HANDY, COLLECTOR OF INTERNAL REVENUE, *v.* DELAWARE TRUST CO., EXECUTOR, ET AL.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 546. Argued February 26, 1932.—Decided March 21, 1932.

Decided upon the authority of *Heiner* v. *Donnan, ante,* p. 312.

CERTIFICATE from the Circuit Court of Appeals upon an appeal from a judgment of the District Court, 51 F. (2d) 867, against the Collector on a claim for refund of taxes alleged to have been illegally exacted.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher,* and *Messrs. Claude R. Branch, Sewall Key, A. H. Conner,* and *Erwin N. Griswold* were on the brief, for Handy, Collector.

Mr. James H. Hughes, Jr., with whom *Mr. Frank S. Bright* was on the brief, for the Delaware Trust Co., Executor.

The provision in question can not be supported under the Fifth Amendment if it be construed as a tax directed at gifts *inter vivos. Schlesinger* v. *Wisconsin,* 270 U. S. 230; *Guinzburg* v. *Anderson,* 51 F. (2d) 592; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 347.

It is unconstitutional under the due process clause if it be construed as aiming a tax at property forming the estate of a deceased person.

Transfers *inter vivos* not made in contemplation of death and not intended to take effect in possession or enjoyment at death bear no reasonable relationship to the tax on the transfer of property at death. *Milliken* v. *United States,* 283 U. S. 15; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339; *Tyler* v. *United States,* 281 U. S. 497; *United States* v. *Wells,* 283 U. S. 102.

There is no reasonable basis of distinction justifying the selection of gifts made within two years of death and exempting those made more than two years prior to death. *Louisville Gas & Elec. Co.* v. *Coleman,* 277 U. S. 32.

The basis of the tax imposed is the circumstance of the transmission of property at death. The time of death is not material. The tax is not laid directly on a transfer *inter vivos.* It is laid on the gross estate of the decedent. The property transferred is not subject to the tax at the time of the transfer. The property becomes taxable only if the accident of death occurs within two years of the transfer. That accident may or may not happen. Cf. *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 347; American Security & Tr. Co. *v.* Commissioner, 24 B. T. A. 334. The effect of the conclusive presumption of the contested provision is to cause a transfer, which the donor has the right to make and which is not taxable when made, to become taxable in the event that the donor dies within two years from the date of the transfer. It is fundamental that tax laws operate specifically and definitely. The tax attempted is highly speculative, depending on that most unknown of all things, to-wit, the time of death. Certainly it would be improper to base a tax on the estate of "A" on the basis of property owned by " B " at the time of "A's " death. *Hoeper* v. *Tax Commission,* 284 U. S. 206; *Nichols* v. *Coolidge,* 274 U. S. 531, 542.

If gifts in fact not made in contemplation of death can not reasonably be classified with transfers testamentary in character, then Congress for purposes of classification can not conclusively presume them to be in contemplation of death, and, without giving the taxpayer an opportunity to be heard as to the actual facts, attribute to arbitrarily presumed facts the legal significance of actual facts. See *Nichols* v. *Coolidge, supra.*

Congress has no power to establish rules which under guise of regulating the presentation of evidence, conclusively presume the ultimate fact upon which a tax is based, and, without giving an opportunity for a hearing, impute to the fact so presumed the legal significance of actual fact. *Hoeper* v. *Tax Commission,* 284 U. S. 206; *Mobile, J. & K. C. R. Co.* v. *Turnipseed,* 219 U. S. 35; *Manley* v. *Georgia,* 279 U. S. 1; *McFarland* v. *American Sugar Rfg. Co.,* 241 U. S. 79; *Bailey* v. *Alabama,* 219 U. S. 219; *Cockrill* v. *California,* 268 U. S. 258; *Shwab* v. *Doyle,* 269 Fed. 321; *Howard* v. *Moot,* 64 N. Y. 268; *In re Barbour's Estate,* 185 App. Div. 445, affirmed, 226 N. Y. 639; Cooley's Const. Lim., 8th ed., p. 768.

The issue is governed by *Schlesinger* v. *Wisconsin,* 270 U. S. 230. Following that case, the tax provision has been held unconstitutional in the following: *Hall* v. *White,* 48 F. (2d) 1060, affirmed, 53 F. (2d) 210; *Donnan* v. *Heiner,* 48 F. (2d) 1058, s. c., 285 U. S. 312; *Guinzburg* v. *Anderson,* 51 F. (2d) 592, affirmed, CCA 2, December 7, 1931; American Security & Tr. Co. *v.* Commissioner, 24 B. T. A. 334, and in this case below, 51 F. (2d) 867, s. c., 53 F. (2d) 1042.

The Fifth Amendment in its application to the legislation of Congress is similar in scope and effect to the Fourteenth Amendment in its application to the legislation of the States. *Nichols* v. *Coolidge,* 274 U. S. 531, 543.

Mr. Justice Sutherland delivered the opinion of the Court.

This case, like *Heiner* v. *Donnan, ante,* p. 312, is here on a certificate from the Circuit Court of Appeals for the Third Circuit. The question submitted is:

"Does the second sentence of section 302 (c) of the revenue act of 1926 violate the due-process clause of the fifth amendment to the Constitution of the United States?"

In this case, as in *Heiner* v. *Donnan*, the decedent, within two years prior to his death, had made transfers *inter vivos* without consideration which were complete and irrevocable. The commissioner included the value of the property so transferred in the value of the gross estate, and assessed a death transfer tax accordingly. Following a claim for refund and its rejection, the executor brought this action to recover the amount of the tax attributable to such inclusion. The trial court found that in fact none of the transfers had been made in contemplation of death, and rendered judgment for the executor for the amount claimed, on the ground that § 302 (c) violated the due process clause of the Fifth Amendment and was therefore unconstitutional.

Our decision in *Heiner* v. *Donnan* requires an affirmative answer to the question submitted.

It is so ordered.

MR. JUSTICE BRANDEIS and MR. JUSTICE STONE dissent.

MR. JUSTICE CARDOZO took no part in the consideration or decision of this case.

SMILEY *v.* HOLM, SECRETARY OF STATE.

CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

No. 617. Argued March 16, 17, 1932.—Decided April 11, 1932.

1. The function of a state legislature in prescribing the time, place and manner of holding elections for Representatives in Congress under Constitution, Art. I, § 4, is a law-making function in which the veto power of the state governor participates if, under the state constitution, the governor has that power in the making of state laws. P. 365.
2. The rule giving weight to practical construction is especially applicable in the case of a constitutional provision which governs the exercise of political rights and hence is subject to constant and careful scrutiny. P. 369.