

descent and distribution of the property of decedents. Accordingly, the time of acquisition of such property is the death of the decedent, and its basis is the fair market value at the time of the decedent's death, regardless of the time when the taxpayer comes into possession and enjoyment of the property." It is upon this regulation that the Court relies to justify its construction of the statute.

I think the regulation plainly unjustified, as an attempt on the part of the Treasury to legislate when Congress has failed to do so. The hearings on the Revenue Act of 1934 show that the Treasury was not satisfied with the provision the Committee recommended Congress should adopt and which Congress did adopt. It evidently attempted to rewrite the Congressional language to carry out what it thought Congress should have provided. It needs no citation of authority to demonstrate that such is not the function of a regulation and that the attempt should fail.

The CHIEF JUSTICE joins in this opinion.

CARY v. COMMISSIONER OF INTERNAL
REVENUE.*

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT.

No. 734. Argued May 1, 1941.—Decided May 26, 1941.

Decided upon the authority of *Helvering v. Reynolds*, ante, p. 428.
P. 443.

116 F. 2d 800, affirmed.

*Together with No. 735, *Flagler v. Commissioner of Internal Revenue*; No. 736, *Estate of Flagler v. Commissioner of Internal Revenue*; and No. 737, *Matthews v. Commissioner of Internal Revenue*, also on writs of certiorari, 312 U. S. 675, 676, to the Circuit Court of Appeals for the Second Circuit.

CERTIORARI, 312 U. S. 675, to review judgments which affirmed decisions of the Board of Tax Appeals sustaining income tax assessments.

Mr. Roswell L. Gilpatric, with whom *Mr. Joseph C. White* was on the brief, for petitioners.

Mr. Thomas I. Emerson, with whom *Solicitor General Biddle*, *Assistant Attorney General Clark*, and *Messrs. Sewall Key* and *Newton K. Fox* were on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Henry M. Flagler died on May 20, 1913. Petitioners are legatees under a testamentary trust created under his will. The trust continued for a period of ten years from his death and terminated on May 20, 1923. As of that time, the trustees delivered to petitioners¹ certain securities which were sold by them in 1934 and 1936. The question presented is whether the basis for computing gain or loss on such sales under § 113 (a) (5) of the Revenue Acts of 1934 (48 Stat. 680) and 1936² (49 Stat. 1648) is the value of the securities when delivered to the legatees, or their value on the date of death of the decedent. Petitioners make substantially the same

¹ Some securities had previously been delivered to Harry Harkness Flagler, petitioner in No. 735, on April 26, 1921. Annie L. Flagler, whose estate is the petitioner in No. 736, received the securities here involved as a gift from her husband, Harry Harkness Flagler. The situation therefore is the same as to both these parties since it is stipulated that he had received the securities as indicated above.

² Sec. 113 (a) (5) of the 1936 Act is the same as § 113 (a) (5) of the 1934 Act. Art. 113 (a) (5)-1 of Treasury Regulations 94, promulgated under the 1936 Act, contains provisions identical with those of Art. 113 (a) (5)-1 of Regulations 86 under the 1934 Act. The relevant portions of that section and regulation under the 1934 Act are set forth in *Helvering v. Reynolds*, ante, p. 428.

argument for application of the former criterion as did respondent in *Helvering v. Reynolds*, ante, p. 428. And they contend that under Florida law they had at the date of death only contingent interests. But assuming they are correct in the latter contention, it is of no avail. For the reasons stated in *Helvering v. Reynolds*, supra, the proper basis was the value of the securities at the death of the decedent. Accordingly, the judgments of the court below (116 F. 2d 800) must be

Affirmed.

The CHIEF JUSTICE and MR. JUSTICE ROBERTS dissent for the reasons stated in their dissent in *Helvering v. Reynolds*, ante, p. 435.

UNITED STATES v. A. S. KREIDER CO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
THIRD CIRCUIT.

No. 853. Argued May 7, 1941.—Decided May 26, 1941.

1. Section 24 (20) of the Judicial Code, which gives the District Courts jurisdiction concurrent with the Court of Claims over certain suits against the United States, provides that no suit shall be allowed thereunder unless the same shall have been brought within six years after the right accrued for which the claim is made. *Held*, that the six-years period is an outside limit consistent with the five-years limit on suits for the recovery of internal revenue taxes set by § 1113 (a) of the Revenue Act of 1926, amending R. S. § 3226. P. 446.
2. In response to a claim of tax refund, the Commissioner of Internal Revenue found an overpayment in the amount claimed and sent the taxpayer a certificate of overassessment in that amount bearing notation that a stated part of it was barred by limitations and enclosed a check for the difference, which the taxpayer accepted. *Held*, that there was no account stated upon which the taxpayer could ground an action for the part not repaid and thus avoid the five-years limitation of § 1113 (a) of the Revenue Act of 1926 on suits to recover internal revenue taxes. *Bonwit Teller & Co. v. United States*, 283 U. S. 258, distinguished. P. 448.