Taxation of Transfers Intended to Take Effect in Possession or Enjoyment at Grantor's Death

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TAXATION OF TRANSFERS INTENDED TO TAKE EFFECT IN POSSESSION OR ENJOYMENT AT GRANTOR'S DEATH

By Henry Rottschaefer*

The inheritance tax statutes of most of the states imposing taxes of that character include among the taxable transfers those intended to take effect in possession or enjoyment at or after the transferor's death. The federal estate tax act, which levies the tax on the transfer of a decedent's net estate, includes in the gross estate property to the extent of any interest therein of which the decedent has, during his lifetime, made a transfer or created a trust intended to take effect in possession or enjoyment at or after the death of the transferor or settlor. The inclusion of such transfers among those taxed by the states is of long standing, and was in its inception and still is motivated largely by the desire to close one of the avenues for tax avoidance. These provisions of state and federal statutes have occasioned an immense amount of litigation; the discussion that follows will consider the judicial treatment accorded the more important problems that have arisen in construing and applying them.

The Problem Under State Inheritance Tax Acts

The discussion of the constitutional problems that have been raised in connection with taxes imposed by these provisions will

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1 Although there are slight variations in the language of the various statutes, their substance is sufficiently indicated by the language in the text. For collections of the statutes, see Otis and Gleason, Inheritance Taxation, or Pinkerton & Millsapps, Inheritance and Estate Taxes.

2 See the Estate Tax Titles of the various Revenue Acts; for that presently in force see the Revenue Act of 1926, somewhat amended on other points by the Revenue Act of 1928.
be deferred until the scope of the taxes imposed thereby has been considered. State inheritance taxes levied on transfers of this character are clearly imposed not on successions to interests in property that occur as an incident to the disposition of the estates of decedents, but rather on successions to such interests that have their legal source in a transfer of property from one living person to another living person. It is too well established to require the citation of authorities that these provisions of state inheritance tax statutes do not tax the succession of a vendee to the vendor’s interest by an absolute sale, or of a donee to a donor’s interest by an absolute and completed gift. The problem, therefore, is to determine what characteristics a transfer inter vivos must possess in order that the succession resulting therefrom be taxable under these provisions of those statutes. A literal reading of the language of these provisions would seem to make the intention of the transferor the decisive factor. The reasoning of the courts in dealing with these questions of taxability, however, is more often directed toward ascertaining the character of the interest created by the transfer than to the intention of the transferor. This fact is not, of course, inconsistent with the theory that those courts treat the transferor’s intention as the decisive factor, since they may well accept the results achieved as the best and almost conclusive evidence of the transferor’s intention in making the transfer. It does, however, suggest that the problem of taxability under these provisions of state inheritance tax statutes be framed as that of defining the type of interest that a transfer inter vivos must create in the transferee if his succession thereto under such transfer is to be taxable thereunder.

The discovery of the essential characteristics that an interest created by these transfers must possess if succession thereto under such transfers is to be taxable requires a consideration of the fact situations in which the courts have drawn the legal inference of taxability and of the reasons that have supported their inferences. The interest may be either legal or equitable. Courts do not decide the question of taxability by analyzing the nature of the interest acquired by the trustee, although an occasional opinion quite erroneously (except where that factor affects the question of the completed character of the gift) refers to that factor in determining whether the transferor has divested him-
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self of title and possession. The statutory language suggests that the real test of taxability is the time when the interest takes effect in possession or enjoyment, and that, if that occurs at or after the death of the transferor, succession to the interest is taxable. Two questions, therefore, arise: (1) What is meant by taking effect in possession or enjoyment; and (2) when may that be said to occur at or after the transferor’s death. The answer to the former rests ultimately on a theory of property that emphasizes certain of its aspects that have received but little explicit recognition in other connections; the answer to the latter may likewise involve some departures from property concepts developed for other purposes. The consideration of these matters is best deferred until the decisions have been analyzed.

A. CONSIDERATION AS AFFECTING TAXABILITY

The language of these provisions of many of the state inheritance tax statutes is sufficiently broad and general to include transfers based on a consideration even where that is both valuable and adequate. The first question that arises is whether transfers for a consideration are taxable where the statute is silent on the question. Although it was stated, but not decided, in one case that they would be and that the fact of consideration was important only on the question of whether the transfer was to evade the tax, the prevailing and correct view is that these provisions apply to donative transfers only. The question, therefore, arises what type of consideration is necessary to make such a transfer non-donative. A transfer under an antenuptial agreement under which the intended wife surrendered her dower rights has been held non-taxable because based on a valuable consideration, but the contrary has also been decided in a case in which the opinion failed to touch on this question. A trans-

3See, for example, People v. Northern Tr. Co., (1928) 330 Ill. 238, 161 N. E. 525.
4See on this subject notes on Consideration as affecting liability to a succession or inheritance tax, 7 A. L. R. 1046, 58 A. L. R. 1143.
8Estate of Oppenheimer, (1925) 75 Mont. 186, 243 Pac. 589. See notes, Antenuptial contract as transfer intended, etc., 44 A. L. R. 1475, 49 A. L. R. 895.
fer made in consideration of the grantee's giving up his profession at the grantor's request in order to devote himself to the latter's business has been held non-taxable because based on a valid and adequate consideration. The consideration must be more than formal, and, therefore, in In Re Orvis' Estate, an agreement between partners under which the survivor was to take the amount remaining in a capital fund, established under the agreement from contributions by both partners, was held to effect a donative and taxable transfer. This case may be taken to overrule several earlier New York cases one of which involved substantially similar facts, and another of which involved the creation of a joint tenancy in property formerly held by the joint tenants as tenants in common. The principles governing this problem have never received a better formulation than in the Orvis Case above cited, in which the court said: "In all cases in which the value of the consideration for the property transferred, under the statutory conditions, is so disproportionately less than the value of the property transferred that the transfer is, in the light of reason and of ordinary intelligence and judgment, beneficent and donative, the transfer is taxable. . . . If, in truth, it in effect bestows, under the statutory conditions, a bounty or a benefaction, and is not a transfer for money's worth, it is taxable."

It seems, however, that it is not sufficient that the grantee has rendered services to the grantor unless these services were intended as, and understood to be, consideration for the transfer rather than gratuitous. It has been stated that the consideration must move from the beneficiary to the grantor, but it has been decided that a transfer under an antenuptial contract to the chil-

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10See late case on this matter, In re Wheeler's Estate (Neb. 1930) 228 N. W. 861.
12In re Borden's Estate, (1916) 95 Misc. Rep. 443, 159 N. Y. S. 346. In re Heiser's Estate, (1913) 85 Misc. Rep. 271, 147 N. Y. S. 557; see also In re De Escoriaza's Estate, (1914) 87 Misc. Rep. 215, 149 N. Y. S. 796, in which the mere recital that the creation of a joint tenancy was for $1 and other good and valuable consideration was held to exempt the transfer from a tax in absence of evidence by state to prove it donative.
13People v. Porter, (1919) 287 Ill. 401, 123 N. E. 59; see also People v. Tavenner, (1921) 300 Ill. 373, 133 N. E. 211.
14In re Stephan's Estate, (1923) 121 Misc. Rep. 596; 201 N. Y. S. 461; this case, however, involved a statute expressly mentioning consideration but silent on the matter for which it is here referred to.
dren of the marriage was non-taxable, though one intended, etc., because based on a good, valid and valuable consideration which in fact moved from the intended wife to the intended husband. It may, therefore, be taken as established that, where the statute is silent on the matter, donative transfers only are taxable, and that a transfer is non-donative only where based on an adequate and valuable consideration moving from the grantee to the grantor with some exceptions as to this last matter.

Some statutes that have express provisions on the matter merely give statutory expression to the principles above developed. Such was the California statute involved in Estate of Brix in which the sole question was as to the adequacy of a consideration that was admittedly a valuable one. It was held that, although it might seem inadequate as measured in wholly pecuniary terms, the matter was not entirely susceptible of that type of measurement, and that, therefore, the judgment of the parties was entitled to great weight. A mere surrender of potential interests is not deemed a valuable and adequate consideration under such a statute. A transfer is taxable though based on a valuable consideration if the value of the transfer greatly exceeds the value of the consideration where the statute exempts only a "bona fide purchase for full consideration in money or money's worth." The effect of the absence of the requisite consideration under these statutes and those that are silent on the matter is to tax the transfer at its full value. Some statutes, however, tax it only on the excess of that value over the value of the consideration received by the grantor. It has been held under such a statute that the consideration must move from the beneficiary.

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16In re Schmall's Estate, (1920) 191 App. Div. 435, 181 N. Y. S. 542, aff'd (1920) 230 N. Y. 559, 130 N. E. 893. See, accord, Estate of Brix, (1919) 181 Cal. 667, 186 Pac. 135, in which the consideration moved from the mother while the transfer was to the children.
17Estate of Murphy, (1920) 182 Cal. 740, 190 Pac. 46. For other California cases on this matter, see Estate of Reynolds, (1915) 169 Cal 600, 147 Pac. 268. Abstract & T. Guar. Co. v. State, (1916) 173 Cal. 691, 161 Pac. 264; Estate of Felton, (1917) 176 Cal. 663, 169 Pac. 392.
B. WHAT TRANSFERS ARE TAXABLE

The successions taxable under the provisions taxing transfers intended to take effect in possession or enjoyment at or after the transferor's death are taxable whether they result from direct transfers or transfers in trust. It may be well to dispose at the outset of the question whether the vested or contingent character of the interest acquired under such transfers has any bearing on the taxability of the succession thereto. A transfer may create an interest that is at the time of its creation either vested or contingent in right or title. An interest vested in title at such time may be either vested in possession and enjoyment at such time or be a mere vested right to future possession and enjoyment. It might in either case be absolutely vested, or vested subject to being divested by the exercise of a reserved power so to do. It seems preferable to place the situations in which a grantor has reserved powers of revocation or control in this category rather than to treat them as if the grantees, who will frequently be to some extent in actual possession and enjoyment of the property, had an interest that was contingent in title. An interest strictly contingent in title at the time of its creation must necessarily be one whose possession and enjoyment is both future and contingent. The discussion of the instant question will be aided by setting forth the types of situation that raise the problem in its various forms. The classification is made solely with reference to the situations created by the transferring instrument or instruments where several of them are for some reason treated as a single instrument; it takes no account of the factor of the modification of the situations created by an instrument made by subsequent independent deeds or contracts, since that raises problems meriting separate treatment.

Five principal types arise as follows: (1) where the transfer creates an interest vested both in title and in possession or enjoyment at the time of its creation; (2) where it creates an interest vested in title at the time of its creation but which is to vest in possession or enjoyment only at or after the transferor's death; (3) where it creates an interest contingent in title at the time of its creation but which may under the terms of the deed vest both in title and in possession and enjoyment prior to the

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21 See on this general subject the note, Taxation of transfers intended, etc., (1926) 35 Yale L. J. 601; note, When transfer deemed to take effect in possession or enjoyment at or after death, 49 A. L. R. 864.
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(4) where it creates an interest contingent in title at the time of its creation but which under the terms of the instrument may vest in title prior to, but in possession or enjoyment only at or after, the transferor’s death; and (5) where it creates an interest contingent in title at the time of its creation and which must remain such up to or after the transferor’s death. The third and fourth cases envisage the possibility that the vesting may never occur prior to the transferor’s death, but they bear on the immediate problem only where such vesting does in fact occur prior to such death. The effect of the vested or contingent character of the interest upon the taxability of the succession thereto can be investigated by considering these various cases.

The succession under a transfer to an interest that is from the time of its creation absolutely vested both in right and in possession and enjoyment is not taxable. If property is transferred to a trustee to pay the income to someone other than the settlor for the cestui’s life, the cestui’s acquisition of that interest is not a taxable succession, and the result is not affected by the fact that the income is to be accumulated for the cestui’s benefit during stipulated periods. The non-taxability of the acquisition by the cestui of his interest under a trust directing the immediate payment to him of the income has been supported on the theory that the beneficial interest vested in him at the time of the delivery of the deed, that he was in possession and enjoyment from that date, and that such possession and enjoyment were in no way dependent on the settlor’s death. The fact that the settlor himself retained no beneficial interest after said date is also stressed. The same general principles prevent the taxation of such a succession to a right to receive the income until the beneficiary attains a specified age, and the succession under a completed gift of the income or principal or both on terms that make it subject to be divested on the happening of a specified contingency. A fortiori is the acquisition of the inter-

est non-taxable when resulting from a completed gift under which the donee at once goes into possession and secures the full use of the donated property; the same result has been reached even where the donee permitted the donor to enjoy some part or all of the beneficial uses of the property and to retain or share in its control and management. The establishment of an irrevocable trust by the deposit of money in a savings bank is deemed a completed gift so that the cestui's interest is held not to be acquired by a transfer making its acquisition taxable, but the contrary result is reached where the settlor retains the benefits and practical control during his life as when the trust is revocable. The holding that the interest acquired by the survivor on the death of the other tenant of a joint bank account with right of survivorship established by the deceased cotenant is not one acquired by a transfer intended to take effect in possession or enjoyment at death has been supported on the theory that the surviving tenant acquired at the creation of the joint account an immediate right of possession and enjoyment of the whole. The factors most stressed in cases involving situations of the type considered in this paragraph are that the transferee has at once the actual possession and enjoyment of the property or a right to its immediate possession and enjoyment, and that the transferor has himself retained no such beneficial interest for the period during which, under the transfer, the transferee has it. It is immaterial in such cases, as will appear later, that the transferor may have retained other rights or powers such as that of disposing by will of any remainder interest that may have remained undisposed of by the instrument of transfer; that may affect


28 In re Thorne's Estate, (1899) 44 App. Div. 8, 60 N. Y. S. 419.


31 In re Barbey's Estate (Surr. Ct. 1908) 114 N. Y. S. 725. In re Halligan's Estate, (1913) 82 Misc. Rep. 30, 143 N. Y. S. 676. It should be said that the courts are not always agreed as to what facts establish the retention of use and control by the settlor.

32 Estate of Gurnsey, (1918) 177 Cal. 211, 170 Pac. 402.
the taxability of successions to those remainders, but not that of succession to the interests immediately vested in possession and enjoyment. It may therefore be stated that in general where an interest created by a transfer in a person other than the transferor is vested both in interest and in possession and enjoyment at the time of its creation, its acquisition involves no taxable succession under those provisions of state inheritance tax statutes that tax transfers intended to take effect in possession or enjoyment at or after the transferor’s death. The only cases that cannot be reconciled with this statement are those holding taxable the acquisition of a life estate under a deed in which the transferor has reserved a power of revocation or very extensive powers of control over the property and the interest of the transferee on the theory that the retention of such powers is inconsistent with an intention to vest an absolute right to present and future enjoyment in the transferee at the time of the deed.\textsuperscript{33} These could be reconciled therewith if the interest of such life tenant be held contingent in title as long as those powers are retained, but that would involve using the conception of contingency in title in a rather unusual sense.

A transfer may create an interest that is immediately vested in title but the possession and enjoyment of which are deferred till some future time. In such case the problem arises whether the mere fact that it is vested in interest at the time of its creation prevents its acquisition from being treated as a succession taxable under the provision of the statute as to transfers intended, etc.\textsuperscript{34} The clearest case raising that issue is where the transferor creates a vested remainder on a life estate reserved to himself. The remainder interest is almost invariably deemed to have been acquired by a transfer intended, etc., so as to render its acquisition taxable.\textsuperscript{35} It is immaterial in such case that one or more of the

\textsuperscript{33}Matter of Bostwick, (1899) 160 N. Y. 489, 55 N. E. 208; In re Hoyt’s Estate, (1914) 86 Misc. Rep. 696, 149 N. Y. S. 91. These cases are limited by numerous other New York decisions.

\textsuperscript{34}Hereafter the phrase “transfers intended etc.” will be used instead of the expanded expression contained in the statutes.

estates in remainder are themselves life estates. It has been stated in one opinion that, if the right to possession and enjoyment passed at the time of the execution of the deed, the transfer would not involve a taxable succession, but this was in a case in which the court construed the transfer as creating a right to future enjoyment that was contingent up till the time of the transferor’s death. Furthermore courts occasionally bolster up perfectly valid reasoning for holding that a given transfer involves no taxable succession with the argument that the right to future enjoyment was vested at the time the deed was executed. However, statements of this character leave untouched the conclusions derivable from the decisions above cited, and are more than balanced by express statements in cases, in which the statement was pertinent to the issue, that the vested character of the right is immaterial if the right to immediate possession and enjoyment is deferred till the grantor’s death. The recently developed tendency to test the taxability of such transfers by reference to the factor of the shifting of the economic benefits and burdens in the thing transferred is inconsistent with attaching decisive importance to whether the interest is vested or contingent in right at the time of its creation. It may, therefore, be taken as established that acquiring an interest that is to vest in possession and enjoyment at or after the transferor’s death is not prevented from coming within the class of taxable successesions under the transfers intended, etc., provisions merely because the interest was vested in right at the time of its creation. This does not mean that the fact that possession and enjoyment are to commence at or after the transferor’s death alone makes the succession taxable, as certain cases later discussed will show. It should, moreover, be said that the vested or contingent character at the time of its creation of a right to the future possession and enjoyment of a thing is an important factor in connection with the problems of the retroactivity of such transfers, when they occur, and on what amount the tax shall

37People v. McCormick, (1927) 327 Ill. 547, 158 N. E. 861.
39In re Estate of Schuh, (1922) 66 Mont. 50, 212 Pac. 516.
be computed; these will be separately considered at a subsequent point in the discussion.

The next situation to be considered is that in which the interest acquired is contingent at the time of its creation but becomes vested both in title and in possession and enjoyment prior to the transferor's death. A case of this kind would arise if A transferred property to T in trust to pay the income to A until A's death or until his first born son, unborn at the time of the deed, attained twenty-one years of age, whichever event should first happen, and thereafter to deliver the corpus to such first born son; and if thereafter his first born son, B, attained said age before A's death. There is no doubt but that, had A died before such son attained said age, B's acquisition of the corpus would have been taxable since he entered into its possession and enjoyment at A's death under a transfer that intended that very result. The question is whether the result would be different because B acquired a right to the corpus vested both in interest and in possession prior to A's death under the alternative disposition in the deed. No case exactly like this has been found. It has, however, been said that the sequence of events is to be viewed in the order of the actual rather than the possible. It is also frequently stated that the vesting in possession and enjoyment must, if the succession is to be taxable, depend upon the death of the transferor. Furthermore, if the fact that a transferor has retained the whole beneficial interest up to the time of his death is a reason for holding a transfer taxable, the fact that he has completely divested himself thereof prior to such time should suffice to establish its non-taxability. The absence of an intention to postpone making a gift till the donor's death, and that the beneficial interest passed in the grantor's lifetime, have been given as reasons for holding the transfers making such dispositions non-taxable. All these considerations justify the conclusion that the succession of B in the case above stated would not be taxable. The cases furnishing the nearest analogy are those in which A, having created in B a vested remainder under a deed in

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which A reserved a life estate, thereafter assigns his life estate to B; the succession of B to the remainder on A's death is generally held non-taxable.46 If acquiring possession and enjoyment prior to the transferor's death under a right so to do prevents the succession to a remainder which, under the deed creating it, could not vest in possession and enjoyment prior to such death, from being taxable, there is every reason to hold that there would be no taxable succession where the right vests and the possession and enjoyment are acquired prior to a transferor's death in accordance with the very terms of the original creation of the interest. It may, therefore, be taken as correct that if an interest vests both in title and in possession and enjoyment prior to the transferor's death in accordance with the very terms of the transfer, the succession is non-taxable, even though at its creation the interest was contingent in title and though there existed a possibility that the succession might occur in such a way as to make it taxable.

The remaining situations can be rather briefly disposed of. If a transfer created a contingent right to receive the principal of a trust fund on the settlor's death which becomes vested in title prior to said death, there is held to be a taxable succession because the interest vested in possession and enjoyment only at the settlor's death.47 This is exactly in line with the principles that make such a succession taxable even where the right to such future possession was vested in title at the time of its creation. There remains the situation in which under the terms of the transfer the interest created is contingent in title at the time of its creation and must remain such up to or after the transferor's death. Since no one would contend that such a condition would prevent taxability, the only question is whether its mere existence requires the succession under such a transfer to be held taxable. Eliminating the cases in which the grantee acquires a life estate, subject to extensive powers of control and revocation and amendment reserved to the grantor, as not properly belonging in the present category, no situation comes to mind in which an interest could continue contingent in title up to the time of, or after, the grantor's death unless it were also limited to take effect in possession or enjoyment only at or after such death. The fact that the holder of such interest


is also in possession and enjoyment of the same property by virtue of a right to receive its income for the settlor's life acquired under the same deed of settlement should not obscure the fact that, under the assumed facts, the remainder can vest in possession and enjoyment only at the settlor's death. Although courts are not in accord as to what facts establish the required contingency, the general holding is that, if the right to possession and enjoyment remains contingent in title until the grantor's or settlor's death, the succession to that interest is taxable. In such cases that fact constituted merely an additional reason for holding it taxable.

The preceding discussion has shown that, if a transfer creates an interest which under the terms thereof vests both in title and in possession or enjoyment prior to the transferor's death, its acquisition is not a taxable succession, with the one possible exception indicated; and that, if it creates an interest which under the terms of the transfer can vest in possession and enjoyment only at or after the transferrer's death, its acquisition generally constitutes a taxable succession whether the interest was vested or contingent in title at the time of its creation or of the transferor's death. The next question is what fact situations have been held to show the presence of those ultimate factors that result in taxability or non-taxability. Such an analysis of the decisions is necessary before any theory can be ventured as to what elements of property are denoted by the concept "possession and enjoyment." The cases are so numerous that the method of using important typical situations will have to be employed. It will be convenient to begin with one that occurs very frequently. One such is the case in which the transferor creates a remainder limited on a life estate reserved to himself, or in which he transfers the property in trust to pay the income to himself for his life, with remainders over. The question in such cases can, of course, relate only to the taxability of the succession to the remainders. The succession is invariably held taxable if the life estate is reserved, or the right to receive the income is created, by the instrument creating the remainder;  


and it is immaterial whether the remainder is limited or unlimited in its duration although that would affect its value. It is on this theory that a transfer to a widow on her husband's death under an antenuptial agreement has been held taxable as one intended, etc. It has even been held that where a donor of stock reserved for his life the right to vote it, the acquisition by the donee of that right constituted a taxable succession to that right. The fact that the remainderman has under the deed a power to withdraw part or all of the corpus by making demand therefor upon the trustee does not prevent taxing the succession to the whole of the principal if that power is unexercised. If the deed directs the trustee to pay part of the income from the property to others and part to the settlor, the succession to the remainder of that part of the capital required to produce the income reserved to the settlor is taxable. Any provision requiring a trustee to pay the income as directed by the settlor is equivalent in this connection to a reservation of it to his own use even though the deed also contains a term providing for the distribution of the income during settlor's life to another.

In both the cases just cited the power to direct was exercised at least in part, but, since there were in both other reasons for holding the transfers taxable, it remains uncertain as to whether the holdings would have been the same had it not been exercised at all and the alternative dispositions of the income been followed. If the grant of a remainder interest subject to a life interest in the grantor for his own life is accomplished by several instruments under circumstances showing an agreement or understanding to that effect, the transaction is considered as a single one by reading the instruments together, and held to effect a taxable succession if it would have done so had the terms of the several instruments been contained in one document. This method seems to be quite

mick, (1927) 327 Ill. 547, 158 N. E. 861; Harber v. Whelchel, (1923) 156 Ga. 601, 119 S. E. 695; In re Marshall's Estate, (Minn. 1930) 228 N. W. 920.


Estate of Oppenheimer, (1925) 75 Mont. 186, 243 Pac. 589. See notes, Antenuptial contract as transfer intended, etc., 44 A. L. R. 1475, 49 A. L. R. 895.

In re Ferris' Estate, (1923) 94 N. J. Eq. 726, 121 Atl. 692.

In re Flynn's Estate (1921) 117 Misc. Rep. 90, 190 N. Y. S. 905.

People v. Kelley, (1905) 218 Ill. 509, 75 N. E. 1038.

People v. McCormick, (1927) 327 Ill. 547, 158 N. E. 861.


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frequently employed. An absolute conveyance under an arrange-
ment by which the grantee at once leased the property to the
grantor for his life without rent or for a nominal rent effects a
taxable succession.\textsuperscript{57} A like result was reached where the lease
back was for a term of years shorter than the donor's life ex-
pectancy but longer than the probable duration of his life because
of his physical condition.\textsuperscript{58} In deciding the question of taxability
courts are more concerned with the substance of the results than
the devices used to produce them. If the substance is a remainder
in the transferee that he can enjoy only after the transferor's
death, and the enjoyment of the property or its fruits by the
transferor until his death, the succession to the remainder is tax-
able.\textsuperscript{59} A common device is for the transferee to execute a bond
or make some other form of contract that insures the transferor
the enjoyment of the property for his life; these transactions are
taxable even though the transferee has possession since the enjoy-
ment is postponed till the transferor's death and remains in him
till then.\textsuperscript{60}

The act by which the person who acquires the remainder vests
in the transferor the beneficial interest for the latter's life is usually
done in fulfillment of an agreement or understanding so to do
entered into at or before the transfer and contemporaneously ther-
with. The fact that it occurs later should not affect the result, but,
if it is a separate and distinct transaction, the creation of the
remainder is not deemed a taxable transfer since in that case
the whole title and interest in the property will have vested in
the transferee immediately upon the transfer to him.\textsuperscript{61} The facts
in some cases show a transferor to have retained practically
complete control and the full fruits of the property conveyed
until his death although there appears to have been no express
arrangement, contract or reconveyance to him made by the trans-
feree under which the transferor could be said to be enjoying
those benefits as a matter of right as against a claim that the
transferee might assert. If the transfer is contingent in title the

\textsuperscript{57}In re Dobson's Estate, (1911) 73 Misc. Rep. 170, 132 N. Y. S.
472.

\textsuperscript{58}In re Russell's Estate, (N. J. Prerog. 1929) 146 Atl. 361.

\textsuperscript{59}People v. Estate of Moir, (1904) 207 Ill. 180, 69 N. E. 905.

\textsuperscript{60}Matter of Brandreth, (1902) 169 N. Y. 437, 62 N. E. 563, 58 L.
R. A. 148; Matter of Cornell, (1902) 170 N. Y. 423, 63 N. E. 445; Reish,

\textsuperscript{61}Matter of Miller, (1902) 77 App. Div. 473, 78 N. Y. S. 930; In re
case for taxability is clear for that very fact would give the transferor the right as against the claims of such transferee to continue to enjoy the property. But there are cases holding that, even if the interest created in the transferee is vested, its acquisition is taxable under the fact situations above outlined. In one case, however, factual enjoyment during the transferor's life of shares of stock transferred to another was held not to make the transfer taxable because no contract had been shown, express or implied, entered into at or before the transfer, from which a trust for the transferor could be inferred. The requirement that the transferor's continued enjoyment of the transferred property during his life be based on some transaction that confers it upon him as a right against the transferee seems technically sound, but courts will have to be diligent in discovering or evoking implied contracts in those situations if it is not to open an avenue for tax evasion. No agreement or consent on the part of the transferee is required where his interest arises under a deed delivered in escrow to be delivered to him on the grantor's death, and the grantee's acquisition of his remainder is taxable. Taxability cannot be avoided by resort to indirect methods if their substantial effect is to reserve to the owner of the property a life estate or right to its income for his life. Hence, where A transferred securities to B who the next day transferred them to T in trust to pay the income to A for his life, the court will treat it as a direct transfer from A to T on such trusts, and the succession to the remainders on A's death is taxable. It has even been held that an absolute gift of shares in a corporation was taxable where the corporation had been organized to hold the donor's real estate which he had transferred to it with a reservation of a life estate, and where the donor withheld from the donee the right to vote such stock during the donor's life. The theory of the decision was that the reservation of a life estate in the realty which prevented any dividends being earned on the shares, since that realty comprised the corporation's entire assets, and the denial to the donee of the right to vote the shares, in effect deferred the time when he would enter into possession and

64People v. Shutts, (1922) 305 Ill. 539, 137 N. E. 418.
enjoyment of the shares until the donor's death. A dissenting opinion rests on the technically correct theory that the reservation of the life estate in the realty is immaterial since it was not that which was given to the donee.

Among the devices frequently resorted to by grantors is an outright transfer in exchange for an enforceable promise that the grantee will confer upon the grantor for his life specified economic benefits of the kind that could have been obtained directly by retaining the property. If the grantee's promise is to support the grantor for life with no obligation to apply thereto the granted property or the income therefrom, the succession is not taxable since it imposes no limitations on the grantee's use and enjoyment and involves no reservation to the grantor of any interest in the property. The same reasons, among others, are urged to support the conclusion that the transfer is not taxable where the donee promises to pay the donor an annuity which, however, is not required to be paid out of the income from the property and is payable whether or not there be any such income, even though the donated property is deposited with a trust company as security for the performance of the promise under an arrangement giving it a power of sale. At the other extreme is the case in which the promise is the payment of an annuity to the grantor for his life out of the income or, if necessary, the principal of the transferred property; the succession under such a transfer is taxable, since this effects a reservation to the grantor of its use and enjoyment for life. The case does not indicate whether the whole of the income was required to pay the annuity or not, but there is no indication that that factor would have affected the quantum of the principal whose transfer would have been held taxable. The language in a New Jersey case and part of its decision rather suggest that if the donor is to receive even a part of the income from the transferred property the transfer of the whole is taxable. Charging the property with the whole of the donor's existing and future liabilities has the same effect. But between these two extremes lie those cases in which the grantee

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66In re Wallace's Estate, (Or. 1929) 282 Pac. 760.
67In re Thorne's Estate, (1899) 44 App. Div. 8, 60 N. Y. S. 419.
68In re Edgerton's Estate, (1898) 35 App. Div. 125, 54 N. Y. S. 700, aff'd (1899) 158 N. Y. 671, 52 N. E. 1124.
69In re Estate of Schuh, (1922) 66 Mont. 50, 212 Pac. 516.
promises to pay the grantor for his life interest on the transferred capital value. This is generally held to make the transfer taxable on the theory that it is equivalent to the grantor reserving a life estate in the transferred property. It has been stated that if a donor, even though immediate possession pass, is to receive interest on the sum transferred, or a sum equal to the whole or a part of the income from the transferred property, the transfer is one in which the donor intends to postpone the donee's enjoyment till the donor's death. The actual decision of that case, however, was that the transfer was not taxable where the donee's promise was to pay the donor for his life a fixed sum which was in fact equal to six per cent. on the sum transferred, since the donee's enjoyment was not deferred till the donor's death. That is technically correct, but it is arguable whether a mere difference in the form of the promise by which the donee assumes obligations, equivalent in amount and identical in their fixity, should entail different tax results.

The question arises as to the effect upon the taxability of a transfer in which the transferor reserves a life estate or a right to receive the income for his life, of a sale or assignment of the life estate to the person entitled after the transferor's death to the remainder or the principal. The majority of the cases that have passed on this problem have held that this has the effect of making the transfer non-taxable, that is, of making the succession to the remainder or principal on the transferor's death non-taxable because not effected under a transfer intended to take effect in possession at or after the transferor's death. The reasons assigned are that the subsequent transaction modifies the original transfer so that the transferee acquires a right to immediate possession and enjoyment; that the transferee acquires nothing by succession on the transferor's death because he entered into possession and enjoyment before such death; and that, had the original deed made the dispositions ultimately made of the income,

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by the assignment, there would have been no taxable transfer. It is, of course, true that under these circumstances the person entitled to the remainder or the principal after the transferor's death under the original deed is in possession and enjoyment as of right immediately after the sale or assignment to him of the transferor's intervening life interest, and that, if the remainder or right to the principal was vested in title, such person has in fact the most important economic benefits of the property from that time on. The life estate and remainder may both have been legal estates or equitable interests, or one may have been a legal and the other an equitable interest; but, irrespective of that factor and of technical rules as to mergers of interests and as to the cestui's power to require a termination of the trust, the above decisions seem justified on the basis of the facts alluded to in the preceding sentence. Neither those facts nor the reasons urged in the cases last cited would apply where the remainder or right to the principal on the transferor's death remained contingent in title up to the time of such death, and hence in such case the possession and enjoyment acquired under the assignment of the intervening life interest do not prevent the succession to the remainder under the original transfer from being taxable. This decision is correct since the economic benefits acquired by the assignment of the life estate were limited in their duration and the possession and enjoyment after the transferor's death involved the acquisition of a new economic benefit not theretofore belonging to him who acquired it. The same result was reached in a case in which the transferor at the time of releasing his life interest reserved a power to recall the property at any time on demand, for the reason, among others, that the retention of that power prevented the property from passing from him, with all the attributes of ownership, until his death. It should be stated that the transferor was in fact permitted to receive the income during his life even after his release thereof, and that that factor is also relied on to sustain the result. The cases that treat the acquisition by the remainderman of the intervening life interest of the transferor as defeating the tax raise certain difficulties. If the tax is on the act of going into possession and enjoyment and dependent on that occurring at or after the transferor's death, it is perfectly logical not to tax where that event occurs prior to

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67 In re Fulham's Estate, (1923) 96 Vt. 308, 119 Atl. 443.
such death. If, however, the tax is on the creation of the right, that is, on the acquisition of an interest limited, by the transfer that creates it, to commence in possession and enjoyment at or after the transferor's death, then the act on which the tax is levied occurs either at the time the deed or transfer takes effect or, if creation of the right is taken to mean a vested right, at the time the event occurs that makes it vested. A tax liability should arise when those ultimate facts occur on which taxability depends even though the duty to discharge that liability might be postponed till a later date. If this be correct, it would follow that a deed that at once created a vested remainder or a vested right to the principal on the grantor's death would at once create the right whose creation constitutes the tax subject. If this be so, the effect of treating the assignment by the grantor of his reserved life interest to those having a vested remainder or right to the principal on his death as preventing taxability, is to extinguish a tax liability that had already arisen. The same would be true in every case where such remainder vested in title prior to the grantor's assignment of his life interest to the remainderman. Expressions can be found to support both of these theories as to the subject on which the tax is imposed. No case has been found in which a grantor has assigned his reserved life interest to the remainderman that discusses this aspect of the problem. This is probably due to the fact that the accrual of the duty to pay a tax at some time and the coming into existence of the duty to discharge that liability by payment when the time for payment has arrived are seldom distinguished either in the statutes or in the decisions.

A donor might conceivably make a transfer in which he retained the right to the income from the property for a definite period not in terms limited by his life. A case of that kind would arise where he transferred land subject to a lease for such period without at the same time transferring his right to receive the rents under the lease. It is clear that the transfer would not be taxable if he survived the termination of the lease. The question is whether it would become so if he died prior thereto. This is not a case of alternative limitations, one of which is such that, if the succession occurs under it, it would be nontaxable. It is rather a case in which facts convert a succession not in terms

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dependent on the donor's death into one that occurs in possession and enjoyment after such death. It has been held that there is in such case no taxable transfer. The reasons assigned were that the donee had all the possession and enjoyment he could acquire until the lease expired, and that his possession and enjoyment were in no sense dependent on the donor's death. The latter of these is both correct and adequate to justify the decision; the former is not correct in any substantial sense, whatever be its technical accuracy, for the donor could have given the donee the right to the rents, that is, to the most significant economic element of enjoyment.

It is patent that the reservation of a life interest that is in fact enjoyed by the transferor until his death affords the clearest case of the creation of an interest intended to commence in possession and enjoyment at such death. The question arises whether the transferor's retention of such an interest is a requirement before there can be a transfer that creates in another an interest intended to take effect in possession and enjoyment at the transferor's death, or whether the retention of other interests or powers where a life interest is not retained suffice to create interests whose acquisition constitute taxable successions. The most important problem of this type is where the transferor has reserved a power to revoke the grant or terminate the trust. The simplest case raising the question of the effect of the reservation of such a power is that in which A transfers property to B, or creates a trust to pay the income therefrom to B, for a term in no way defined by reference to A's life. It is clear that B in such a case in fact possesses and enjoys the property, or enjoys its fruits, for such term from the very moment the transfer is made and does so under a right derived thereunder. The decisions are not in accord as to whether the reservation of the power to revoke or terminate makes the acquisition of that interest taxable. It has been held that it was taxable because the holder of the interest was prevented thereby from having that complete dominion over the property which is the characteristic of absolute ownership.

78 In re Bell's Estate, (1911) 150 Iowa 725, 130 N. W. 798.
79 The discussion that follows is restricted to this problem so far as it arises under the "Transfers intended, etc." provision of state inheritance tax statutes. Some of the statutes at present contain specific provisions as to the effect of the reservation of a power to revoke, alter, etc. Cases under them are not considered. See on this general problem E. S. Stimson, When Revocable Trusts are Subject to an Inheritance Tax, (1927) 25 Mich. L. Rev. 839.
that it was not until the donor's death that the beneficiary became irrevocably entitled to the income of the trust property whose income he was to receive for his own life, and that the donor had not surrendered complete dominion over the property. Long prior to that case, however, New York had definitely held in In Re Masury's Estate that the mere reservation of a power to revoke did not make the transfer taxable since the cestui, who under the deed was to get the income during his minority and thereafter the principal, had the full enjoyment of the income during the settlor's life and that no change in his relation to the trust was effected by said death. The Bostwick Case, however, limited the Masury Case so closely that it was treated as having overruled it. In that case the transfer of a life interest for the cestui's life was held taxable where the deed of trust reserved to the settlor a power to revoke and other powers of control, since the reservation of those powers was held to be inconsistent with a purpose of immediately vesting in the beneficiaries an absolute right to the present and future enjoyment and precluded the inference of an intention to have the transfers take effect in possession and enjoyment before the settlor's death. The history of the question in New York after the Bostwick Case shows a gradual trend away from it back to the viewpoint of the Masury Case, and finally it became as definitely established as such things can be that the mere reservation of a power to revoke did not make the transfer one intended to take effect in possession and enjoyment at or after the transferor's death. A clear statement of the reasons to support the present rule is found in In re Cochrane which involved the taxability of the creation of a life interest for the cestui's life under a deed in which the settlor reserved a power to revoke. Emphasis was placed on the fact that the enjoyment, construed to mean the use of, or income from, the property, passed to the beneficiary at once, that no further beneficial interest passed to him on the settlor's death, and that the gift was complete.

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in possession and enjoyment until the reserved power was exercised. The same result has been reached in other states in cases involving the taxability of both the acquisition of life estates for the transferee's life or other interests not measured by the transferor's life, and of remainders limited to commence on the expiration of such interests. In one case the reservation of the power to revoke was held not to make taxable the transfer of either a life estate for the transferor's life or of the remainder where both were given to the same person, despite the fact that the remainder took effect at the transferor's death. Courts frequently frame the issue in these cases as that of discovering the transferor's purpose in inserting the reserved power to revoke, and finding that purpose not to have been to postpone possession and enjoyment until his death. Other factors stressed have been that the reservation did not affect the beneficiary's power of enjoyment, nor prevent the passing of a complete interest to the trustee or the creation of a valid trust; all these reasons except the first seem too formal to deserve any bearing on the tax question.

There have been several cases besides the New York cases cited in the preceding paragraph in which the reservation of the power to revoke or terminate has furnished either the sole or one of the principal reasons for holding the transfer taxable. In one case A had reserved a life right to the dividends from stock transferred to T in trust for that purpose, with remainder to T. Before his death he released said right to T, but in fact continued to receive the dividends till his death. By the instrument of release he reserved the power to recall any of the shares on his demand. This factor constituted practically the whole reason for holding the transfer taxable, since because of it A had failed to relinquish


all power of control and to confer upon T the right to dispose of the property and use its avails. To escape the tax a transfer must pass the property from the donor with all the attributes of ownership independently of his death. The succession taxed in this case included the acquisition of the remainder. In another case A had transferred property to T in trust to pay the income to B for a limited period, renewable by A at the end of any period for another like period; the principal to be paid to B within sixty days after the termination of the period during which A died. The transfer of the principal to B was held taxable because her interest therein was contingent until A's death since it depended upon A dying without revoking. A later Massachusetts case involved a trust creating immediate life interests, for the cestuis' lives, with remainders over not in any manner conditioned by reference to the settlor's death; the settlor had reserved a power to alter the trust in any way that would not vest in him any beneficial interest in either the income or principal. The transfer was held non-taxable because the beneficial interest vested in the cestuis at once, they were in possession and enjoyment from the delivery of the trust deed, and that possession and enjoyment were not contingent on the settlor's death. It was also stated that the settlor reserved no beneficial interest, and that the mere existence unexercised of a power to divest the donees did not deprive them of their interest or make it contingent on the settlor's death. It is true that this would not deprive them of their interest; but it is equally clear that it would make their continued enjoyment contingent up to the time of the settlor's death in a factual although not in a technical legal sense, and that that contingency is in no way affected by the fact that the reservation was not for the settlor's benefit, although it might well be contended that it was for his benefit in so far as he effectually retained the important power to dispose of the property. A rather recent Massachusetts case involved the taxability of the successions to remainders created by a trust deed by which the settlor created an immediate life interest for the cestui's life in another than himself or the remaindervmen, and in which the settlor reserved the right to alter or terminate the trust with the consent of others than the remaindervmen whose successions were being

89In re Fulham's Estate, (1923) 96 Vt. 308, 119 Atl. 443.
taxed. The court held the successions taxable since the interest of these remaindermen remained contingent until the settlor's death because of certain provisions in the deed, including the provision as to the power to alter or terminate. It is true that in this case their interests were thus contingent in a technical sense as well as in fact because of the other provisions relied on and that these alone would have justified the result. The case is, therefore, only inferentially authority for the proposition that the mere reservation of a power to alter or terminate creates a contingency affecting the interests created by a transfer until the transferor's death, and that such contingency makes the transfer taxable as one intended to take effect in possession and enjoyment at such death. In so far as it points in that direction it seems in conflict with the last preceding case cited unless the manifestly untenable position be taken that the contingency disappears merely because the power reserved cannot be exercised to revest the property in the settlor but only to divest the interests created and transfer them to others. In both cases the transfers created in others than the settlor an interest immediately possessed and enjoyed by its owner as of right, with remainders limited to commence in possession on the termination of the first interest, and a factual contingency affecting them all. Whether the question is of any practical importance in Massachusetts since the Saltonstall Case depends upon its implications and the inferences that can be drawn from some of the arguments advanced in the opinion therein both by the Massachusetts court and the Supreme Court of the United States. It can at least be said that the cases discussed in this paragraph, and some of the New York decisions referred to in the preceding one, give those states that have not yet decided the matter a respectable foundation on which to predicate the taxability of the acquisition of interests by transfers in which the transferor has reserved a power to alter, revoke or terminate.

The cases that have been reviewed in considering the effect upon the taxability of a succession of the fact that the transferor has reserved a power to alter, revoke or terminate have all, with the possible exception of In re Fulham's Estate involved situa-
tions in which there was an immediate creation in another than the transferor of a right to presently enjoy the use of or income from the transferred property. The question in some of them was as to the taxability of the transfer of that interest itself. It is difficult to see how on any theory as to what constitutes taking effect in possession and enjoyment at or after the transferor's death the mere reservation of a power to revoke can have that effect where the interest created is for the life of the transferor, since that death puts an end to the period of enjoyment and it would be absurd to treat the prior enjoyment as taking effect at the moment it in fact ceases. The case is not as easy where the interest created may under its terms and does in fact endure beyond the transferor's death. The power to revoke cannot be exercised after such death, and, therefore, that death gives the interest an unconditional character that it did not have before even though it may have been vested in the technical sense. The owner of the interest is now assured of its enjoyment for the specified period. He is also in fact in a better position than before to capitalize that series of future enjoyments by a sale. It is not wholly unreasonable to interpret these facts as involving the acquisition of new economic benefits that shifted to him at that time. But this applies only to that part of the series originally transferred that will materialize after the transferor's death. The few decisions in which the transfer of such interests have been held taxable where a power to revoke was reserved do not show whether the tax was computed on the value at the time of the transferor's death of the future units in the series or of the whole series originally transferred. It is difficult to see on what theory the uses in fact enjoyed prior to the transferor's death can be considered as having taken effect at such death; the economic benefits from them certainly did not shift to the owner of the interest at that time. The cases declining to tax the acquisition of such an interest merely because subject to a reserved power to revoke seem clearly sounder than the few that tax it. Even levying the tax on that part of the series that comes after the transferor's death seems questionable so far as the tax is deemed on the creation of the right, unless that right be split into one to enjoy up to the date of death unless revoked and one to enjoy thereafter; it is more readily defensible so far as treated as levied on the act of actually acquiring something in possession and enjoyment at the transferor's death. The question of the effect of a reserved power to
revoke has, however, also been considered as it affected the
taxability of the transfer of a remainder limited to commence
in actual possession and enjoyment at the termination of an
interest presently vested in enjoyment in another than the trans-
feror or the remainderman for a period not measured by reference
to the transferor's life. If the remainder should actually com-
mence in possession and enjoyment prior to the transferor's death,
the case would be practically the same as one in which the enjoy-
ment commenced at once on the transfer, and the considerations
above set forth would apply. Hence the test case is where actual
possession is in fact deferred until or after the transferor's death.
Such a transfer of a remainder would not be taxable if no power
to revoke had been reserved. The reservation of such a power
does in fact make the remainderman's interest contingent until the
transferor's death, however much it may be vested in the technical
sense. He, therefore, acquires at such death definite economic
benefits which may be said to shift to him at that time. That
benefit is the absolute right to a series of future enjoyments com-
mencing either at the very instant of the transferor's death (in
the possible case in which the prior interest in possession chances
to end at that very moment) or in the future, and its absolute
character in fact makes that worth more than was his prior con-
tingent interest. Prior to such death he had neither the actual
present enjoyment nor an absolute right to the future series; after
it and because of it he has the latter but not the former for even
in the possible case above mentioned he does not acquire immediate
enjoyment because of such death. It is recognized that he would
acquire such absolute right only at such time even where his actual
enjoyment has commenced prior thereto, and that logic might
require treating at least continued enjoyment of the series after
such time as taking effect at that time on one of the theories
above suggested in the case of interests presently vested in
enjoyment subject to a power to revoke. The decisions give no
answer to this question. There are, therefore, very cogent
reasons for treating the mere reservation of a power to revoke
as making the transfer of a remainder taxable where that does
not in fact commence in possession and enjoyment before the
contingency to which it is subject is removed by the transferor's
death. The majority of cases that have passed on it, however,
do not so hold. It should be stated that the preceding discussion

95 People v. Northern Trust Co., (1927) 324 Ill. 625, 155 N. E. 768.
of this point has assumed that there were no other provisions in the deed of transfer making the right to the remainder contingent either in fact or in a technical sense.

The question of the effect upon the taxability of a succession of the retention of powers other than that of revoking or terminating, or of interests other than a life estate or right to the income for the transferor's life, must next be considered. A transfer in which the donor reserved extensive powers of control and management over the property during his life has been held taxable since that prevented that parting with title, possession and enjoyment during his life which is essential to non-taxability. The same factor has been relied on along with others to reach the same result, and that effect has been impliedly admitted even where the actual decision was against taxability. Reserving a power to remove the trustee and supervise his investments during the settlor's life, and providing that no part of the property should be sold during the settlor's life without his consent, have been held insufficient to make the transfer taxable. The reasons assigned were that these did not prevent the enjoyment by those immediately entitled thereto, nor the complete divestment by the settlor of his ownership. Reserving a power to alter or amend has usually been accompanied by a power to revoke, and seems to be accorded the same treatment as the latter when it is unqualified. It has, however, been held that a power to amend did not make a transfer taxable where limited so that it could not be exercised so as to revest in the settlor any beneficial interest in the property, on the theory that he reserved no beneficial interest and that the mere existence of a power unexercised to divest the donees of their interest did not deprive them of those interests or make them contingent on the settlor's death. If a donor reserves and exercises a power, created

96 State & City Bk. & Tr. Co. v. Doughton, (1924) 188 N. C. 762, 125 S. E. 621.
97 Matter of Bostwick, (1899) 160 N. Y. 489, 55 N. E. 208; People v. Shaffer, (1920) 291 Ill. 142, 125 N. E. 887.
101 See In re Bower's Estate, (1921) 195 App. Div. 548, 186 N. Y. S. 912, aff'd (1921) 231 N. Y. 613, 132 N. E. 910 in which court treated a power to alter or amend as including the power to revoke.
by the deed, to appoint by will a remainder, the succession thereto has been held taxable both where that remainder was limited to take effect in possession and enjoyment at the donor's death, and where limited so to commence on another's death who in fact died after the donor although under an alternative disposition it would have so commenced at his death. Both cases involved transfers that created interests in others that were immediately possessed and enjoyed by them; in the former no disposition of the remainder was provided for, while in the latter there was an alternative disposition thereof in the deed, but it does not appear whether or not it was appointed to the same persons who would have taken in default thereof. There is nothing in the opinions indicating whether any of these factors had any effect on, or were considered in making, the decisions. Whether the mere existence of such a power unexercised would make the succession to the remainder taxable raises substantially the same problems that were discussed when considering the effect of an unexercised reserved power to revoke, and need not be again discussed. Whatever be the effect given to such a reservation, it cannot be avoided by indirection as by a donative transfer to another followed by a re-transfer on terms giving the transferee, who was originally the owner, this power to dispose of the remainder; in such case the transfer is treated as that of the original owner. A question likely to arise in cases where the issue of taxability turns on the degree of control retained is whether factual control is sufficient to make the transfer taxable or whether that control must belong to the donor as of right. The cases have usually involved situations in which the donor had a right to such control by express agreement or understanding, and even in the case where no such express agreement was found the court based its decision on what the parties intended. It has been stated that it is the source and not the extent of the control that is important in a case in which the transfer was held nontaxable where there was in fact control under a subsequent agreement. It may be said in conclusion that, where the reservation of control renders taxable a transfer of a life estate for the donee's life

103 Appeal of Seibert, (1885) 110 Pa. St. 329, 1 Atl. 346.
104 Lilly v. State, (1928) 156 Md. 94, 143 Atl. 661.
105 Lilly v. State, (1928) 156 Md. 94, 143 Atl. 661.
106 People v. Shaffer, (1920) 291 Ill. 142, 125 N. E. 887.
commencing immediately, the same problems arise as to whether the thing taxed is the whole interest or only that whose enjoyment occurs after the donor's death, as were considered in discussing the effect of reserving a power to revoke in a deed creating such a life interest.

A donor may dispose of property on such terms that there remains a possibility of its reverting to him. The question arises whether the mere existence of this possibility makes a transfer taxable. It usually does, and probably always must, arise as to interests limited as remainders on an interest that immediately vests in possession and enjoyment. If the latter interest is a life interest reserved to the donor for his own life the succession to the remainders is clearly taxable apart from any question of the effect upon its taxability of the existence of a possibility of reverter. Nevertheless the existence of that possibility was relied on to support the taxability of a succession to a remainder under those facts. That possibility arose in that case because the trust was limited to expire on an event that might, but in fact did not, occur during the donor's life.\textsuperscript{108} The same factor was relied on to support a tax on the succession to a remainder where the possibility of reverter arose solely because a condition might arise making ineffectual every one of the dispositions made by the deed, even though the remainder was limited to the person who had a present life interest for the donor's life.\textsuperscript{109} An earlier New York case, however, denied that the mere possibility of reverter arising from the contingency that all the remaindermen might die before the donor made taxable the transfer of a remainder limited on a present life estate for the donee's life where said donee was a person other than the donor or the remainderman.\textsuperscript{110} There have been several cases in which the deed expressly provided for a reverter if the donee of an immediate life estate for the donee's life predeceased the donor, with an alternative disposition of the remainder if the donor predeceased the donee. This was among the factors relied upon to support the taxation of the succession to the remainder under the alternative disposition on the theory that the right of the remainderman did not become absolute until the donor's death and that there was not until then a completed gift.

\textsuperscript{108} People v. McCormick, (1927) 327 Ill. 547, 158 N. E. 861.
\textsuperscript{109} In re Dunlap's Estate, (1923) 205 App. Div. 128, 199 N. Y. S. 147.
of that remainder. A later New York case reached an opposite result in a substantially similar case on the theory that the possession and enjoyment of the remainder did not depend on or accrue at the donor's death. An even later case refused to tax a succession to a remainder limited on a life estate for the donor's life to the very person who was the remainderman merely because the property was to have reverted to the donor if the donee predeceased him. Among the reasons urged was that the donor retained no right of ownership, or dominion over the property. An early Pennsylvania case, however, relied to some extent upon the fact that the deed provided for a reverter to the donor if the donee predeceased him in holding taxable a transfer that was clearly so on other grounds. It is clear the effect of the existence of a possibility of reverter upon taxability is far from settled. It seems rather extreme to tax on this account where the possibility of reverter is due solely to the factor that all those, in whose favor the dispositions have been made, may die before the donor. The coming into possession and enjoyment of the remainders is in such case in no sense dependent on the donor's death except where he has retained a life estate for his own life or created a present life estate in another for the donor's life or where by other terms the remainder is to commence in enjoyment at his death; and in the case of those exceptions there is no need to rely upon this factor of the possibility of reverter. It is almost as extreme where that possibility is due solely to the factor that the trust may expire before the donor's death for practically the same reasons and subject to the same exceptions as above mentioned and to the further exception where the term of the trust is fixed by the donor's life. Here again it is not necessary to invoke the possibility of reverter in order to sustain a tax. There is, however, one difference between the two cases. The latter lends itself more readily to creating a situation in which the probability that the reverter will occur can be enhanced, but the likelihood that it will be thus employed involves assumptions as to what such donors intend that are seldom true to fact. There remain, therefore, the cases in which express provision is made for reverter upon the termination of a present

111 In re Schermerhorn's Estate, (Surr. Ct. 1913) 149 N. Y. S. 95.
112 In re Wing's Estate, (Surr. Ct. 1921) 190 N. Y. S. 908; see also In re Kirby's Estate, (1928) 133 Misc. Rep. 152, 231 N. Y. S. 408.
interest in enjoyment for a term not defined by references to the donor's life, conferred upon another than the donor, with an alternative disposition of the remainders if the donor predeceases the donee of such present interest. The right of the remainderman can never in such a case be anything but conditional as long as the donor lives. Whether that involves the conclusion that he can never enter into possession and enjoyment of the property until at or after such death depends on what is meant by possession and enjoyment. There is no doubt but that on the donor's death before the owner of the present interest in enjoyment dies, the remainderman's interest increases in value and that some economic benefits shift to him at that time and because of such death, nor can it be denied that those benefits could not have come to him prior to such death. There exist, therefore, good reasons for taxing the succession to such remainders, but the true reason is not that the deed created a possibility of reverter to the donor but that it was only at the time of, and because of, the donor's death that there occurred a fundamental change in the nature of the remainderman's relations in respect of the property, and that that change could not, under the deed of transfer, have occurred prior thereto.\footnote{See Boston Safe Dep. & Tr. Co. v. Comm'r's etc., (Mass, 1929) 166 N. E. 729, in which is found reasoning of this character.}

The preceding discussion leads naturally to the cases in which the factor that a remainder interest continued contingent or conditional until the donor's death weighed heavily in holding the succession thereto taxable. The provision most frequently considered in this connection is that which makes the right to succeed depend on the remainderman surviving the donor. This was held to make the transfer taxable in one case because such a transfer could take effect "neither in right nor in possession" until the donor's death; the decision, however, could have been, and to some extent was, based on other grounds\footnote{Wright's Appeal, (1861) 38 Pa. St. 507.} The same factor was relied on in another case to reach a like result even where the settlor had assigned his reserved life interest to the remaindermen before his death, for the reason that it vested in the sons who survived the settlor "in interest, possession and enjoyment" only by reason of and upon the settlor's death.\footnote{Coolidge v. Comm'r's etc., (Mass. 1929) 167 N. E. 757.} In another case it had been argued that there had been a completed gift of the remainder at the time the deed of trust was delivered. The terms of the deed were such that the remainderman could take only
if he survived not only the donor but also the holder of the immediate interest in possession. It was primarily in answer to this contention that the court described the interest that passed to the remainderman at the time of the delivery of the trust deed as "a possibility of a right which could not ripen into anything more than a contingency" until, among other things, the settlor had died.\textsuperscript{118} The theory in the above cases seems to have been that the remainderman's interest continued contingent in right until the donor's death. The cases in which a donor has created an immediate interest in possession in another with provision for a reverter if the holder of that interest predeceased the donor and for alternative dispositions of the remainder if the donor die first, have already been considered in discussing the effect upon the taxability of the succession to such alternative remainders of the retention of such a possibility of reverter. It need only be added that such remainders in fact remain conditional until the donor's death, whatever the technical character thereof under such a disposition of property, and that, for reasons already indicated, good reasons exist for taxing the succession thereto. The decisions in this type of case are, however, in sharp conflict,\textsuperscript{119} although the New York cases cited as upholding taxability can be, and were, supported on other grounds also.

The question whether a transfer taxable as one intended to take effect in possession and enjoyment at or after the transferor's death occurs upon the death of a joint tenant or a tenant by the entirety bears a very close resemblance, so far as the significant economic factors are concerned, to those in which a remainderman is to take only if he survives the donor.'\textsuperscript{120} This question has been most frequently treated by the New York courts, although there have been a few decisions in other juris-

\textsuperscript{118}Boston Safe Dep. & Tr. Co. v. Comm'rs, etc., (Mass. 1929) 166 N. E. 729.


\textsuperscript{120}The cases discussed in the text do not include those under statutes that expressly include such transfers. See on this general problem, note, Survivorship agreement, personal property passing under, as subject to succession tax, 3 A. L. R. 1642; note, joint tenancies and survivorship agreements, 58 A. L. R. 1146.
dictions. In discussing the cases a transfer of personalty to 
two or more persons with right of survivorship will be treated 
as creating a joint estate therein, since that accords with the 
treatment of such situation by the courts. Three quite distinct 
situations may arise. A, an owner of property, may transfer 
it to himself and B as joint tenants without any consideration 
whatever. There is in such case no denying that B acquires 
an interest from A at the time the tenancy is created, and that 
such interest includes the right of survivorship. It was, there-
fore, held that, where an owner of stock caused to be issued 
a new certificate made out to himself and his wife, and the 
survivor of them, a taxable succession to the wife for the full 
value of the shares occurred at his death.\textsuperscript{1}

The later New 
York decisions, in which the essential facts were similar, held 
there was no taxable succession for any amount, and these cases, 
as was the first cited, were affirmed by the court of appeals 
but without opinion.\textsuperscript{2} These later decisions are in line with 
the result finally reached by New York as to the non-taxability 
of the survivor's succession to joint bank accounts.\textsuperscript{3}

All the 
cases above referred to involved personal property. Prior to 
the time when the New York court of appeals had affirmed deci-
sions holding non-taxable survivorship in the case of joint ten-
ants of personalty and joint bank accounts, it had by a divided 
court held taxable the interest, acquired by a wife on her hus-
band's decease, in property that he had conveyed to himself 
and her, but one judge only of the majority had treated the 
transfer as creating a tenancy by the entireties or at least a joint 
estate. The minority treated the transfer as creating an estate 
by entireties, and took the position that the wife acquired nothing 
by the husband's death since by the deed she had acquired the 
title to the whole.\textsuperscript{4} It is certain that a lower court correctly


\textsuperscript{4}In re Klatzl's Estate, (1915) 216 N. Y. 83, 110 N. E. 181.
interpreted the effects of the court of appeals' later decisions in holding that no taxable succession accrued to the surviving joint tenant of realty upon the other joint tenant's death. The decisions on this type of case in other jurisdictions accord with those finally arrived at in New York, except that the implications of a New Jersey case later noted clearly indicate a contrary rule. The second type of case is that in which A and B transfer their separate property to each other as joint tenants. The succession of the survivor in such a case was held non-taxable because nothing passed from the decedent to the survivor on the former's death. A New Jersey case is contra; the reason assigned was that, though the grantor might technically have made an immediate transfer of his half interest to the grantee, the "remainder" took effect in possession or enjoyment only at his death. It is certain that every state that declined to tax the succession occurring by survivorship in cases of the first type of case would decline to do so in the second type of case. The third type of case arises where the joint tenancy is created by the deed of a third party. It has been said, but not decided, that the succession of the survivor would not be taxable in such case because there is no transfer from the deceased joint tenant, a reason that would make it immaterial that the consideration for the transfer moved from the deceased joint tenant. The Dana Case last cited also intimates clearly that the succession would not be taxable if the donor joint tenant predeceased the donee joint tenant. It may be taken as

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126 Estate of Gurnsey, (1918) 177 Cal. 211, 170 Pac. 402; McIntosh's Estate, (1927) 289 Pa. St. 509, 137 Atl. 661; the latter case really involved a situation of the second type to be considered, but its implications support the rule of non-taxability in a case of the kind now under discussion.
127 In re Huggins' Estate, (1924) 96 N. J. Eq. 275, 125 Atl. 27, aff'd (1925) 130 Atl. 923, aff'd (1926) 103 N. J. L. 182, 134 Atl. 917.
128 McIntosh's Estate, (1927) 289 Pa. St. 509, 137 Atl. 661. This case has been treated as belonging to this type, although the joint estate arose under a transfer from a stranger to whom each joint tenant had first conveyed his or her separately owned realty.
129 In re Huggins' Estate, (1924) 96 N. J. Eq. 275, 125 Atl. 27, aff'd (1925) 130 Atl. 923, aff'd (1926) 103 N. J. L. 182, 134 Atl. 917.
130 Note, In re Heiser's Estate, (1913) 85 Misc. Rep. 271, 147 N. Y. S. 557, holding such a succession non-taxable because the transfer was based on a valuable consideration.
certain that a state refusing to tax the survivor's succession in the case of a joint tenancy would so refuse where the tenancy was one by entireties; it is probable that a state taxing the former would tax the latter because the former result is generally reached by brushing aside all technical considerations drawn from the common law incidents of such estates, and a court willing to do that in the case of joint estates would probably be willing to do so for estates by the entirety. It may be said in conclusion that the cases holding these successions non-taxable have relied wholly on technical considerations that should have had no place in deciding the tax question; the cases contra have more often had in mind, even when they have inadequately indicated it, the practical effect upon the survivor's position of the other joint tenant's death. It cannot be denied that such death enhances the value of the survivor's interest in the property, and that this involves a shifting to him of real economic benefits. It would, however, be dangerous to predict how the courts of a state that had not yet passed on these questions would decide them, but there is reason to believe that the probability of decisions in favor of taxability are greater today than before emphasis had been directed to the factor of a shifting of economic benefits.

Among the reasons frequently assigned for holding a transfer non-taxable is the fact that the transferor has by the transfer divested himself completely of all interest in the property.\(^{132}\) The question arises whether this alone suffices to make the succession to an interest under such a transfer non-taxable. The language of the statutes suggests that it is not, for some of the dispositions made may be limited to take effect in possession and enjoyment at or after the grantor's death within a not unreasonable interpretation of that expression. An examination of the cases bears out the suggested conclusion. There have been several cases in which a donor has transferred property in trust to pay the income to another for the donor's life, remainder to the cestuis for life if living at the donor's death, with alternative remainders to others if the cestuis for life predeceased the donor. It is clear that the donor has in such case completely divested himself of all his interest unless the existence of a

possibility of reverter be deemed an interest retained. The succession to the remainder has been held taxable under these circumstances both where the alternative remainders took effect,\textsuperscript{133} and where the remainders went to the life cestuis who survived the donor.\textsuperscript{134} An argument that appeared in two of these cases was that the possession and enjoyment of the remainders were not intended to commence until the donor's death. The Massachusetts case advanced the reason that to escape taxability the property with all the attributes of ownership must pass independently of the donor's death and the recipient acquire the unrestricted right to dispose of the property and to receive and use its proceeds, and that in that case the principal was not to pass out of the donor till his death. It is true that the principal was not to pass to the remainderman with full powers of enjoyment till then, but that was not due to the fact that the donor had retained those benefits unless the existence of the possibility of reverter has that effect. The court may have thought that it was essential to taxability that an interest pass directly from the donor at his death, but a later Massachusetts case expressly stated that this was not necessary.\textsuperscript{135} The case is supportable on other grounds, but the above reasoning seems quite inadequate. The \textit{Dunlap Case} alone of those cited makes the existence of a possibility of reverter a factor in its decision. The \textit{Coolidge Case} just cited may be taken as also illustrating the principle that the succession to an interest does not escape taxation merely because the transfer under which it was created divested the donor of all his interest in the property.\textsuperscript{136} The same can be said of those cases previously considered in which an important reason for holding a succession taxable was that the remainderman's interest was defined in terms such that it could not materialize in possession and enjoyment until at or after the donor's death. Where, however, a donor divests himself of all interest in the property by creating interests in others of such kinds that possession and enjoyment thereunder are not contingent on the donor's death, the successions to such interests

\textsuperscript{135}Coolidge v. Comm'rs, etc., (Mass. 1929) 167 N. E. 757.  
\textsuperscript{136}It should be stated that this divestment in this case occurred under the original deed and a subsequent assignment by the donor of his reserved life estate.
under such a transfer are non-taxable. Here, too, may be cited the cases holding that the mere fact that the deed of transfer provides for accumulating the income for fixed periods does not make the transfer taxable, even where one of the alternative periods for accumulation was defined by the donor's death. The reason most frequently given for holding taxable the succession to an interest created by a transfer by which a donor disposes of his whole interest in the property, is that the possession and enjoyment of such interest can commence only at or after the donor's death and by reason thereof. Other reasons are assigned in particular cases, but the above occurs with the greatest frequency. But if the mere fact that a donor has divested himself of all interest in the transferred property by the transfer, or by it and other dispositive acts prior to his death, is not alone sufficient to result in the non-taxability of the transfer, neither is the mere fact that he has retained some interest up to the time of his death under a deed intending that very result a sufficient basis for taxability. It is necessary only to refer to the previous discussions of the cases involving reserved powers of revocation and amendment and joint estates and bank accounts. It is only where the interest retained prevents the donee from possessing or enjoying the property up to the time of or until after the donor's death, and where the retention of the interest makes such possession and enjoyment dependent on such death, that the retention of such interest makes the transfer taxable. If it does that, it is immaterial that these may also be postponed until the death of another person. Prior discussion has shown that there is no unanimity as to when the reservation of interests by the donor has the above mentioned effects. Whether taxing a succession to an interest, created by a transfer by which the donor parts with his whole interest in the property, merely because some of such interests may be limited to take effect in possession and enjoyment at or after his death accords with the real purpose of these taxing statutes or not, the decisions and reasoning in the first

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140 Boston Safe Dep. & Tr. Co. v. Comm'r's, etc., (Mass. 1929) 166 N. E. 729.
group of cases considered in this paragraph show that it is within their letter.

There remain to be considered a few miscellaneous situations in which the question of taxability has been considered. A transfer in which the donor retains both a life interest for his own life and a power of revocation is taxable.\footnote{Bullen v. Wisconsin (1910) 143 Wis. 512, 128 N. W. 109, aff'd (1915) 240 U. S. 625, 36 Sup. Ct. 473, 60 L. Ed. 830.} The same is true where he reserves such a life estate and a power to appoint by will\footnote{Smith v. State, (1919) 34 Md. 473, 107 Atl. 255.} or to demand part of the corpus.\footnote{Downes v. Safe Dep. & Tr. Co., (Md. 1929) 145 Atl. 350.} A transfer in which the donor reserves a life estate for his life is not rendered non-taxable by the unexercised power in the remainderman to withdraw any or all of the transferred property from the trustee, at least where the trust deed provides that such withdrawal shall not transfer any ownership in that withdrawn to such remainderman until the donor's death.\footnote{In re Flynn's Estate, (1921) 117 Misc. Rep. 90, 190 N. Y. S. 905.} The amount received by the beneficiary under a life insurance policy on the insured's death is not deemed taxable as received under a transfer intended, etc., merely because it can be received by the beneficiary only on the insured's death. Among the reasons assigned was the factor that the grant of the right in the contract took effect in possession and enjoyment at once upon the designation of the beneficiary, and that this is true even where there is a reserved right to change the beneficiary.\footnote{Tyler v. Treas. & Rec. Gen., (1917) 226 Mass. 306, 115 N. E. 300.} The same result was reached where the policy, made out to the insured's estate, was later assigned to his wife; here the court stressed the reason that the assignment gave the wife "an immediate title and right to enjoy the moneys when they became payable as death losses."\footnote{Tyler v. Treas. & Rec. Gen., (1917) 226 Mass. 306, 115 N. E. 300.} It has, however, been held in a New Jersey case\footnote{Fagan v. Bugbee, (N. J. Sup. 1928) 143 Atl. 807.} that, where the insured exercised his power to change the beneficiary by substituting for his wife a trust company to receive the proceeds and to pay the income therefrom to the wife for life with remainders over, the interests acquired by the wife and the remaindermen were taxable as successions under...
a transfer intended, etc. The court admitted that the receipt by a
beneficiary, other than the insured’s estate, of the proceeds of a
policy would not be subject to an inheritance tax, but held that it
is the nature of the vehicle which conveys the property, not the
class of the property, which determines the taxability of a
transfer. A New York case, in which a policy payable to the in-
sured’s estate was assigned to another in trust for the benefit of
the insured’s wife and children, held that this involved neither a
transfer intended, etc., nor one by will nor under the laws of intes-
tate succession. It treated the power of revocation reserved by the
insured as in substance merely a right to change the beneficiary
of the policy which right existed under the policy. This de-
cision seems preferable to that in the New Jersey case if it be
admitted that the receipt by a beneficiary of the proceeds of a
policy on the insured’s death is not to be taxed. That rule itself
probably accords with what the framers of these inheritance tax
provisions intended; but it cannot be denied that the receipt of
the proceeds involves a shifting of economic benefits occurring
at the time of, and dependent upon, the insured’s death, and that
in substance this shift is from the insured to the beneficiary,
although, of course, the value of the insured’s economic interest
just before his death, as measured by the policy’s cash surrender
value, is certain to be less than the value received by the bene-
ficiary. These insurance cases may be said to represent the
triumph of technical considerations over economic realities, al-
though it cannot be denied that the insured does in these cases
transfer all the interest that he has, except where he retains a
power to change the beneficiary, and that the beneficiary imme-
dataacquires the whole of that interest unconditionally, except
where the power to change the beneficiary is reserved. The ques-
tion is one on which the courts of most of the states have not yet
passed. To what extent they will, if called upon to decide it, fol-
low the few decided cases or the implications of the “shifting of
economic benefits” doctrine cannot, of course, be foretold. Another
problem deserving at least a mention is the taxability of savings
bank trusts established by one person for another. These cases

\[\text{In re Voorhees' Estate, (1922) 200 App. Div. 259, 193 N. Y. S.}
\[168. \text{For the treatment of such a case under another provision of the}
\[236 N. Y. S. 395.}
\[149\text{See in this connection the remarks in Chase Nat'I Bk. v. United}
\[\text{States (1928) 278 U. S. 327, 49 Sup. Ct. 126, 73 L. Ed. 405.}\]
have held that there was no taxable transfer intended, etc., where
the facts showed a completed irrevocable gift during the donor's
lifetime,¹⁰⁰ and that there was a taxable transfer where that was
lacking.¹⁰¹ It should be stated that the cases cited were decided
while the law of New York as to the effect of reserving a power
to revoke was in a somewhat uncertain state. The opinions in
these cases throw practically no light on the problem of what
constitutes deferring possession and enjoyment until the donor's
death. One further matter deserves consideration. A transfer
may make alternative dispositions such that one of them creates
interests the succession to which would not be taxable if it stood
alone while the other creates interests the succession to which
would be taxable if it stood alone. No case has been found dis-
cussing the question whether the mere presence of the latter
disposition would make taxable an actual succession under the
former. It has, however, been said in a case involving such
alternative dispositions in which the actual succession occurred
in accordance with that one under which it would have been
taxable had that stood alone, that the mere fact that the suc-
cession might under the deed have occurred in a manner involv-
ing non-taxability did not make the actual succession non-taxable.
It was stated that the sequence of events is to be viewed in the
order of the actual rather than the possible.¹⁰² If that be so,
then it would follow that the mere presence of a disposition
under which the succession would be taxable should not make
taxable an actual succession under the alternative disposition under
which it would not have been taxable had it stood alone. It is
practically certain that a court would so decide the question if
presented with it.

(To be Continued)

¹⁰⁰In matter of Reed, (1915) 89 Misc. Rep. 632, 154 N. Y. S. 247;
In re Rudolph, (1915) 92 Misc. Rep. 347, 156 N. Y. S. 825; In re Bren-
¹⁰¹In re Barbey's Estate, (Surr. Ct. 1908) 114 N. Y. S. 725; In re