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State Inheritance Tax on Gifts Made Within Six Years of Donor's Death

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CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAW—STATE TAX ON GIFTS MADE WITHIN SIX YEARS OF DONOR'S DEATH.—[United States] A Wisconsin statute levied a progressive tax upon transfers at death or made in contemplation of death, and provided that all material transfers made within six years of the transferrer's death, without adequate valuable consideration, should be construed as made in contemplation of death within the meaning of the law. The rates progressed from 1 to 15 per cent according to the size of the estate.[1] One Schlesinger died testate in 1921, and, in proceedings to tax his estate, it was found that within six years he had made four separate gifts to his wife and children, amounting to over $5,000,000, none of which were actually made in contemplation of death. The Milwaukee county court subjected these gifts to the transfer tax and the Supreme Court of Wisconsin affirmed this order.[2] In *Schlesinger* v. *Wisconsin*[3] the United States Supreme Court held this to be a violation of the Fourteenth amendment. Mr. Justice Holmes (with whom concurred Brandeis and Stone, JJ.) gave a dissenting opinion. The gist of Mr. Justice McReynold's reasoning for the majority appears in the following quotation:

"The court below declared that a tax on gifts inter vivos only could not be so laid as to hit those made within six years of the donor's death and exempt all others—this would be 'wholly arbitrary.' We agree with this view and are of opinion that such a classification would be in plain conflict with the Fourteenth amendment. The legislative action here challenged is no less arbitrary. Gifts inter vivos within six years of death, but in fact made without contemplation thereof, are first conclusively presumed to have been so made without regard to actualities, while like gifts at other times are not thus treated. There is no adequate basis for this distinction. Secondly, they are subjected to graduated taxes which could not properly be laid on all gifts or, indeed, upon any gift without testamentary character.

"The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, *A* may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the state readily to collect lawful charges against *B*. Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The state is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."[4]

In his dissent Mr. Justice Holmes suggests that if the time were six months instead of six years the power of the state would not be denied, as the difficulty of proof would warrant making the presumption absolute, and that reasonable men might regard six years as not too remote for this purpose. That some gifts not made in contemplation of death will be hit by such a tax he regards as within the principle that considerations of administration may justify

1. Wis. R. S. 1921 sec. 72.01-2.
2. *Estate of Schlesinger* (1924) 184 Wis. 1.
3. (1926) 46 S. Ct. Rep. 260.
4. 46 S. Ct. Rep. at 261.

the inclusion within a proscribed class of some innocent articles or transactions, as in the instances made familiar by prohibition legislation.

It is to be noted that the majority opinion contains not a word to indicate that its decision would be otherwise were the six-year period greatly shortened. It being admitted by everyone that a tax upon gifts inter vivos could not be made to depend upon the accident of occurring within a certain period of the donor's death, can gifts within even a short time of a donor's death be conclusively presumed to be in contemplation of death? If nearly everyone who died were so ill for at least six months before as to excite reasonable apprehension of his demise, such a presumption for gifts within that period would really stand; or if the presumption were confined to persons over sixty years old. But obviously a good many not elderly people in apparently good health are killed by accidents or die from sudden and acute ailments, and as to them such a presumption, if made conclusive, lacks that 'rational connection between the fact proved [a gift within six months of death] and the ultimate fact presumed' [contemplation of death] which is required for even a prima facie presumption.[5] There is at least fair reason to believe that no gift within a period, however short, before death, could be conclusively presumed to be made in contemplation of death, without regard to any circumstance save that of death actually ensuing. The new provision in the federal Revenue Act of 1926 making such a presumption conclusive as to transfers within two years of death is perhaps open to the same objection under the due process clause of the Fifth amendment, though this is not nearly so sweeping a prohibition of somewhat arbitrary discrimination as is the equality clause of the Fourteenth amendment.

The intimation of the majority that gifts inter vivos could not be subjected to taxes graduated like those in many inheritance tax statutes seems only partly tenable. If the tax is graduated according to the *amount of each individual gift,* the per cent taken increasing progressively with the size of the gift, it is hard to understand the objection to it under the Fourteenth amendment. Gifts are simply divided into classes according to amount and a tax rate fixed for each class, a procedure familiar in various forms of taxation, notably income and inheritance taxes. But if the gift tax is graduated according to the *total amount of the estate* ultimately left by the donor, perhaps many years after the gift, this seems an essentially irrational method of measuring a tax. The Wisconsin tax, however, was apparently measured by the amount of the individual gifts. The federal gift tax of 1924 was graduated according to the total amount of gifts made by a donor during a calendar year, and was assessed against the donor. The tax imposed on gifts to *A* and *B* was thus affected by the amount of gifts independently made to *C* and *D* during this period, but probably the total extent of a

5. See *Mobile, J. & K. C. R. Co.* v. *Turnipseed* (1910) 219 U. S. 35, 42-44.

donor's bounty during a single year is not an irrational measure of a tax upon it as a whole—such tax not being subject to the effect of some purely fortuitous circumstance like the donor's death.

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CONSTITUTIONAL LAW—THE HARRISON ANTI-NARCOTIC ACT AND THE LIMITATIONS OF THE TAXING POWER.—[United States] The case of *United States* v. *Daughtery*[1] evidences a change of front, and an insistence that hereafter the federal taxing power shall be used as a means of raising revenue and not as a means of enforcing a national police power. In it the Supreme Court of the United States takes a radical departure from its long established practice of only considering the constitutionality of statutes when the issue is forced upon it, and in no case when the question has not been raised in the lower court. In reviewing a sentence which was imposed for a violation of the so-called Harrison Anti-Narcotic Act, it remanded the case for the correction of some errors, but with the suggestion that on the further proceedings the constitutionality of the Anti-Narcotic Act should be questioned. It admits that the validity of that Act was sustained in the case of *U. S.* v. *Doremus,*[2] but says that—

"The doctrine approved in *Hammer* v. *Dagenhart* 247 U. S. 251, 38 S. Ct. Rep. 529, 62 L. ed. 1101, 3 A. L. R. 649, Ann. Cas. 1918E, 724; *Child Labor Tax* case 259 U. S. 20, 42 S. Ct. Rep. 449, 66 L. ed. 817; *Hill* v. *Wallace* 259 U. S. 44, 67, 42 S. Ct. Rep. 453, 66 L. ed. 822; and *Linder* v. *United States* 268 U. S. 5, 45 S. Ct. Rep. 446, 69 L. ed. 819: may necessitate a review of that question, if hereafter properly presented."

The Harrison Narcotic Drug Act, section 1, requires all persons producing, importing, manufacturing, compounding, dealing in, selling, dispensing, distributing, or giving away narcotic drugs to register with the collector of internal revenue and to pay a special tax of one dollar per annum and makes it unlawful to import, sell, etc., such goods without having first registered. Section 2 requires all orders given for such drugs to be written on a form issued by the commissioner of internal revenue and makes it an offense to sell, etc., such drugs, except on such order.

In the case of *United States* v. *Doremus,*[3] the constitutionality of this act was sustained under the authority of Article 1, section 8, of the federal Constitution, which gives the Congress power "to lay and collect taxes, duties, imposts, and excises, to pay the debts, and to provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

In sustaining the validity of this Act, the court stated that the only limitation upon the power of Congress to levy excise taxes was

1. 46 Sup. Ct. Rep. 156.
2. 249 U. S. 86.
3. 249 U. S. 86.