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TAXATION - VALIDITY OF RETROACTIVE INHERITANCE TAX ON CONTINGENT TRUST REMAINDERS

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TAXATION — VALIDITY OF RETROACTIVE INHERITANCE TAX ON CONTINGENT TRUST REMAINDERS — In 1877 the settlor created an irrevocable trust with reservation of the income for life. Under the terms of the trust deed, on the death of the settlor, the income was to be paid for twenty years after the settlor's death "to and among such of" settlor's children as may be living at the time of the payment. The living issue of deceased's children were to take by right of representation. On the death of the settlor in 1931 the state of Massachusetts by statute [1] enacted in 1907 taxed the remainder as property passing by deed "intending to take effect in possession and enjoyment after death." *Held* (by a unanimous court), the tax was constitutional.[2] *Binney v. Long*, 299 U. S. 280, 57 S. Ct. 206 (1936).

Increasing demands by the state and nation for revenue have produced increasing efforts on the part of state and federal taxing instrumentalities to reach into the past and tax those transactions which have been wholly or partially

[1] Mass. Gen. Laws (1932), c. 65, § 1.

[2] Attempts to tax as a part of decedent's estate, under statute enacted in 1909, Mass. Gen. Laws (1932), c. 65, § 2, certain other trust property created by trust instruments executed in 1862 and 1891 and vesting in decedent a power of appointment were held unconstitutional as a denial of the equal protection of the laws because this statute did not tax similar interests the enjoyment of which depended upon the exercise of a power embodied in a deed effective after September 1, 1907. Justice Brandeis wrote a dissenting opinion on this portion of the court's holding.

completed.[3] Consequently, almost every inheritance tax brings to the court some new phase of the problem of the constitutionality of statutory enactments which purport to levy a death duty upon transfers of property effected by instruments executed prior to the enactment of the statute.[4] The retroactive feature of such a statute is not per se void.[5] If, when the instrument was executed, a transfer for which it provides is subject to a tax under a statute then in existence, there is not a deprivation of property without due process of law by the application of the rates in force at the time of the donor's death rather than the rates in force at the time the instrument was executed.[6] Even in the absence of a tax existing on such a transfer when the instrument is executed, the courts have previously upheld retroactive death duties so long as they were enacted before the then owner relinquished his power to control the ultimate disposition of the property on his death. Thus the state may constitutionally levy a transfer tax on property passing under a revocable trust even though the trust was created before the statute was enacted.[7] And there is no lack of due process in the taxation of the succession to property received by virtue of the exercise or non-exercise of a power of appointment even though the instrument vesting the power in the donee was executed before the statute was passed.[8] But if the

[3] On retroactive taxation generally, see "Developments in the Law—Taxation," 47 HARV. L. REV. 1209 (1934).

[4] See 30 MICH. L. REV. 150 (1931); 28 COL. L. REV. 777 (1928); Amberg, "Retroactive Excise Taxation," 37 HARV. L. REV. 691 (1924); and 4 C. C. H., 1932-34 Inheritance Tax Service.

[5] Orr v. Gilman, 183 U. S. 278, 22 S. Ct. 213 (1902); Kentucky Union v. Kentucky, 219 U. S. 140, 31 S. Ct. 171 (1911). But such a statute will not be construed retroactively unless such a construction is necessary. Shwab v. Doyle, 258 U. S. 529, 42 S. Ct. 391 (1922). In the principal case the Supreme Court was bound by the state court's construction of the statute. Stebbins v. Riley, 268 U. S. 137, 45 S. Ct. 424 (1925); Saltonstall v. Saltonstall, 276 U. S. 260, 48 S. Ct. 225 (1928). The Supreme Court was also bound by the state court's interpretation of the trust instrument. Nickel v. Cole, 256 U. S. 221, 41 S. Ct. 467 (1921); Enterprise Irrigation Dist. v. Canal Co., 243 U. S. 157, 37 S. Ct. 318 (1917).

[6] In Milliken v. United States, 283 U. S. 15, 51 S. Ct. 324 (1930), the donor made a gift in contemplation of death in 1916; in 1918 the rates were raised; in 1920 the donor died; the gift was taxed under the 1918 rates. In Phillips v. Dime Trust & Safe Deposit Co., 284 U. S. 160, 52 S. Ct. 46 (1931), the tenancy by the entirety was created in 1917; the rates were raised in 1924; the joint tenant died in 1925; the 1924 rates were applied. In both cases the Court points out that the nature and amount of the tax may be foreseen by reason of the existence of another similar statute in force at the time.

[7] Saltonstall v. Saltonstall, 276 U. S. 260, 48 S. Ct. 225 (1928). Such property may also be included in the federal estate tax. Reinecke v. Northern Trust Company, 278 U. S. 339, 49 S. Ct. 123 (1929).

[8] In Chanler v. Kelsey, 205 U. S. 466, 27 S. Ct. 550 (1907), deeds were executed in 1848, 1849, and 1865 creating a life estate in the donor's daughter with a special power of appointment by her. The taxing statute was enacted in 1897. In 1902 the daughter died, having exercised the power. The argument was made, and rejected by the court, that the property passed from the donor and not from the donee of the power and that therefore the deeds created a vested right subject to being

transfer is fully complete, the legislature cannot constitutionally turn back the clock for the purpose of taxing the completed transfer. Hence, the state cannot tax an inter vivos gift which was fully complete before the enactment of the statute.[9] In *Coolidge v. Long*[10] the Supreme Court held that Massachusetts could not tax retroactively the transfer of property passing under an irrevocable trust reserving a life estate in the settlor and creating for the beneficiaries a vested remainder subject to being divested by their predeceasing the settlor. In the principal case the taxpayer contended that under the decision in *Coolidge v. Long* the tax here assessed was in violation of the due process clause. The Court, through Justice Roberts,[11] distinguished the principal case from *Coolidge v. Long* on the ground that in the instant case the trust deed created contingent remainders whereas the trust instrument in *Coolidge v. Long* created remainders which were vested before the statute was enacted. Whether a remainder is vested or contingent depends entirely upon the language used in the trust instrument. If the conditional element is incorporated into the grant to the remainderman, the remainder is contingent, but, if the grant is absolute, and there is a clause added divesting it, the remainder is vested.[12] The Supreme Court is here relying on the technicalities of property law in determining the

divested by the exercise of the power. For the same result by the state court, see Minot v. Stevens, 207 Mass. 588, 93 N. E. 973 (1911). *Contra*: Matter of Lansing, 182 N. Y. 238, 74 N. E. 882 (1905).

[9] Blodgett v. Holden, 275 U. S. 142, 48 S. Ct. 105 (1927). In the course of the opinion in the Blodgett case Justice McReynolds said at page 147, "it seems wholly unreasonable that one who, in entire good faith and without the slightest premonition of such consequence, made absolute disposition of his property by gifts should thereafter be required to pay a charge for so doing." In Untermeyer v. Anderson, 276 U. S. 440, 48 S. Ct. 353 (1928), the court held the tax invalid although the gift was made while the tax was pending before congress. Justice Brandeis dissented along the lines previously suggested by Justice Holmes in his dissenting opinion in Schlesinger v. Wisconsin, 270 U. S. 230, 46 S. Ct. 260 (1926), where on page 241 he says the statute should be sustained because it merely "allows a penumbra to be embraced that goes beyond the outline of its object in order that the object may be secured."

[10] 282 U. S. 582, 51 S. Ct. 306 (1931). The tax was levied under Mass. Gen. Laws (1932), c. 65, § 1, the operative provision in the principal case. An attempt by the Federal Government to retroactively tax the same transfer was held bad in Nichols v. Coolidge, 274 U. S. 531, 47 S. Ct. 710 (1927). But see Third Nat. Bank & Trust Co. of Springfield v. White,(D.C. Mass.1930) 45 F. (2d) 911, in which the tenancy by the entirety was created in 1915; the tax was passed in 1924; the joint tenant died in 1926; the value of the entire property was held subject to the estate tax. Certiorari was denied and this judgment of the court was affirmed in 287 U. S. 577, 53 S. Ct. 290 (1932).

[11] Justice Roberts wrote a vigorous dissent in Coolidge v. Long, 282 U. S. 582, 51 S. Ct. 306 (1931).

[12] GRAY, THE RULE AGAINST PERPETUITIES, 3d ed., 85 (1915). A devise to *A* for life remainder to his children, but if any child dies before the death of *A* then his share to go to the children who survived, creates a vested remainder subject to being divested. Thaw v. Ritchie, 136 U. S. 519, 10 S. Ct. 1037 (1890). But a devise to *A* for life remainder to such of *A's* children as survive him creates a contingent remainder. Wright v. Blakeslee, 101 U. S. 174 (1879).

validity of this retroactive statute.[13] Perhaps the line is somewhat arbitrary, but somewhere an arbitrary line must be drawn; at some point the tax ceases to be a levy on the succession to property and the Supreme Court has now made it clear that the occasion on which the state may levy its death duties is the vesting of the interest in the beneficiary and not his entry into possession and enjoyment of the property or the termination of the possibility of the contingent gift over.[14]

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[13] In the course of the opinion on page 209, Justice Roberts says, "Having relied on legal rather than practical considerations to invalidate the tax in *Coolidge v. Long* it would be inconsistent here to rely on practical rather than legal considerations to invalidate the same tax." Under such a rule the results may depend upon the peculiarities of the local property law; thus in Louis C. Raegner, Jr., 29 B. T. A., February 27, 1934 the remainder although contingent at common law was vested under the New York statute and the tax was held bad.

[14] This same distinction is carried over into the interpretation of the applicability of the present federal estate statute to property passing under trust instruments created after the enactment of the statute. Compare Klein v. United States, 283 U. S. 231, 51 S. Ct. 398 (1931), with Helvering v. St. Louis Union Trust Co., 296 U. S. 39, 56 S. Ct. 74 (1935), and Becker v. St. Louis Union Trust Co., 296 U. S. 48, 56 S. Ct. 78 (1935).