inquiry.

The constitutionality of the tax upon gifts in contemplation of death, in the limited sense in which that phrase has been employed, seems little in doubt. When, in the face of probable approaching death from existing causes, a man makes a gift, it is reasonable to characterize his act as testamentary.

In stating the underlying basis of the tax upon gifts in contemplation of death, it seems, however, that the Supreme Court has sometimes confused motive and justification, with the result of self-contradiction. Compare the following statement in the opinion in *Nichols v. Coolidge*:[32]

> Undoubtedly, Congress may require that property subsequently transferred in contemplation of death be treated as part of the estate for purposes of taxation. This is necessary to prevent evasion and give practical effect to the exercise of admitted power, but the right is limited by the necessity.

with the following passage from the opinion in *Schlesinger v. Wisconsin*:[33]

> The presumption [that gifts within six years of death were in contemplation of death] and consequent taxation are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. . . . Rights guaranteed by the Federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The state is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever.

If, however, transfers in actual contemplation of death have characteristics in common with transfers at death, so as to justify the inclusion of the former with the latter in one scheme of taxation,—if there is testamentary character,—constitutional objections disappear. Such seems to be the case.

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[32] *Supra*, note 22, l. c. 542.
[33] *Supra*, note 6, l. c. 240.

This, however, does not means that the "contemplation of death" clauses of the statutes are free from constitutional problems. Three very interesting problems exist notwithstanding the acceptance of the general principle of their validity:

(1) These clauses, too, contain a problem of retrospective operation. Suppose the taxing statute be enacted intervening the date of a gift in contemplation of death and the date of the donor's death. It may conceivably be held that the gift, though testamentary in character, has become vested, and the taxing statute is bad so far as it is retrospective. On this point the passage from *Nichols v. Coolidge,* just quoted, is interesting, if not instructive, for it will be observed that the Court imputes to Congress the power to tax gifts "subsequently transferred" in contemplation of death. However, so long as a statute does not by its express terms impose a tax on transfers made prior to its enactment, it will be construed as not having retrospective effect,[34] and hence the constitutional issue will not arise except in the case of such statutes where retroactive intent is plainly declared.

(2) As in the case of postponement of "possession or enjoyment," there is, pertinent to the "contemplation of death" clauses, a problem of valuation. Suppose a man, ill of an incurable disease, and contemplative of his death as a result of it, transferred shares of General Motors stock to his children; after the transfer, but before the donor's death, let us assume that the stock doubled in value. May the state tax the value as of the date of death? To do so would be to tax *values* which did not exist at the time of the transfer, and which the beneficiaries did not receive by virtue thereof. Even more pointed would be the case of a trust fund transferred in contemplation of death, which had increased in value, prior to the donor's death, due to investment and reinvestment, for here the measure of the tax would be *property* which was never transferred.[35]

(3) States have not been content merely to enact that gifts made in contemplation of death should be subject to succession taxes, but, confronted with the difficulty of proof of such contemplation, have created statutory presumptions that gifts

[34] Shwab v. Doyle (1922) 258 U. S. 529.
[35] See note (1926) 40 HARV. L. REV. 118.

made within a certain period prior to death were made in contemplation of death. Where these presumptions are fact presumptions, they merely constitute rules of evidence, and it is unlikely that they will be declared invalid. As was said in *Mobile Railroad Company v. Turnipseed:*[36]

> Legislation providing that proof of one fact shall constitute prima facie evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government.

But suppose that the presumption created by the statute be a presumption of law. Such was the situation in *Schlesinger v. Wisconsin,*[37] where the Supreme Court of the United States declared invalid (as applied to a transfer not in fact made in contemplation of death) a clause in a Wisconsin taxing statute, which provided that every transfer made by a donor within six years prior to his death, of a material portion of his estate, without adequate valuable consideration, should be construed to have been made in contemplation of death. In the court's view, the tax was not sustainable as one on succession at death, since the gift was not made with actual testamentary intent. The purpose of preventing evasion of the succession tax was not regarded by the court as constitutional justification for a tax otherwise bad.

We can only speculate as to the validity of a presumption, based upon a shorter period of time. In a dissenting opinion in the *Schlesinger* case, Mr. Justice Holmes inferred that a six months' presumption would undoubtedly be held good. Logically the reasoning of the majority opinion would seem to preclude any conclusive presumption whatsoever. However, conflicting principles have often created constitutional limitations, which are not in conformity with logical deductions from any one principle. Constitutional law, by its very nature, defies the support of a framework of pure syllogism.

V. Transfers in Exercise of Powers of Appointment

The effect of powers of revocation reserved in instruments of gift *inter vivos* has been discussed *supra*. It will be recalled

[36] (1910) 219 U. S. 35.
[37] *Supra*, note 6.

that in *Saltonstall v. Saltonstall*,[38] statutory authority for the tax, imposed with respect to property transferred subject to such a power, was found by the state court in a clause of the Massachusetts succession tax law governing transfers in exercise, or upon default of exercise, of powers of appointment. In the construction placed by the state court upon its statute, the Supreme Court of the United States was bound to acquiesce. Based upon considerations already mentioned it found the tax upon transfers subject to a reserved power in the donor valid.

But what shall be said of the constitutionality of such a taxing statute, where the power is not in the nature of a reservation by the donor, but is conferred upon another, a "donee"?

The incidence of the tax now under consideration is upon transmission by, or succession from, the donee, and not the donor. So far as the donor is concerned no further tax is exigible. If the power was conferred by a deed of gift containing no reservations and made without contemplation of death, the transfer *creating* the power would not be subject to inheritance taxes. If the power was conferred by will, gift subject to revocation, or transfer intended to take effect in possession or enjoyment at, or in contemplation of, death, the entire property so passing, including the estates therein subject to appointment, will presumably have been taxed as part of the estate of, or succession from, the donor of the power.

Under succession tax laws, states can discriminate between the interests created under a taxable transfer, so as to impose the tax on presently vested interests at the time of the testator's or donor's death, and reserve the imposition of the tax on contingent interests until the time of their vestiture.[39] Probably a like discrimination between interests defined by the will or deed, and those subject to appointment would be permissible. This situation, however, assumes the power to tax the entire succession from the donor and the postponement of the full exercise of the power to tax until appointment by the donee. The solution of the problem involves the validity of a classification, rather than the power to tax the transfer. In the case now under consideration, the full exercise of, or failure to exercise,

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[38] *Supra*, note 11.

[39] Solomon v. State Tax Commission (1929) 278 U. S. 484.

the power to tax the estate of, or succession from, the *donor* of the power is assumed, and the problem is one of the constitutionality of a tax imposed by virtue of the exercise by the *donee,* or his failure to exercise, the power.

In *Orr v. Gilman*[40] and *Chanler v. Kelsey,*[41] the Supreme Court had before it for consideration Laws of New York, 1897, Chapter 284:

> Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property, made *either before or after the passage of this act,* such appointment, when made, shall be deemed a transfer taxable, under the provisions of this act, *in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power,* and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omissions or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure.

In the *Orr* case, one David Dows, by will, probated prior to the enactment of the statute, conferred upon his son the power to appoint by will certain property among the children of the donee. The power was exercised after the enactment of the statute. In the *Chanler* case, William B. Astor made, long before the enactment, transfers of real estate and personal property upon trust for the benefit of a daughter during her life, remainder to her issue, remainder should she die without issue to her surviving brothers and sisters and their issue, with power on the part of the life tenant, by deed or will, to apportion among the classes named. The daughter died without issue, and by will, probated after the enactment of the statute, appointed the property to certain of her collateral kindred. Except as to the

[40] (1902) 183 U. S. 278.
[41] (1907) 205 U. S. 466.

manner in which the power might be exercised, the two cases were in their essentials alike, and in both cases the court sustained the tax imposed under the above quoted law.

In *Chanler v. Kelsey,* Mr. Justice Holmes filed a dissenting opinion, concurred in by Mr. Justice Moody, wherein he expressed his view that the tax was bad as a succession tax, because "there was no succession for it to operate upon." Since the justification for a succession tax, he reasoned, lay in the privilege of succession, accorded by the state through its Statute of Wills and laws of descent, no succession tax could constitutionally be imposed where that privilege was not requisite to pass the title. *Orr v. Gilman* was distinguished on the ground that there the power could only have been exercised by will, whereas in *Chanler v. Kelsey* the donor had provided that other ways of exercising the power might be employed. It is not often that Mr. Justice Holmes has voted against the states on tax questions. Even here he qualified his statement that there was no succession by basing it on the possibility of exercise of the power by deed. There was, however, in the dissenting opinion a note of prophecy.

The gist of the majority opinions in the two cases under consideration was that, however technically correct it might be to say that the appointed estate came from the donor and not from the donee of the power, yet it was only upon the exercise of the power that the estate of the appointees became complete.[42] According to the law of New York, it was then only that the estate vested in the appointees.[43]

The position was not without difficulty. When, as in *Saltonstall v. Saltonstall,* the completion of the transfer occurs by reason of the donor's death and his failure to revoke, a succession takes place at that time. But in each of the cases under consideration, a succession took place at the death of the donor, which the state had full power to tax at that time. Whether it exercised such power through a succession tax law then in force, or not, seems immaterial. By the appointment clauses of its statute, the state then undertook to impose *another* tax when the remainders became *vested* by exercise of the power of ap-

[42] *Supra,* note 42, l. c. 473.
[43] *Supra,* note 40, l. c. 282.

pointment. Had the remainders become vested by the happening of a contingency, instead of by the act of the donee of the power, it would be more apparent that the vesting related back to the original deed or will. The principle, however, in the contingent remainder and appointment cases, seems the same, namely, that vesting is not tantamount to succession.

It must be noticed, however, that the appointments in the *Orr* and *Chanler* cases were both made by will. In the *Chanler* case, it might have been made by deed, and if such had been the case, it would have been apparent that the vesting of the estates in the appointees bore no relation to the death of anyone so as to constitute a succession at death. Does the manner of exercise, *viz.*, by will, make any difference? While it is true that the state Statute of Wills is called into operation as a test of the validity of the appointment, it is also true that it is called into operation *by the donor* of the power who might have stipulated for a will executed according to the laws of Timbuktu, rather than according to the laws of the taxing state. The fact that the appointment is required to be by will owes its significance to the act of the donor of the power, and not to the privilege accorded by the laws of the taxing state to appointees to succeed to the property of the donee of the power. The donee had no fee in the property. The tax on the exercise of the power of appointment by the donee seems to be something other than a succession tax, and to include the property passing thereunder with the property of the donee of the power for succession tax purposes, seems arbitrary.[44]

After two decades of silence and a change in the personnel of the Supreme Court came *Wachovia Bank and Trust Company v. Doughton*,[45] which represents the present current of Supreme Court decision. That case involved the power of the State of North Carolina, under a statute similar to the New York statute above quoted, to tax the exercise by one of its citizens of a power of appointment created by the will of a Massachusetts decedent, who died before the enactment of the North Carolina statute. The property subject to appointment was held by a Massa-

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[44] For a treatment of these cases from the standpoint of retroactivity, see Julius H. Amberg in (1924) 37 HARV. L. REV. 691, at 700.

[45] (1926) 272 U. S. 567.

chusetts trust company upon trust to pay the income thereof to the donee of the power during her lifetime, and the corpus to whomsoever she should appoint *by will*. The power was exercised by the donee by will duly probated in North Carolina. It was held that the tax sought to be imposed was unconstitutional as to the appointment in question.

There are two differences between this case and the *Orr* and *Chanler* cases. In the first place, the power of appointment was general and not limited to certain classes of relatives of the donee as in both of the earlier cases. This might have been considered as vesting in the donee, for taxing purposes, an equitable fee, which passed as part of the property of the donee. The court, however, did not touch upon this point. In the second place, the last residence of the donor of the power and of the trustee were outside the State of North Carolina. Since the North Carolina statute in question does not purport to tax the succession from the donor, but taxes the property as if it were property of the donee of the power, residence of the donor would not seem to make any difference. It is, however, the residence of the trustee and the presence of the property in Massachusetts, upon which the court distinguishes the *Orr* and *Chanler* cases. Said the court:[46]

> A state may not subject to taxation things wholly beyond her jurisdiction and control.

If this were the only significance of the *Wachovia Bank* case, it might well be relegated to the problem of state jurisdiction over property for succession tax purposes.[47] It would not belong to the subject matter of this paper.

However, intangible personal property (of which the fund consisted) is taxable at the domicile of its owner,[48] and it was necessary for the court to decide that the property in question was not the property of the donee of the power in order to reach the conclusion that the property was not in North Carolina. According to the laws of the State of Massachusetts, the court held, property, over which one has a power of appointment, is not the

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[46] *Supra*, note 45, l. c. 575.

[47] Discussion of this feature of the inheritance tax laws by this writer will be found in (1929) 14 ST. LOUIS L. REV. 99.

[48] Blodgett v. Silberman (1928) 277 U. S. 1.

property of the donee, but of the donor of the power. Hence, the real basis of the decision must have been that no succession occurred at the death of the donee of the power.

It is very interesting that the court omitted discussion of the donee's will as an act whereby the estates of the appointees became vested. Yet it is submitted that that act was as pertinent to the power of taxation in the *Wachovia Bank* case as in the *Chanler* case.

It is the conviction of the writer that the earlier cases were decided upon principles which are unsound and which have been at least partially repudiated by the court in the *Wachovia Bank* case. The act of vestiture upon which the older cases relied is not tantamount to the creation of a succession. A tax upon the exercise of the power of appointment is not a succession tax. So far as the taxing statute included property passing by appointment, with property owned by the donee of the power, in the computation of the tax, it treated the former as if it also were property of the donee, a premise which the *Wachovia Bank* case denied, and taxed as a succession at the death of the donee something as to which the appointees did not succeed the donee.

VI. Summary

Extensions of the inheritance tax laws to include transfers not taking place at the death of the original transferor have been motivated by the desire to prevent circumvention. The reasonableness of an extension to accomplish that end ought not, however, to be the test of its constitutionality. Rights under the due process clause are, as has been said, superior to the necessities of legislation.

In searching for the test of constitutionality due regard should be paid the doctrinal basis of inheritance taxation. This type of taxation, as well as the mode of imposition and discrimination held permissible, has been postulated upon the nature of an inheritance tax as a tax upon a privilege granted by the sovereign. To extend the tax so as to embrace transfers not made in exercise of that privilege would amount to supporting one tax by the justification for another.

To include property passing by virtue of transfers *inter vivos*, or in exercise of powers of appointment, in the estate of a dece-

dent for inheritance tax purposes would seem to fail of justification, unless the testamentary character of such a transfer bring it within the reason supporting the inheritance tax. If a disposition by reason of surrounding circumstances or in accordance with its own terms accomplishes substantially the same result as would have been accomplished by a will, the tax seems constitutionally permissible, but not otherwise.

In the treatment of the various subdivisions of our topic the cases have been found, in the main, to have been consistent with the test herein submitted. However, it has been found difficult to reconcile *Keeney v. New York, Orr v. Gilman* and *Chanler v. Kelsey* with a test formulated on the basis of the nature of inheritance taxation. The Supreme Court seems, in these instances, to have permitted the reasonableness of the state's motive to overcome considerations of principle. The doctrines of these cases have been partially repudiated in *Nichols v. Coolidge* and *Wachovia Bank and Trust Company v. Doughton.* Whether the reasoning in the later cases will be extended to engulf the earlier doctrines, forms one of the interesting problems of contemporary constitutional law.