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Taxation--Future Interests--Presumption of Capacity to Bear Children

Robert W. Burke
West Virginia University College of Law

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pay an ascertainable sum for all the coal in the tract. There is no surrender clause in the instrument, hence whether or not the taxpayer mines all of the coal, he will incur liability.¹⁰

The "lessee" here was privileged to mine all of the coal, but by the contract had to pay for what was not mined. Accordingly, all of the elements of a sale were present. The decision in the principal case may, therefore, be doubtful.

—JOHN L. DETCH.

TAXATION — FUTURE INTERESTS — PRESUMPTION OF CAPACITY TO BEAR CHILDREN. — The trustee of the testator's estate, the income from which was given to his daughter for life, with remainder to certain charitable institutions, if she should die without issue, brought suit for refund of an alleged overpayment of taxes. Under the statute¹ the amount given to charities was to be deducted from the gross estate in computing the federal estate tax. Evidence was offered that prior to the testator's death, the daughter had undergone an operation rendering her incapable of issue. *Held*: The evidence was admissible to show the vesting of the remainder in the charity. *United States v. Provident Trust Company*.²

In applying the presumption that possibility of issue is not extinguished until death, the English courts claim to distinguish between those cases in which property rights will be affected and those in which they will not.³ In the former class the presumption is treated as being conclusive,⁴ while in the latter it is considered

¹⁰ It is the established rule in tax collection cases, which are brought at the instance of the Government, that all doubts are resolved against the Government. *Gould v. Gould*, 245 U. S. 151, 38 S. Ct. 53 (1917). Possibly this rule of law was an unmentioned factor in the decision of the principal case.

¹ Revenue Act of 1918, § 403 (a) (3), 40 STAT. 1098. Since present value of contingent bequest to charity is not deductible from gross estate, *Humes v. U. S.*, 276 U. S. 487, 48 S. Ct. 347 (1928), it is important that the possibility of issue be extinct and the remainder to charity be vested at death of testator. The deduction is determined from the data available at that time.

² — U. S. —, 54 S. Ct. 389 (1934).

³ "If property is given to A in the event of B having no children, can A claim that property before the death of B? My answer is, 'No'; neither at law, nor in equity, unless B's possible child is the only person who can deprive A of the property." *Re Hocking*, 79 L. T. N. S. 164, 169 (1898),—the limitation here was: to unborn son of A in fee, but if no issue of A, then to B in fee.

⁴ In applying the rule against perpetuities, to suppose it impossible for persons of advanced years to have children "is a very dangerous experiment, and introductive of the greatest inconvenience, to give latitude to such sort of conjecture." *Jee v. Audley*, 1 Cox 324 (1787); *Leake v. Robinson*, 2

as being rebuttable.⁵ The courts of the United States, with but rare exceptions,⁶ have conclusively presumed that death alone terminates the capacity to procreate. The rule has been applied in cases involving future interests⁷ under wills⁸ and trusts,⁹ and other interests in land.¹⁰ The rigorous consistency in its application purports to be imperiously necessitated by the view that a conjecture based on age is too doubtful and uncertain¹¹ and that even though medical testimony of the impossibility of bearing children be denied, the courts claim the rule to be sound from the standpoint of morals and public policy.¹² Probably the true basis

Mer. R. 363 (1817); *Re Dawson*, (1888) L. R. 39 Ch. Div. 135; *Burnyeat v. Ward*, (1923) 2 Ch. 52. *Contra* and overruled,—*Cooper v. Laroche*, (1881) L. R. 17 Ch. Div. 368. Other cases where presumption was employed though person aged: woman 70, *Perkin v. Bland*, 122 L. T. N. S. 181 (1920); woman 52, *Re Warren* (1884) 52 L. J. Ch. 928; man 95, *Lushington v. Boldero*, 13 Beav. 418 (1850).

⁵ *Woman 51*, ⁶*Carr v. Carr*, 106 L. T. N. S. 753 (1912); woman 56, *Re White* (1901) 1 Ch. 570; woman 52, *Re Belt*, 37 L. T. N. S. 272 (1877); woman 50, *Groves v. Groves*, 9 L. T. N. S. 533 (1864); woman 56, ⁷*Lyddon v. Ellison*, 19 Beav. 565 (1854); woman 69, ⁸*Leng v. Hodges*, Jac. 585 (1822); man and woman 52, ⁹*Reynolds v. Reynolds*, Dick. 374 (1764). ¹⁰Cases in which the "gift over" beneficiary was required to give bond for payment, in case there might be after born issue.

¹¹*Moores Ex'or v. Beauchamp*, 5 Dana 70 (Ky. 1837) (considered issue extinct but required those taking to give bond); *Male v. Williams*, 48 N. J. Eq. 33, 21 Atl. 854 (1891); see *Apgar v. Apgar*, 38 N. J. Eq. 549 (1884).

¹²Applied conclusively to rule against perpetuities. *Gettins v. Grand Rapids Trust Co.*, 249 Mich. 238, 228 N. W. 703 (1930); *Graves v. Graves*, 94 N. J. Eq. 268, 120 Atl. 420 (1923); *Rozell v. Rozell*, 217 Mich. 324, 186 N. W. 489 (1922); *Loud v. St. Louis Union Trust Co.*, 298 Mo. 148, 249 S. W. 629 (1923); *Taylor v. Crosson*, 11 Del. Ch. 145, 98 Atl. 375 (1916).

¹³*Futrell v. Futrell's Ex'or*, 224 Ky. 814, 7 S. W. (2d) 232 (1928); *Burrell v. Jean*, 196 Ind. 187, 146 N. E. 754 (1925); *Oleson v. Somogyi*, 93 N. J. Eq. 506, 115 Atl. 526 (1921); *Williams v. Frierson*, 150 Ga. 797, 105 S. E. 475 (1921).

¹⁴*Du Pont v. Du Pont*, 11 Del. Ch. 316, 159 Atl. 841 (1932); *Application of Smith*, 94 N. J. Eq. 1, 118 Atl. 271 (1923). There is *dictum* in *Carney v. Kain*, 40 W. Va. 758, 811, 23 S. E. 650, 657 (1895), to the effect that if it is a dry trust or limited to death without issue and person past age of child bearing childless, the trust would end, providing there would be no harm. In every other case, however, the West Virginia Court holds,—“the law considers that the possibility of issue continues so long as the person lives, no matter how improbable it may be from the great age of the party.”

¹⁵The recent cases range from *Riley v. Riley*, 92 N. J. Eq. 465, 113 Atl. 777 (1921), where woman was 47, to *In re Sterret's Estate*, 300 Pa. 116, 150 Atl. 159 (1930), where woman was 78. The conclusive presumption was applied in *Sims v. Birden*, 197 Ala. 690, 73 So. 379 (1916), in proving the legitimacy of child.

¹⁶Note to *Miller v. Macomb*, 26 Wend. 229 (N. Y. 1841) cites instances of childbirth in women ranging from 50 to 84 years of age,—saying the most remarkable (if true) is one in which the husband was 94 and the wife was 86. Age alone should not determine the impossibility. *Hill v. Spencer*, 196 Ill. 65, 63 N. E. 614 (1902). It is of interest to note that in the book of Genesis of the BIBLE, Ch. 17:17, 21:2, it is stated that Sarah gave birth to Isaac at the age of 90.

¹⁷The courts often fear that surgical operations might be resorted to, to

is a desire for the mechanical uniformity of a rule of property or stare decisis.¹³

Recently, an exception to the orthodox American rule has arisen in tax cases.¹⁴ Here the presumption has been rebutted by medical testimony¹⁵ and the possibility of issue treated as being extinct. This deviation is probably attributable to the fact that courts favor charities¹⁶ and that tax statutes are usually construed against the government.¹⁷ In the instant case, the court may have latently considered that in truth the contingencies were removed in the life of the testator.¹⁸ Nevertheless, the admission of the medical testimony followed the tendency to impose taxes with a view to the practical consequences more than to legal fictions.¹⁹ The result obtained was surely not subversive to the view of Congress in the particular tax legislation.²⁰

—ROBERT W. BURK.

make it absolutely certain that no issue could be born and thereby cause the interest to vest. *Hill v. Sangamon, Loan & Trust Co.*, 295 Ill. 619, 129 N. E. 554 (1920). In *City Bank Farmers' Trust Co. v. United States*, 5 F. Supp. 871 (D. C. S. D. N. Y., 1934) they say this consideration might have force in some cases but not in tax cases where incapacity is referable to nothing but advanced years.

¹³ "Whether the rule rests upon indelicacy of the acts to which such an inquiry might lead, or to the great uncertainty of arriving at an accurate conclusion, we know not; but certain it is, the rule has stood the test of time, and received the sanction of the ages." *List v. Rodney*, 83 Pa. 483, 492 (1877).

¹⁴ *City Bank Farmers' Trust Co. v. U. S.*, *supra* n. 12. See dissenting opinion in *Farrington v. Commissioner of Int. Rev.*, 30 F. (2d) 915 (C. C. A. 1st, 1929).

¹⁵ The court has here treated it as a true presumption of fact. 5 WIGMORE (2d ed. 1923) §§ 2491, 2492.

¹⁶ The policy to uphold charitable gifts and give effect to them whenever possible should not be changed because bequests for such purpose are exempted from the inheritance tax law. *Re Estate of Graves*, 242 Ill. 23, 89 N. E. 672 (1909). The fact that charities are favored can be exemplified no better than by citing the Revenue Act, *supra* n. 1, exempting charitable gifts from estate tax.

¹⁷ *Gould v. Gould*, 245 U. S. 151, 38 S. Ct. 53 (1917). Although exemption from taxation is not favored, *South Carolina Produce Ass'n v. Com'r of Int. Rev.*, 50 F. (2d) 742 (C. C. A. 4th, 1931), the tendency in favor of charities applies in bringing the case under the statute. *School of Domestic Arts & Science v. Carr*, 322 Ill. 562, 153 N. E. 669 (1926).

¹⁸ If the limitation in these cases were "without children" instead of "without issue" then it would be necessary to consider the possibility of adopting a child.

¹⁹ *Tyler v. United States*, 281 U. S. 497, 50 S. Ct. 356 (1930); *Lawrence v. State Tax Comm.*, 286 U. S. 276, 52 S. Ct. 556 (1932); *City Bank Farmers' Trust Co. v. United States*, *supra* n. 12

²⁰ "Tax funds are property devoted to public uses; so are gifts to public charities. There is every presumption that congress did not intend to divert to its particular public uses money already applicable to the same kind of uses." Dissenting opinion, *Farrington v. Com'r of Int. Rev.*, *supra* n. 14.