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

BY HENRY ROTTSCHEFER*

C. WHEN THE TRANSFER OCCURS

The question of when the transfer occurs is of importance in connection with the following problems arising in this kind of taxation: (1) the law governing the tax; (2) the base on which the tax is to be computed; (3) the jurisdictional problem; and (4) the problem of whether the taxing statute is being given a retroactive effect and the validity thereof. The last of these will be discussed under a separate heading.

The liability for any tax arises when those facts occur on whose existence the statute makes taxability depend. The law in force when those facts occur should, therefore, determine whether a transfer is taxable. The decisions on the question when the taxable transfer occurs may, accordingly, be expected to throw some light on the problem of what it is that is being taxed. The preceding discussion has shown various types of transfer that have been held taxable, and convenience of treatment of the problem of what law governs will be served by observing the distinctions between them. The question can arise only where there has been a change of law between the execution of the instrument effecting the transfer and the transferor's death. It is universally held that, where the donor reserves both a life estate for his own life and a power of revocation, the transfer is deemed to occur at the donor's death subject to the law then in force on the theory that such dispositions are so ambulatory as to be in effect testamentary. Hence such a transfer by a non-resident of stock in a domestic corporation is taxable where the law in effect at the time of the

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†Continued from 14 MINNESOTA LAW REVIEW 453. 493.

donor's death included the transfer of such property by such a
donor although that in effect at the time the deed of trust was
delivered did not include it.\textsuperscript{154} Exactly the same result was
reached in a case involving the same problem where the donor
reserved in addition a power to appoint the remainder by will.\textsuperscript{155}
The court in this case stressed both the ambulatory character of
the transfer and the fact that the remainders remained contingent
until the donor's death due to the reserved power to appoint. It
has also been held that the law in effect at the donor's death de-
termines the applicable rates in a case in which the donor, although
creating an immediate life interest in another for that other's
life, reserved the powers to revoke and appoint by will and the
possibility of a reverter to him for his life. The principal reason
advanced was that the remainderman's interest vested, and could
vest, only on the donor's death.\textsuperscript{156} The same factor was relied on
in reaching the same answer to the same problem in a case in
which the remainders were held contingent in title until the donor's
death because the trust might have terminated during his life and
revested the property in him.\textsuperscript{157} If the donor reserves a life estate
to himself and disposes of the remainder to another if he survives
the donor, the transfer has been held to be testamentary in char-
acter so that rates and exemptions are governed by the law in
effect at the donor's death.\textsuperscript{158} It may, therefore, be stated that,
assuming a transfer within these statutory provisions, the law
in force at the time of the donor's death governs whenever the
interest created by such a transfer remains contingent in title
or conditional in substance up to the time of such death. The
frequent emphasis upon the reservation of a power to revoke or
alter as a reason for treating a taxable transfer as ambulatory

\textsuperscript{154} Matter of Schmidlapp, (1923) 236 N. Y. 278, 140 N. E. 697.
\textsuperscript{155} In re Hanna's Estate, (1922) 119 Misc. Rep. 159, 195 N. Y. S. 749; but see Estate of Murphy, (1920) 182 Cal. 749, 190 Pac. 46,
where the law in force at the time the deed took effect was held to
govern where the donor reserved a life estate with power to appoint
by will but no power to revoke; the court treated the reserved power
to appoint the remainder by will as ineffective.
\textsuperscript{156} Lilly v. State, (1928) 156 Md. 94, 143 Atl. 661.
\textsuperscript{157} People v. McCormick, (1927) 327 Ill. 547, 158 N. E. 861.
\textsuperscript{158} In re Garcia's Estate, (1918) 183 App. Div. 712, 170 N. Y. S. 980, aff'd (1920) 192 App. Div. 902, 182 N. Y. S. 925. See also People
v. Northern Trust Co., (1928) 330 Ill. 238, 161 N. E. 525, holding the
tax governed by law in force at time of donor's death where re-
mainders limited on a reserved life estate were contingent on the
remainderman's surviving the donor; the opinion, however, is devoid
of reasoning directed at this particular problem.
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until the donor's death and, therefore, testamentry in character, makes it practically certain that a state that holds that the mere reservation of such power renders a transfer taxable would treat such transfer as governed by the law in force at the date of the donor's death. It may be incidentally remarked that it seems somewhat inconsistent for a state to deny that the reservation of such powers alone makes transfers taxable while admitting that its effect in the case of a transfer taxable on other grounds is to make it governed by the laws in force because of its testamentary character.

The other group of cases in which the problem of the applicable law has been considerably discussed consists of those in which the transfer was taxable because the donor reserved a life estate for his own life. The decisions are practically uniform that the law in force at the time that the deed of transfer took effect governs in such a case. Hence it is that law that determines the matter of exemptions and rates. The reasons generally assigned are that the tax is on the vesting in interest, and not on the transfer of the enjoyment. The same theory underlies the arguments that in such cases there is a completed gift at the time the deed of transfer is delivered. As was stated in a case involving another point, the tax is a "charge upon the creation of the right," not "upon fruition in enjoyment or possession." Reference should here be made to two cases dealing with the problem of the retroactive taxation of such transfers whose implications are inconsistent with the above line of cases. They involved transfers that were transfers intended, etc., solely because the

139 Estate of Murphy, (1920) 182 Cal. 740, 190 Pac. 46; Houston's Estate, (1923) 276 Pa. St. 330, 120 Atl. 267; Chambers v. Lamb, (1921) 186 Cal. 261, 199 Pac. 33; In re Mesarole's Estate, (1916) 98 Misc. Rep. 105, 162 N. Y. S. 414; Brown v. Pa. Co. for Ins., (Del. Super. 1924) 126 Atl. 715; Blodgett v. Uni. & N. H. Tr. Co., (1922) 97 Conn. 405, 116 Atl. 908; note that in Estate of Murphy the donor also reserved a power to appoint by will, but the court treated this as ineffective.


donor reserved a life estate. Nevertheless they were held taxable though no law taxing them was in effect at the time the deeds of transfer were delivered because, among other reasons, the property vested in the possession and enjoyment of the remaindermen upon the donors' deaths which occurred when laws taxing such transfers were in effect.\textsuperscript{106} There is no doubt but that the prevailing doctrine accords more nearly with the technical interpretation of the language of these taxing provisions than do these last two cited cases; which accords the better with the doctrine that attaches greater weight to the shifting of economic interests than to technical factors will be later considered.

The time when the transfer occurs is also important in determining the amount on which the tax is to be computed and the exemption to be allowed. The question can arise only where the same person has been the beneficiary under more than one transfer taxable under the statute. The usual situation has been that in which he has received something from the donor both under a transfer intended, etc., and under his will or as his successor under the laws of intestate succession. The cases herein discussed, except where the contrary is stated, involved statutes that did not contain any express provisions dealing with this question. It is generally held that, if the grant makes a transfer that occurs on the donor's death under the principles already discussed, the tax is based on the aggregate of that received under the grant and under the will or as successor under the intestate laws; it is immaterial that they are derived under different instruments.\textsuperscript{167} This has been so held whether the factor that made the transfer occur at the donor's death was the reservation of a power to revoke,\textsuperscript{168} or the contingent character of the interest taxed due to the fact either that the trust might terminate before the donor's death,\textsuperscript{169} or that the remainderman was to take only if he survived the donor.\textsuperscript{170} Furthermore, in such cases, but one exemption is allowed.\textsuperscript{171}

\textsuperscript{106}In re Wallace's Estate, (Or. 1929) 282 Pac. 760; In re Miller's Estate, (1919) 43 Nev. 12, 177 Pac. 409.


\textsuperscript{169}People v. McCormick, (1927) 327 Ill. 547, 158 N. E. 861.


\textsuperscript{171}In re Furnald's Estate, (Surr. Ct. 1921) 187 N. Y. S. 921, aff'd
Various reasons are assigned for these holdings such as that the property passes under both methods at the same time and by reason of the same event,\textsuperscript{172} that both transfers are testamentary in character,\textsuperscript{173} and that, if the rule were otherwise, an easy method would be afforded for reducing taxes.\textsuperscript{174} If the transfer is on such terms that, under the principles heretofore discussed, it is deemed to occur when the deed of transfer takes effect, sums received under it are not combined with those received under the will of the same donor,\textsuperscript{175} and a separate exemption is allowed against each type of transfer determined by the law in force at the time that each transfer occurred.\textsuperscript{176} The logic underlying these decisions would require each transfer intended, etc., where the transfer was deemed to occur at the time the deed took effect, to be separately treated with an exemption allowed against each. A case is possible in which there had been several of them, each occurring at a time when different laws with different exemption provisions were in effect. It is difficult to see how effect could be given to the rule that the taxability is governed by the law in effect at the time the transfer occurs, unless each were thus separately treated. If, however, there have been several such transfers under one law, there is no such practical obstacle to lumping them and allowing but one exemption. Any objection to lumping will then have to be based on the proposition that the statute taxes each transfer as a unit rather than all transfers of the same type as a unit. The emphasis on the time factor in the cases permitting aggregation with but a single exemption where the transfers, though under different instruments, occur at the same time, rather favors the view that transfers occurring at different times are to be separately treated even though belonging to the same

\textsuperscript{172}Pratt v. Dean, (1923) 246 Mass. 300, 140 N. E. 924; People v. McCormick, (1927) 327 Ill. 547, 158 N. E. 861.

\textsuperscript{173}In re Cumming's Estate, (1921) 115 Misc. Rep. 276, 187 N. Y. S. 921.

\textsuperscript{174}Pratt v. Dean, (1923) 246 Mass. 300, 140 N. E. 924.

type. No case has been found deciding either of the two problems here raised, but it has been stated that a separate exemption should be allowed against each type of transfer, but not against each instance of such type where there were more than one. This, however, was in a case in which the several transfers belonging to the same type were made on the same date.\textsuperscript{177} Whether a state statute would be constitutional that required transfers intended, etc., of the kind that are generally held to occur when the deed takes effect, to be lumped with transfers of whatever kind occurring at the donor's death has not yet, so far as the writer has been able to discover, been decided. The same may be said of statutes attempting to lump transfers intended, etc., of the kind just described, where they occur at different times whether under the same or under different laws, and of statutes lumping these with transfers of whatever kind occurring at the donor's death. A court in one case that held against lumping a transfer of this kind with that under a will seems to have been influenced by the belief that this would have effected a retroactive increase in rates on the transfer before death of doubtful validity.\textsuperscript{178} This would not, of course, be true where all the transfers were under one law that had remained unchanged during the period involved. If the theory of the shifting of economic benefits be taken as a starting point, there is not only no valid objection to lumping under all circumstances, but it would seem to be a more valid method than that actually adopted for the cases in which the transfer is deemed to occur at the time the deed of transfer takes effect. It should again be stated that the questions discussed in this paragraph arise only in the case of several transfers to one beneficiary.

The general principles governing the jurisdiction of states to impose taxes on transfers intended, etc., are the same as those governing their power to impose inheritance taxes generally and will not be discussed. These transfers, however, raise several problems of jurisdiction which, while not restricted to them, are


\textsuperscript{178}Estate of Potter, (1922) 188 Cal. 55, 204 Pac. 826. It may be remarked that lumping occurs inevitably under the Federal Estate Tax Acts.
yet different than the ordinary jurisdictional problem. The first is as follows: A, while domiciled in the state B, transfers intangible personalty to T, a person domiciled in state C, in trust to pay the income to A for life, remainders over; A reserves a power to revoke; thereafter A dies domiciled in state B. It has been held in Keeney v. New York,\textsuperscript{179} that in such a case state B can tax the transfer and that to do so does not violate due process since the property had its situs in said state at the time of the execution of the deed of transfer. It was stated that the validity of the tax must be determined by the situation as it existed at that time. Intangible personalty disposed of by such a transfer has been held to have its situs in state B at the time of the donor's death so as to be there taxable because he remained in substance its owner until his death; the case, however, did not discuss the constitutional question.\textsuperscript{180} It has been stated, but not decided, that state C could also tax the transfer under these facts.\textsuperscript{181} It is generally held that such transfers are governed by the law in force when the donor dies because of their testamentary character. If that theory be taken as the sole and required starting point in dealing with this problem, then the situs of the property at the donor's death should be determinative and the property be deemed as in effect owned by him until his death. The theory adopted becomes of importance where the personality is tangible instead of intangible. If the tangible personality, though within state B at the time the deed was delivered, is at A's death in state C, the domicile of T, it would seem that state B could not tax it if the transfer taxed is that which occurs at the donor's death even though the donor be considered the owner up to that time. It might even be of consequence where it was intangible if it should ever be decided that the problem of situs is to be de-

\textsuperscript{179}(1912) 222 U. S. 525, 32 Sup. Ct. 105, 56 L. Ed. 299.
\textsuperscript{180}Lines Estate, (1893) 155 Pa. St. 378, 26 Atl. 728; the result accords with that reached in Bullen v. Wisconsin (1916) 240 U. S. 625, 36 Sup. Ct. 473, 60 L. Ed. 830.
\textsuperscript{181}Bullen v. Wisconsin (1916) 240 U. S. 625, 36 Sup. Ct. 473, 60 L. Ed. 830. See In re Hayes' Estate, (1914) 162 App. Div. 173, 147 N. Y. S. 329, aff'd (1916) 175 App. Div. 933, 986, 161 N. Y. S. 1128, aff'd (1917) 221 N. Y. 613, 116 N. E. 1050, in which, however, the court treated the succession to remainders, limited on the donor's life under a deed also reserving the power to appoint by will, as passing under the laws of intestate succession where the donor failed to appoint; the donor executed the deed while domiciled in Massachusetts and died domiciled there; the property had no situs in New York at time the deed was executed but had a situs there when the donor died; the court held New York had jurisdiction.
terminated by looking to the legal title and the actual physical location of the evidences representing the intangibles, where there are such.\textsuperscript{182} If, however, the reasoning used in the case first cited be adopted as a permissible premise, then state B could tax, even were the property tangible personality, if it had its situs in such state at the time the deed took effect. The premises that are permitted to be adopted would also have a bearing on state B's power to tax if, after the deed had been executed, A had died domiciled in another state, and in fact in every situation involving state C's power to tax except where the property was tangible personality having its situs therein both at the time that the deed was executed and of A's death. No cases have been found deciding these matters.

Another situation that has been passed on by courts is as follows: A, while domiciled in state B, transfers intangible personality to T, domiciled in same state, in trust to pay the income to A for life, remainders over; A reserved a power to revoke; thereafter A died domiciled in state C. It was held in \textit{MacClurkan v Bugbee},\textsuperscript{183} that the state C could tax this transfer, and that it violated neither the state constitution prohibiting the taking of private property for public use without compensation nor the due process clause of the fourteenth amendment. The reasons on which the conclusion was based were that taxability was governed by the law in effect when the donor died, that it was the domicile of the donor and not of the trustee that determined the right to tax, and that it was that donor's domicile at death and not when the deed was executed that was decisive. Those reasons would clearly prevent state B from taxing such transfer, but other jurisdictional bases that have received recognition might be invoked to support its taxation of this transfer. Had the transfer been to T, a resident of state D at the time the deed was executed and when A died, state B's power to tax might be supported by invoking the theory expressed in the \textit{Keeney Case} first cited in the preceding paragraph. Whether state D could then tax would depend or whether the reasons of \textit{MacClurkan v. Bugbee} or that in other cases were given decisive weight. The complications that would arise if the property were tangible personality are obvious from the discussion in the preceding para-

\textsuperscript{182}See in this connection Safe Dep. & Tr. Co. v. Virginia, (1929) 50 Sup. Ct. 59, which, however, involved a direct property tax.

\textsuperscript{183}(N. J. Sup. 1928) 143 Atl. 757.
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graph and will not be repeated. It has been elsewhere stated that a transfer intended, etc., in which the donor merely reserves a life interest, is deemed to occur at the time the deed of transfer is executed, and that the law then in force governs its taxability. The question arises whether it is also the situs of the property at such time which determines the jurisdictional problem. It would seem that it logically should, and this view has been applied in a case in which, however, the constitutional problem was not considered. The result in that case was that the state taxed only those assets that had their situs therein at the time the deed of transfer was executed by a non-resident who later died domiciled in the state. It need only be said in conclusion that several difficult jurisdictional questions presented in the taxation of transfers intended, etc., remains unsettled.

D. RETROACTIVE TAXATION OF SUCH TRANSFERS

The actual discussion in the cases of the question of the retroactive taxation of transfers intended, etc., can be understood only if the doctrines heretofore discussed as to when the transfer occurs are borne in mind. The general doctrine that these tax laws will not be given retroactive effect unless their language expressly requires it is too familiar to require buttressing by the citation of cases. But it gives no clue as to what constitutes giving such statutes retroactive effect and no light on the validity of one requiring it. It has already been shown that transfers intended, etc., may be made on such terms as to render them testamentary in effect, and that in such cases it is the law in force at the donor's death that governs their taxation. It would seem that no statute could be deemed retroactive as to them that was in effect at the time of the donor's death, irrespective of the time of the execution of the deed of transfer. It has, nevertheless, been several times contended that to construe a statute, enacted after the deed creating such transfers was executed, as including such transfers where the donor died after it took effect was giving an unconstitutional retroactivity thereto. The theory of the objection was that it took property without due process of law in violation of the due process clause of the.

184Estate of Murphy, (1920) 182 Cal. 740, 190 Pac. 46.
185On this general subject, see R. W. Chubb, Retroactive Succession Taxes, (1925) 10 St. L. L. Rev. 249; Note, Retrospective Operation of Succession Tax, 26 A. L. R. 1461.
fourteenth amendment or of state constitutional provisions performing a similar function. The contention has been denied where the transferor reserved a life estate for his own life and a power of revocation, because such gifts approach so nearly gifts by will that the legislature may "declare their substantial identity for purpose of taxation." It has also been held that it does not impair a vested right or contract, nor take property without compensation, to tax a transfer by which the donor reserved a life estate and the remainder was contingent on the remainderman surviving the donor where the deed took effect before, but the donor died after, the statute under which the tax was imposed. The reason assigned was that the remainderman's interest was contingent until the donor's death. This reasoning is difficult to reconcile with that in a New York case which held invalid the taxation of a remainder limited on a life estate in the donor who died after the enactment of the tax law passed after the deed took effect. The reasoning was that the remainders, whether vested or contingent, constituted present property rights on the execution of the deed, and that their taxation under a subsequent statute impaired the obligation of contracts and took property without compensation. This reasoning is somewhat too technical where a question of taxation is involved. The Massachusetts cases invariably emphasize that the tax is on the coming into possession and enjoyment, and that, if that occurs after the taxing statute takes effect, there is no retroactive application thereof. It is immaterial what terms of the deed are relied on to show that that succession occurs at the donor's death. Since that succession must, under the statutes, occur at or after the donor's death, the net effect is that the statute is not considered as being given retroactive effect if in force at the time the donor dies. This theory is quite in line with the theory that it is the shifting of economic benefits that constitutes the really significant factor in those problems.

186Matter of Schmidlapp, (1923) 236 N. Y. 278, 140 N. E. 697; see also In re Hanna's estate, (1922) 119 Misc. Rep. 159, 195 N. Y. S. 749, which applied a law enacted after the deed was executed but before the donor's death to such a transfer under that deed.


No case has been found in which it was attempted to apply to such transfers a tax act that took effect after the donor's death. Since, however, these statutes frequently tax transfers intended to take effect in possession and enjoyment after as well as at the donor's death, such a case is conceivable. Here it would probably make a difference whether the theory that relies on the testamentary character of these transfers or that resting on the doctrine of the shifting of economic benefits were accepted as the required test of constitutionality. It is difficult to see why this would violate due process if it does not do so to impose a tax on transfers resulting from the exercise of a power of appointment created under the will of one who died prior to the taxing statute but exercised by the donee thereafter.\textsuperscript{100} or why it would not be valid under the principles enunciated in the \textit{Saltonstall}\textsuperscript{191} and other cases.\textsuperscript{192} The question, however, must still be deemed open. It may, however, be stated that, wherever a transfer intended, etc., is for any reason such as to be testamentary in character, there is no real retroactive taxation if it is taxed under a statute in force at the donor's death though there was no statute taxing it when the deed of transfer took effect, and that interpreting such a statute so as to include such transfers under those circumstances does not violate either the contract clause or due process clause of the fourteenth amendment or provisions of state constitutions performing a similar function.

The other principal type of transfer intended, etc., is that in which the donor has reserved a life interest for his own life. The general rule is that the taxable transfer in this type occurs at the time the deed of transfer takes effect. It has accordingly been frequently held that to tax such a transfer under a law enacted after that time but before the donor's death involves giving that law retroactive effect.\textsuperscript{193} To give such a statute such retroactive effect has several times been decided to be un-

\textsuperscript{100}In re Vanderbilt's Estate, (1900) 50 App. Div. 246, 63 N. Y. S. 1079, aff'd (1900) 68 N. Y. S. 1150, aff'd (1900) 163 N. Y. 597, 57 N. E. 1127; Manning v. Bd. of Tax Comm'r's, (1925) 46 R. I. 400, 127 Atl. 865.


\textsuperscript{193}Brown v. Pa. Co. for Ins., (Del. Sup. 1924) 126 Atl. 715; People v. Carpenter, (1914) 264 Ill. 400, 106 N. E. 302; see also cases cited in footnote 194.
constitutional as a taking of property without compensation and without due process of law, and several other cases contain strong intimations that this would constitute an unconstitutional impairment of vested rights. That there might be some question as to the constitutionality of thus applying a subsequent statute to a case in which the remainderman's title vested before the statute was suggested in a case which sustained a subsequently enacted statute as applied to a transfer under which the remainderman's interest remained contingent until the donor's death. Even the contract clause has been invoked to hold such retroactive application of a tax statute invalid. The factor most stressed in the decisions thus holding is that the interest was vested prior to the time the statute took effect. This may well be admitted, but the fact remains that a shifting of some economic benefits to the remainderman occurs at the time of the donor's death. This is not to deny that, if a remainder is actually vested when the deed of transfer takes effect, the remainderman can dispose of his interest immediately at its discounted value; it means only that on the donor's death there comes to him the then value of his interest relieved of the necessity of discounting it for the period of the intervening life estate of the donor. It is certain that realizing on such an interest by such a sale is not considered entering on its possession and enjoyment since the situation now being considered is always held to involve a transfer in which possession and enjoyment of the property transferred take effect at the donor's death. It is emphasis on this factor that has led one court to hold that to tax such transfers, made when no statute taxed them, under a later statute in effect when the donor died was not unconstitutional; the opinion does not indicate which constitutional provisions it had in mind. Other


198An interest that is contingent at the time of its creation can theoretically also be immediately realized by sale, but the practical probability of so doing is much less than where the interest is vested, and may, in some cases, be practically nil.

courts have held such transfers taxable under such circumstances, but without discussing the constitutional issues. The emphasis in these cases is on the factor that it is the vesting in possession and enjoyment at the donor’s death and after the statute was enacted that is the important thing. One case asserted that such a transfer resembles one under a will. It is apparent, therefore, that, while it is generally stated that a transfer intended, etc., of the kind now being discussed, is governed by the law in force when the deed of transfer takes effect, and that, therefore, if not taxable then, it cannot constitutionally be taxed under a subsequent statute in force when the donor dies, nevertheless there are cases to the contrary that afford a convenient basis for those states that have not yet committed themselves on the question and which desire to reach such contrary result. That result would seem to be more in accord with the theory that stresses the shifting of economic benefits as the most important factor, although, as already stated, it is undeniable that some such benefits shift immediately upon the execution of the deed of transfer.

The problem of retroactive taxation of these transfers has constituted the major constitutional problem specific to this type of transfer. It may, however, be well to refer to the fact that the power to tax transfers intended, etc., was definitely established as against objections based on the due process and equal protection clauses of the fourteenth amendment in Keeney v. New York.

The Problem Under Federal Estate Tax Acts

The federal estate tax is levied on the transfer of the net estate of a decedent. The net estate is defined as the gross estate less specified deductions. Among the items includible in the gross estate is property to the extent of any interest therein of which the decedent has during his life made a transfer, or created a trust, intended to take effect in possession or enjoyment at or after

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202 In re Wallace’s Estate, (Or. 1929) 282 Pac. 760.

his death. The tax is generally held to be on the transfer of, rather than on the succession to, property of the decedent. It taxes not the interest to which some person succeeds on a death, but the interest which ceases by reason of the death. While this difference is important in connection with some tax problems, it is rather difficult to say how much it has influenced the courts in determining what property must be included in the gross estate under this provision. The cases are not in accord as to what transfer is the subject of the tax. It has been stated that the tax is an excise on the transfer of the decedent's property by his will (in this case he had made a will), not on the transfer intended, etc., made during his life, and that the property disposed of by the latter is one element in measuring the tax on the former. On the other hand, it has been said that the language of the statute "is not consistent with the idea that it utilizes the gross estate merely to measure a proper charge upon the transfer by death." The same case, however, contains language further along in the opinion that seems to adopt the very theory of what is being taxed that it had just rejected. It states, for example, that the statute requires the executors to pay an excise ostensibly laid upon the transfer of property by death from the decedent to the executors, but reckoned upon its value plus the value of other property conveyed before the statute was enacted. Furthermore, in the course of its argument to show the arbitrary character of the tax, it says that, if the deceased leaves no estate, there is no tax, but, if he leaves even the smallest estate, it and the property transferred during his life become liable. These statements may possibly be explained as due to the fact that the court merely adopted this theory, which had been advanced by the government, for the sake of showing that the retroactive application of the tax was arbitrary and unconstitutional on the basis of the government's own premises. Furthermore, it has been stated that the subject of the tax is the shifting

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of the economic interest in the property. That occurs in the case of transfers intended, etc., because of that transaction, not because the decedent has left other property transferred by a will or under the laws of intestate succession. That view, therefore, indicates a theory that the subject of the tax resulting from the inclusion of property disposed of by such a transfer is the transfer itself rather than the transfer by will or intestate succession. It would seem desirable to have some agreement as to what is being taxed in the case of the inclusion of these transfers in the decedent's gross estate in order to avoid inconsistent premises in determining the scope of the taxes imposed by this provision. The lack of it may not be particularly important in the general run of cases; it may become so in those on the border line.

A. WHEN PROPERTY THUS TRANSFERRED INCLUDIBLE IN GROSS ESTATE

The most convenient way of considering when property disposed of by these transfers is includible in the transferor's gross estate is to follow as nearly as possible the order used when discussing state inheritance taxes. The statutes have always excepted transfers by a bona fide sale for an adequate and full consideration in money or money's worth. Hence the only question has been what constituted such consideration. There have been but few decisions on it. A transfer under an antenuptial agreement made in return for a surrender of dower rights is held to be within this exception; but a transfer by which the parties in substance each grant the other a remainder in the property limited on a life estate reserved by the grantor, though not without consideration, is not a bona fide sale for a fair consideration in money or money's worth.

206 Reinecke v. Northern Trust Co., (1928) 278 U. S. 339, 49 Sup. Ct. 123, 73 L. Ed. 410. This same case also contains the following language: "In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred."

207 The Revenue Act of 1926, now in force, uses the language "adequate and full consideration in money or money's worth;" the prior Revenue Acts used the language "fair consideration in money or money's worth."

The case in which a donor has transferred property, reserving an estate for his own life, is one that has been frequently passed on. The decisions under state inheritance tax statutes are unanimous that this is a transfer intended to take effect in possession or enjoyment at the donor's death. If, then, this language in the federal estate tax act describes the same fact situations described by the same expression in the state statutes, then would the property thus disposed of have to be treated as part of the donor's gross estate. It has been held a part thereof in most cases. It was so held in one case on the theory that this was in substance such a post-mortem disposition of the property as the statute was intended to tax. The decision in another case was based on the reasoning that the donor, by reserving the income for his life, retained an interest in the property until his death, that it was only then that the transaction was fully completed, and that the beneficiaries acquired no benefits until that time. The fact that the interest of the remainderman was technically vested prior to the donor's death is immaterial since the tax question does not depend for its answer on such consideration. There have, however, been contrary decisions. One of these rested on the theory that the donor had by the transfer completely divested himself of the title to the property, and that, therefore, the fact that the beneficiaries were postponed until his death, as far as the actual enjoyment of the property was concerned, was immaterial. Another adopts the position that property can be held to have been disposed of by a transfer intended, etc., so as to be includible in the gross estate, only if the transfer remains in-

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213 McCaughn v. Girard Tr. Co., (C.C.A. Pa. 1926) 11 F. (2d) 520, which reversed (D.C. Pa. 1925) 3 F. (2d) 618, which had held the property not includible in donor's gross estate largely because the remainderman had received a vested remainder when the deed of transfer was delivered; but see Stark v. United States, (D.C. Ohio 1927) 24 F. (2d) 237, reversed, (C.C.A. 8th Cir.) 32 F. (2d) 453.

214 Boyd v. United States (D.C. Conn. 1929) 34 F. (2d) 488; the decision also rests on other grounds.
complete up to the time of the donor's death.\textsuperscript{215} It purports to derive this test from \textit{Nichols v. Coolidge}, \textit{Reinecke v. Northern Trust Co.}, and \textit{Chase National Bank v. United States}.\textsuperscript{216} The importance attached by the last two of these cases to the shifting of economic interests is rather an argument against than for such views. It is undeniable that a donor who transfers property with a reservation of a life estate or right to the income for his own life retains the most important economic interest therein until his death, and that that interest is furthermore either a legal or equitable estate in the property.\textsuperscript{217} If the purpose is to include in the gross estate the property interests retained by the decedent until his death, and the property whose economic benefits he enjoyed until that time, there is every reason for including property disposed of during his life by a transfer under which he reserved a life interest in the thing transferred. It is, of course, true that, in a technical sense, his interest does not pass at his death, but his death is the event on whose occurrence like benefits shift to the remainderman. The cases first discussed should, therefore, be considered as correctly stating the law on this matter. The effect upon taxability of a release by the donor of his life interest cannot yet be considered as definitely decided. There have been cases in which this occurred in which the transfers were nevertheless held transfers intended, etc., but the property excluded from the gross estate because its inclusion would have required giving the statute an unconstitutional retro-activity.\textsuperscript{218} Furthermore neither case considered this problem.

The question of when a transaction is such that a donor has retained a life interest in transferred property has not received as extensive consideration under the federal estate tax act as it has under state inheritance tax statutes. It may be assumed that courts will not permit the tax to be avoided by the device

\textsuperscript{215}Carnill v. McCaughn (D.C. Pa. 1929) 30 F. (2d) 696; the decision also rests on other grounds.


\textsuperscript{217}This statement assumes that the cestui's rights are at least in part in rem. It lies beyond the scope of this article to set forth the arguments for and against this proposition.

of a transfer of the full legal interest to one who reconveys a life interest to the donor, or promises to pay him for life the income from the property, under a contemporaneous agreement or understanding to that effect. If, however, the promise to pay the income to the donor for his life is in no sense attributable to such contemporaneous agreement or understanding, but is made for wholly different and independent reasons, the property is not deemed to have been disposed of by a transfer of this character and is, therefore, not includible in the original donor's gross estate.\(^1\) The court in this case attached some importance to the fact that the subsequent agreement as to the income left the title in the original donee, but this reason is scarcely adequate. It has also been decided that the transfer of a house, followed immediately by a lease for one year by the donees to the donor at a nominal rent and with a privilege of renewal but terminable by either party at a month's notice, was not one, intended, etc., and hence the property not includible in the donor's gross estate, though it seems to have been understood by the parties that the donor would be allowed to lease as long as she desired to use the same as her residence.\(^2\) The reasons assigned were that the deed vested the full and complete title in the donees at once, and that their right to come into full possession and enjoyment did not depend on the donor's death; in fact, the court seemed of the opinion that they had these immediately on the delivery of the deed.\(^3\) It would seem that this decision opens a wide loophole for tax avoidance. Whether a transfer in return for the payment of an annuity constitutes one such that the property must be included in the gross estate cannot yet be said to have been definitely determined. It has been held such a transfer even where the annuity was not charged on the property but where the donees in effect pledged the transferred property to secure the payment of the notes evidencing the required annual payments to the donor.\(^4\) On the other hand in another case containing all the essential elements of a transfer in return for an annuity paid by another but guaranteed under certain conditions by the donee, the transaction was treated as the purchase of an

\(^3\) The Supreme Court adopted this reasoning in affirming the decision in Nichols v. Coolidge, (1927) 274 U. S. 531, 47 Sup. Ct. 710, 71 L. Ed. 1184.
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annuity by the donor, and the transfer held not within the statute because the donee entered into the possession and enjoyment of the purchase price at once.\textsuperscript{223} The court of claims has also held non-includible property transferred in return for the donee's promise to pay a stated annuity to the donor's wife for her life, and to him for his life if she pre-deceased him, on the theory that the donor had completely divested himself of all title and interest at the time of the transfer, urging in proof thereof that the property was not chargeable with the annuity.\textsuperscript{224} It is to be hoped that the final decision on this question may be reached without invoking some of the insubstantial distinctions that state courts have made in dealing with the same problem. The case for taxability is clear where the annuity is charged on the transferred property; almost as clear where that property is used to insure performance of the promise to pay; and it is at least debatable whether there is any substantial difference of sufficient importance between them and the case where the annuity, though not a charge on the property, bears a close relation to the income therefrom and is probably expected to be paid from such income.

The donor may transfer the property so as to confer upon others the whole series of future uses and incomes to commence immediately, reserving for himself only the power to amend or revoke. Such cases raise the problem of the effect upon taxability of reserving such powers. The decisions, though not uniform, support the holding that the property disposed of by such a transfer must be included in the gross estate.\textsuperscript{225} The principal reason relied on is that the reservation of such power leaves the transfer, as to the donor, incomplete, and gives him a legal interest which is subject to the tax. It has, however, been stated, but not decided, that the mere reservation of such power would not make the property includible in the gross estate if possession and enjoyment are in fact not postponed till the donor's death.\textsuperscript{226} If, however, the power can be exercised only

\textsuperscript{223} Polk v. Miles, (D.C. Md. 1920) 268 Fed. 175.
\textsuperscript{224} Hirsh v. United States, (Ct. of Cl. 1929) 33 F. (2d) 982.
\textsuperscript{226} Stark v. United States, (D.C. Ohio 1926) 14 F. (2d) 616; see also Farmers Loan & Trust Co. v. Bowers, (C.C.A. 2d Cir. 1928) 29 F. (2d) 14, which reversed, (D.C.N.Y. 1926) 15 F. (2d) 706, which was in accord with the cases cited in footnote 224.
with the consent of the beneficiaries, whose interests in this matter are adverse to the donor's, the property is not includible since, for all practical purposes, it has "passed as completely from any control by the decedent which might inure to his own benefit as if the gift had been absolute." It has even been held that a reserved power to revoke only with the consent of trustees removable at will prevented the inclusion of the property in the gross estate, although this court would clearly have held the same way had the power to revoke been unconditional. The reason stated was that the original deed transferred all the donor's title, possession and enjoyment, and that the reservation of a power to revoke did not affect this. The mere fact that a gift may be revoked under state law is not sufficient to require the property to be included in the taxable estate. The mere reservation of extensive powers of control and management does not make the transfer taxable if they do not save to the donor power to control it for his own benefit. It may, therefore, be taken as established since the Reinecke Case that the effect upon taxability of the donor's reservation of powers of amendment, revocation or control depends entirely upon whether their exercise would enable him to divert to himself the economic benefits of the property. If they permit that, the property is includible in the gross estate; if they do not, it is not includible. An unconditional power to amend or revoke clearly does so and, therefore, those cases correctly state the law that include property thus transferred. No general principle can yet be formulated as to when the reservation of other powers of control results in taxability.

Property transferred by a deed under which the donor reserves not only a life estate but also an unqualified power to revoke is clearly includible in his gross estate. The reasons relied on


have been sufficiently covered in discussing the effect of each such reservation upon taxability. A fact situation that has come before the courts several times is that in which a donor has created a trust to pay the income to another for that other's life, on the death of said other before the donor to pay the income to him for his life, with remainders over. The donor predeceased such other in every instance. There are two cases squarely in conflict on the inclusion of property thus transferred in the donor's gross estate. The case denying taxability does so for the reason that the right to possession and enjoyment passed on the execution of the deed and independently of the donor's death. The decision sustaining the taxable character of the transaction stresses the fact that the remainderman had neither a right to dispose of, or to receive the income from, the property until the donor's death. It also denied that the mere receipt of the income constitutes possession and enjoyment of the property, and required the donee to be in actual possession and enjoyment of the property itself if the transaction is to escape taxation. There is a prospect that the issue may receive authoritative settlement soon since the Supreme Court has granted certiorari in the last case. In one such case the court stated that the amount includible in the gross estate was limited to the value of the donor's reserved interest, but taxability was denied on other grounds. If the donor is to take back the principal if the immediate life tenant predeceases him, the retention of said interest has been held to make the transfer taxable since on his death there occurred a shifting of economic benefits to the remainderman whose interest up to that time was contingent. It is clear that, in cases of the kind considered in this paragraph, the donor has reserved an interest however speculative it may be. It is also clear that on his death prior to that of the holder of the immediate life interest, the rights of the remaindersmen are relieved of a condition that might have defeated them entirely so far as the interest retained by the donor is concerned, and that this result was conditioned on

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232 Nichols v. Bradley, (C.C.A. 1st Cir. 1928) 27 F. (2d) 47.
234 (1929) 50 Sup. Ct. 35. The Supreme Court has, since this article was printed, reversed the circuit court of appeals, May v. Heiner (U.S. April 14, 1930).
236 Dean v. Willeutts, (D.C. Minn. 1929) 32 F. (2d) 374.
the donor's death. There is, therefore, a shifting of some economic benefits on his death, and, if that be accepted as the test of taxability, good reasons exist for including property thus disposed of in the gross estate. If the fact that the donor has retained an interest be taken as the test, then reasons also exist for reaching such a result unless the speculative character of the interest is a sufficiently important factor to negative the force of such reasoning. The state decisions heretofore discussed show the same lack of agreement evidenced in the decisions just considered. The situation is clearly one that demands settlement by an authoritative pronouncement by the Supreme Court.

The question has several times arisen as to whether property must be included in the gross estate if disposed of by a transfer that disposes of the donor's whole interest therein but which creates some interests that can take effect in possession or enjoyment only at or after the donor's death. The question was first raised in cases in which the donor transferred property in trust to pay the income to others for the duration of the trust and upon its termination to distribute the principal to others than the donor, where the trust was to terminate at a fixed date or after a fixed period. The cases arose because the donor in fact died prior to its termination with the result that the possession and enjoyment of the principal would commence only after his death. Property thus disposed of was held not includible in the donor's gross estate for the reasons that the deed of transfer divested the donor of all his interest in the property and that possession and enjoyment by the beneficiaries of the principal were not dependent on his death since that neither hastened nor postponed them.\textsuperscript{237} Substantially the same reasons were assigned to support a like result in a case in which the transfer in trust was to accumulate the income until its termination and then to distribute the principal and accumulations to others than the donor, where the trust term, though not in terms defined by reference to the donor's life, must necessarily have endured beyond the donor's life expectancy.\textsuperscript{238} The lower court had held the property includible largely because the trust term could not terminate during the donor's life as measured by his expectancy. Neither of these

\textsuperscript{237} Fid. & Col. Tr. Co. v. Lucas, (D.C.Ky. 1925) 7 F. (2d) 146.

cases decided the question where the donor, though divesting himself completely of all interest in the property, did so by transfers creating interests so limited that they could take effect in possession or enjoyment only at or after his death, or so limited that, while they might so take effect before such death, they might also so take effect at or after such death and where in fact they did so. A literal reading of the language of the statutes was relied on by the government in including the property thus transferred in the donor's gross estate. The Supreme Court, however, decided it to be not includible for the reason that the statute showed no purpose to tax completed gifts, not made in contemplation of death, in which the donor had retained no control, possession or enjoyment. Reference in this case to the factor that the gift was a completed and absolute one suggests the question whether property is includible in the gross estate if disposed of by a transfer by which the donor divests himself of his entire interest to others but creates some interests that are at their creation and remain until the donor's death contingent in title or at least conditional. It has been elsewhere shown that state decisions are not in accord as to whether the succession to such interests is taxable under state inheritance tax statutes. The case that comes nearest to this problem is that of Coolidge v. Nichols in which the court held that a transfer under which the donor had completely parted with all interest in the property but under which the remaindermen were to acquire the principal of the trust fund on the donor's death if they survived him, with alternative disposition if they did not, was one intended, etc., and that, therefore, the property would have had to be included in the donor's gross estate but for the fact that the law could not be given retroactive effect for constitutional reasons. The court treated the interest of each of the remaindermen who actually took the principal under the deed as a vested one subject to be divested. The court also stated that it was immaterial that the donor retained no interest in the property until her death, a theory that has been expressed in at least one other case and which is clearly inconsistent with the implica-

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239 Reinecke v. Northern Tr. Co., (1928) 278 U. S. 339, 49 Sup. Ct. 123, 73 L. Ed. 410. Note that the court intimates a doubt as to the constitutionality of a statute that attempted to subject such transfers to an estate tax.
240(D.C. Mass. 1925) 4 F. (2d) 112.
tions of the Reinecke Case. If the mere fact that a transfer creates interests which can take effect in possession or enjoyment only at or after the donor's death affords no basis for including the property thus transferred in the gross estate, it would seem that the legal devices and factors by which such postponement is effected should make no difference to the question of taxability. The mere fact, however, that the donor's whole interest may be divested prior to his death under one of two alternative dispositions does not relieve the transfer from the tax if the property in fact passes under the other disposition under which the donor retained an interest until his death.\textsuperscript{242}

The preceding discussion of the decisions under the federal estate tax acts has shown that, while there is some lack of agreement as to what is being taxed when property disposed of by transfers intended, etc., is includible in the gross estate, the trend is in favor of the view that it is the transfer that occurs at the donor's death as evidenced by the shifting at that time of the economic interests in the property. The tests developed to determine taxability focus attention on the question whether the donor retains an interest in the property until his death. If the deed of transfer has that effect, the property in which such interest was retained is includible in the gross estate; if not, it is not includible. In determining whether such an interest has been thus retained economic and practical considerations have been given more weight than technical legal analysis, and are tending to assume an even greater importance. This represents a correct approach to problems of taxation. It is difficult to see why problems as to the distribution of the tax burden should be determined by considerations of so highly a technical nature as have been developed for other reasons in the field of property law.

B Retroactive Taxation of Such Transfers\textsuperscript{243}

The problem of the constitutionality of the retroactive taxation of such transfers remained in a very unsettled and unsatisfactory

\textsuperscript{242}Stark v. United States (D. C. Ohio 1926) 14 F. (2d) 616, decision reversed on constitutional grounds. (D.C. Ohio 1927) 24 F. (2d) 237, which was itself reversed, (C.C.A. 6th Cir. 1929) 32 F. (2d) 453.

\textsuperscript{243}On the general question of the power to impose an estate tax on such transfers, see note, Power to impose tax in estates in respect of property transferred in contemplation of death or by conveyance intended to take effect in possession or enjoyment at death, 52 A. L. R. 1091. On retroactive taxation of such transfers, see Amberg, Retro-
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condition for many years. None of the statutes have attempted to tax the net estate of a decedent dying prior to their enactment.244 The problem has, therefore, been whether there could be included in the gross estate of a person dying after the statute was enacted (which was also after it took effect) property disposed of by a transfer intended, etc., under a deed taking effect prior thereto. It so happens that the transfers involved in the cases hereinafter considered all antedated the enactment of any federal estate tax act, not merely that one of such acts as was in force when the donor died and under which the tax was sought to be imposed.245 The first question is when can a statute be said to have been given retroactive effect where a transfer of this kind is involved. The answer was given in unmistakable terms in Reinecke v. Northern Trust Co.246 The Court therein said that "a transfer made subject to a power of revocation in the transferor, terminable at his death, is not complete until his death," and that therefore, no retroactive effect is being given by applying to it a statute in force when the donor dies. Hence it sustained the tax so far as based on the inclusion in the gross estate of the property thus transferred against objections based on the due process clause of the fifth amendment. The principle, of course, applies only where the reserved power to amend or revoke is such that its presence in the deed brings the transfer within these terms of the statute. The case has been followed in several decisions by lower federal courts.247 It should be noted that the donor also reserved the income for his life in the trusts involved in these cases, but the Supreme Court made no reference to that factor. It may, therefore, be taken as established that a transfer that is for any reason incomplete until the donor dies occurs only at his death as far as this tax is concerned, and that subjecting it to the tax law then in force does not involve giving that law


244As to the probable constitutionality of such an attempt, see following cases under the federal gift tax, Blodgett v. Holden, (1928) 275 U. S. 142, 48 Sup. Ct. 105, 72 L. Ed. 206; Untermeier v. Anderson, (1928) 276 U. S. 440, 48 Sup. Ct. 353, 72 L. Ed. 645.

245Note that the problem of retroactivity in the Reinecke Case concerned only those trusts created before there was any estate tax act.


retroactive effect even though the deed of transfer was delivered before there was any law taxing such transfers. Prior to the Reinecke Case there had been contrary decisions based on Nichols v. Coolidge; the donor in one of them did not retain a life interest until his death, but this would seem to be immaterial under the Reinecke Case. There have been no decisions since the Reinecke Case determining what terms, other than those reserving beneficial powers of amendment or revocation, will make a transfer incomplete until the donor's death. Such cases might arise where the donor specifically provided for the reverter of the property to him if the holder of an immediate interest for the latter's life predeceased the donor, and where the donor predeceased such other person. It is doubtful whether it will ever be held that a transfer is incomplete within this doctrine merely because a trust may expire before the settlor's death, thus leaving him with a possibility of reverter.

The other leading case on the constitutionality of including in the gross estate of a decedent dying after the enactment of an estate tax act, the property disposed of by a transfer intended, etc., under a deed executed before there was any such tax act is Nichols v Coolidge. Under the transfer involved in that case the donor had originally reserved a right to the income for her life which was released during her life to those to whom the principal was to be distributed at her death. The lower court treated these transfers as having divested the donor of her entire interest in the property; that, since the enjoyment of the principal was postponed until the donor's death, it was a transfer intended, etc.; but that the inclusion of the property in the gross estate was so arbitrary as to violate the due process clause of the fifth amendment. The theory was that, since the donor had parted with all control over and interest in the property prior to the statute, it was arbitrary to include as a measure of the estate tax the property of others. The Supreme Court's argument is not as easily stated. Its starting point is that the transfer was in no sense testamentary and bore no substantial relation to the transfer by death. The tax is said to be arbitrary because made

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250 (1927) 274 U. S. 531, 47 Sup. Ct. 710, 71 L. Ed. 1184.
to depend upon past lawful transactions, not testamentary in character, and beyond recall. The Court also adverts to the unfairness of the tax in cases where the property has greatly increased in value since the transfer since that is taxed if decedent leaves any property at his death but untaxed if he leaves none. This argument as framed by the Court assumes what has never yet been decided by it, that the subject of the tax is the transfer by will or intestate law and not the transfer intended, etc., itself; this assumption runs counter to the Court's own theory on this matter enunciated in the Reinecke Case. Furthermore, this argument rests ultimately upon the unreasonableness of the differences in treatment between the two cases mentioned therein, and would be equally applicable to two such transfers made after the enactment of the statute. If, however, the essential point of the argument is not the possible inequality between the two postulated situations, but the arbitrary character of including the enhanced value in the gross estate, again the argument is as applicable to such transfers after as before the statute. It is unnecessary to consider the argument that Congress cannot, under the guise of taxing what is within its power, tax that which is without it, since that contains no proof that anything is either within or without its powers. It is practically impossible to discover in the arguments of the Supreme Court in this case anything establishing that it is the retroactive application of the statute to transfers antedating it that is arbitrary. They rather prove either that it is arbitrary to include in the gross estate the property, disposed of during life by a transfer which completely divests the donor of all interest at once, at its value at the time of the donor's death, or that it is arbitrary to include it even at its value at the time the deed of transfer was delivered. It may be that the defect in the argument could be cured by invoking the theory that such transfers made after the statute will have been made with knowledge of their tax consequences, and that the arbitrariness of a retroactive application of the statute to these transfers consists in imposing consequences that could not have been foreseen and that cannot be avoided by the donor's sole act after the statute is enacted. This consideration would appear to have considerable merit. If, however, be taken as established law that the

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252 The substance of this argument appears in the opinion in Coolidge v. Nichols, (D.C. Mass. 1925) 4 F. (2d) 112.
due process clause of the fifth amendment is violated by requiring the inclusion in the gross estate of one dying after the statute of the value at the time of the donor's death of property disposed of during his life by a transfer that completely divests him of all interest in the property if the deed of transfer was executed before there was any estate tax act. Whether it will ultimately be held invalid to include such property under those circumstances even at its value at the time the deed was executed, and whether it will ever be held invalid to include property thus transferred by a deed made after the tax statute, depend on how far the Court is willing to go in converting into law some of the implications of its own reasoning in the Coolidge Case. It may not be without some significance that it expressly stated in that case that it was not necessary to consider whether the provision was valid as applied to such transfers subsequent to the statute's enactment

There have been several cases which have involved the validity of including in the gross estate of persons, dying after the statute, property disposed of by a deed made before there was any taxing statute, where the donor reserved only a right to the income for his own life. The early cases involving this situation sustained the application of such statute to such a transfer. The reasons advanced in that one of these cases that discusses the matter most fully, Reed v. Howbert, were that the transfer was complete only on the donor's death, and that the decisions up to that time sustained the validity of the tax even if the transfer were deemed completed prior to the law's enactment. The most cogent and extensive statement of the contrary view is found in Frew v. Bowers. The opinion by Judge Hough starts from the premise that the property whose transmission is taxed must be the property of the decedent whose estate bears the incidence of the tax. He holds that the transfer was complete when the deed of transfer was executed and that, therefore, the donor had no interest in

the property at the time of his death. The transferred property was described as that of another at the time of the donor's death, part of which (the increase in value) he had never owned and part of which he gave away when the deed was executed. He then formulates the question, on the assumption that the donor retained some sort of interest, as whether Congress can measure a tax on the donor by another's property, and concludes that that is so arbitrary and capricious as to be unconstitutional. It should be stated that he considers the transfer by the donor's will as the subject taxed. There is not one of these arguments that would not be equally applicable had the transfer occurred after the statute, and hence it proves too much unless the cases holding that the reservation of a life estate under a deed executed after the statute makes the property includible in the donor's gross estate are to be set aside, a very improbable thing. Judge Hand's argument follows somewhat different lines. He concludes that the inclusion of the property in the gross estate at its value when the donor died is so arbitrary and unequal as to violate the due process clause of the fifth amendment, but states that he is not prepared to hold that it would be invalid to include it at its value when the deed of transfer was executed. Even this argument is difficult to restrict to transfers antedating the statute. Here again, however, the argument may be adduced that the imposition of consequences that can be known in advance of conduct may be reasonable where it would be arbitrary to impose them on conduct not entailing them when that conduct occurred. The opinion hints in this direction but makes no use of it.

It is undeniable that a donor who reserves a life estate in the property transferred retains an interest until his death despite the views expressed by Judge Hough in *Frew v. Bowers*. The cases last considered are, therefore, materially different from *Nichols v. Coolidge*, even though this case makes no point of the fact that the donor had completely divested herself of all interest prior to her death. That case has, however, been interpreted to govern cases of the type discussed in the preceding paragraph. State cases have generally held that the transfer occurs in these cases when the deed is executed and have determined the issue.

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of retroactivity in the light thereof. But the issue in them involved a tax on the succession to an interest; the issue under the federal estate tax acts turns on whether the donor retained an interest until his death. The Reinecke Case held that there was no retroactivity if the gift was incomplete until the donor died even though the deed of gift antedated the taxing statute. Reed v. Howbert treated a transfer in which the donor reserved only a life estate as one that remained incomplete till the donor's death for the reason, among others, that the donor retained an interest until that time. Frew v. Bowers treated it as a completed transfer as soon as the deed of transfer was executed for technical reasons and because the donor retained no interest thereafter. The adoption of the former view would bring these cases within the Reinecke Case. The adoption of the latter view would not necessarily mean that Frew v. Bowers was correct for it has not yet been finally decided that the mere fact that a transfer was completed in a technical sense makes the application to it of a statute enacted thereafter but in effect at the donor's death retroactive in the prohibited sense. This would not be true so far as Frew v. Bowers rests on the theory that the donor retained no interest, but this view is clearly wrong on any valid theory as to the meaning of "interest" in these tax statutes. So far as the emphasis has been put on the shifting of economic interests, there is as much reason for holding that this occurs on the death of a donor who has reserved the economic benefits for his life as on the death of one who has merely reserved a power to revoke. Since, however, the Reinecke Case and those following it all involved trusts in which the settlor reserved both a life interest and a power to revoke, there is a possibility that its scope may be restricted to that type of case. The only safe statement is that the issue on which Reed v. Howbert and Frew v. Bowers reached contrary conclusions is still open. The same is true of the question whether property thus disposed of before there was any taxing statute can be validly included in the gross estate of a person dying thereafter at its value at the time the deed of transfer was executed.

The constitutional provisions invoked in these cases involving the retroactive application of these provisions of the federal estate tax acts have been those requiring direct taxes to be apportioned.

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258 This has reference to the opinion of Judge Hough.
among the states on a population basis, and the due process clause of the fifth amendment. The former of these has quite generally been held inapplicable because the tax has been held an excise.\textsuperscript{259} The arguments based on it received a limited recognition in the opinion of Judge Hough in \textit{Frew v. Bowers},\textsuperscript{260} but the same opinion also calls it an excise. It is unnecessary to recapitulate the consideration the due process argument has received. It is the one now generally invoked.

It remains only to indicate several unanswered questions bearing on the problem of the retroactive application of these provisions of the federal estate tax acts. No case has been found discussing the validity of applying the statute in force when a donor dies to a transfer intended, etc., made prior thereto but while there was in force a similar statute repealed by the statute in force when the donor dies. There would be no question of its validity as applied to a transfer incomplete until the donor's death.\textsuperscript{261} It would be reasonable to consider successive similar statutes as in substance the continuation of a single statute during the entire period so that, if the one in force when the donor dies in terms applies to such transfers antedating it, its application to such prior transfers would be valid. The statute in force when he dies must, however, contain provisions making it applicable to such prior transfers.\textsuperscript{262}

\section*{Conclusion}

It is clear from the preceding discussion that it would be practically impossible to construct a succinct definition covering the whole content that has been given the conception "taking effect in possession or enjoyment at or after death" as used in state inheritance tax statutes, federal estate tax acts, or both. It is, however, possible to indicate the factors that have played the largest part in shaping it. This can best be done by pointing out those elements of property that are really significant in dealing with these tax questions. The arguments employed in deciding

\textsuperscript{259}Reed v. Howbert, (D.C. Colo. 1925) 8 F. (2d) 641; Cleveland Trust Co. v. Routzahn, (D.C.Ohio 1925) 7 F. (2d) 483, reversed on other grounds, (C.C.A. 6th Cir. 1927) 22 F. (2d) 1009.

\textsuperscript{260}(C.C.A. 2d Cir. 1926) 12 F. (2d) 625. See Amberg, Retroactive Excise Taxation, (1924) 37 Harv. L. Rev. 691.

\textsuperscript{261}For such a case see Dean v. Willeutts, (D.C.Minn. 1929) 32 F. (2d) 374.

\textsuperscript{262}Carnill v. McCaughn, (D.C.Pa. 1929) 30 F. (2d) 696.
whether there was a taxable succession under state inheritance tax statutes have stressed either that the donor retained something until his death, or that the donee acquired, or could acquire, something only at or after such death; the arguments employed in deciding issues under the federal estate tax acts have most frequently emphasized the former of these factors. The question is, what is that "something"? The cases holding taxable the succession to a remainder, vested or contingent, limited on a life estate reserved to the donor, or that property thus transferred is includible in the donor's gross estate, support the view that that "something" is the right presently to receive the income or beneficial uses of the transferred property. They also show that it is not the mere power to presently dispose of some part of the series of future incomes and benefits. That power, however, is important if it relates to and contains the contemporaneous unit of that income or benefit series. That factor is particularly important wherever the question of taxability turns on the reservation of powers of amendment or revocation. It is the disposition of, and control over, these elements of property, made by the transfer, to which courts look in determining whether a transfer comes within the meaning of these statutory provisions. These are the substantial factors back of the recent emphasis on the importance for these tax problems of the shifting of the economic interests in property. It is the disposition made by the transfer of the enjoyment of the property, that is, of its income or beneficial uses, that determines, and should determine, whether a transfer creates a taxable succession, or whether the transferred property is to be included in the donor's gross estate.

It would not, however, be wholly accurate to affirm that the whole law developed about these statutory provisions can be interpreted from the suggested point of view. That has been in part shaped by transferring to these tax problems considerations derived from the technical rules of property law. These have had some influence on the problem of what transfers come within these statutory terms. They have, however, had their greatest influence on the problem of when a transfer occurs under state inheritance tax statutes, and on the problem of retroactivity under both the state and federal statutes. There is some evidence that the more significant factor of the shifting of economic interests may become a determining factor even in these problems. This
will not, of course, change the law in those states that have already decided these matters, but it may help to shape it in those jurisdictions that have thus far not committed themselves on these questions. It should be stated in conclusion that the adoption of the test of the shifting of economic benefits is not a means for avoiding difficulties in this field since it is not always easy to determine that this occurs at one time rather than another. Cases arise in which it would be impossible to deny that some economic benefits shift at one time although others shift at another. It must, however, be said that the viewpoint expressed in this doctrine focuses attention on what should be the really important factors in settling these questions of taxation.