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## Recent Changes in the Inheritance Tax Laws

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In the most recent case, *C. v. Schroeder*,<sup>9</sup> the court apparently holds that "irresistible impulse" even if shown to be habitual is not a defense. The court said: "This recital of facts we have deemed necessary because of the main defense interposed in the appellant's behalf, which was that she was the victim of an uncontrollable impulse to rob, steal and flee. \* \* \* \* Every habitual criminal might excuse his wrongdoing on the ground that his impulses moved him to break the law. It may be that unrestrained impulses operate in many crimes, but society for its own protection cannot recognize such a state of mind as excusing the wrongdoer. The court should have told the jury that the defense of irresistible impulse is one which our law does not recognize." The court cited *C. v. Mosler, supra*.

A decision that denies an exemptive effect to mental diseases which affect the conative emotional life of an actor, or his power of inhibiting acts that he apparently knows to be wrong and illegal, is sure to be provocative of criticism. In view of the recent progress of medical and psychological learning it is to be regretted that the court was content to base its decision upon a Gibsonian hypothesis propounded in 1846.

W. H. Hitchler.

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### RECENT CHANGES IN THE INHERITANCE TAX LAWS

The Act of May 16, 1929, P. L. 1795 amending the Inheritance Tax Act of June 20, 1919, P. L. 521 and its supplements has made several distinct changes in the classes of property on the transfer of which a tax is to be levied.

Under the Act of 1919 a tax was to be levied under Section 1 (d), "when any person or corporation comes into the possession or enjoyment \* \* \* \* of any property transferred pursuant to a power of appointment contained in any instrument taking effect after the passage of this act".

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<sup>9</sup>302 Pa. 1, 152 Atl. 835 (Nov. 24, 1930).

It had early been recognized in Pennsylvania that when the power of appointment was exercised the property passed from the donor to the appointee and not from the donee to the appointee.<sup>1</sup> Hence when the tax was assessed the property was regarded as passing from the donor and whether it was to be the collateral tax or the direct tax was to be determined by relationship to the donor and not to the donee.<sup>2</sup>

In recent years the Supreme Court formulated a new doctrine in reference to transfers under powers. *McCord's Estate*<sup>3</sup> said, "The donee may transfer property to her own estate and make it a part thereof for all purposes. It thus becomes blended with her other property as one estate, from which debts and legacies were payable. The donee could have transferred the property as a gift from the donor but did not do so. Here the property passes as the estate of the donee and is subject to the inheritance tax as the donee's transfer."

This doctrine of "blending" the property over which the decedent had a power and his own in such a fashion as to have the transfer or passing regarded as his act and not that of the donor has been consistently followed.<sup>4</sup>

The Act of 1929 makes this addition to the Act of 1919, "Provided, That property transferred pursuant to powers of appointment shall, in all cases where the power is hereafter exercised, be taxed as of the estate of the donor, notwithstanding any blending of such property with the property of the donee."

The necessary effect of this proviso is to abolish the exception created by the Pennsylvania courts to the general rule that property passing under an exercise of a power of appointment is a passing from the donor.

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<sup>1</sup>Comm. v. Williams' Exs., 13 Pa. 29 (1850).

<sup>2</sup>Huddy's Estate, 236 Pa. 276 (1912).

<sup>3</sup>276 Pa. 459 (1923).

<sup>4</sup>Forney's Estate, 280 Pa. 282 (1924); Twitchell's Estate, 284 Pa. 135 (1925); Hagen's Estate, 285 Pa. 326 (1926); Valentine's Estate, 297 Pa. 99 (1929); 64 A. L. R. 748 (1929).

*Leach's Estate*<sup>5</sup> raised the question as to whether there was a sufficient transfer of property on the death of one of two joint tenants, with the right of survivorship present by agreement, for the assessment of an inheritance tax. It was there held that the interest of the survivor accrued at the time of purchase and that the one-half did not pass to him by succession from the decedent but by reason of the contract. It was properly held that no tax was due. That the same conclusion would inevitably follow in the case of tenants by the entirety was conceded in the *Leach* case.

The Act of 1929 adds subdivision (e) to Section 1 making a tax due, "whenever any property, real or personal, is held in the joint names of two or more persons, *except as tenants by the entirety*,<sup>6</sup> or is deposited in banks or other institutions or depositories in the joint names of two or more persons, *except as husband and wife*,<sup>7</sup> and payable to either or the survivor upon the death of one of such persons, the right of the surviving person or persons entitled to the immediate ownership or possession and enjoyment of such property shall be deemed, prima facie, a transfer of one-half, or other proper fraction thereof, taxable under the provisions of this act, in the same manner as though this part of the property to which such transfer relates belonged to joint tenants or joint depositors as tenants in common and had been bequeathed or devised to the surviving persons by such deceased joint tenant or joint depositor by will."

This provision is manifestly an endeavor to negative the decision in the *Leach* case and to make a tax due on the accrual of the right of possession or ownership by survivorship in joint tenancies.

The act raises several interesting questions. Is the act constitutional? The possible objection that the subject matter of taxing the right of possession or ownership accruing by survivorship is not covered by the title of the

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<sup>5</sup>282 Pa. 545 (1925). See also *McIntosh's Estate*, 289 Pa. 509 (1927).

<sup>6</sup>Italics added.

<sup>7</sup>Italics added.

act<sup>8</sup> is met by the addition to the title of these words, "and taxing joint estates." It would seem that a question might well be raised whether the act does not embrace more than one subject.<sup>9</sup> The subject of the Act of 1919 is the taxing of transfers of property on death or in contemplation of death. But the Supreme Court has held that there is no transfer in the case of survivorship.<sup>10</sup> Is not the "taxing of joint estates" the taxing of something other than transfers of property? The act exempts tenancies by the entirety and joint deposits by husband and wife. Is this exemption constitutional? The Constitution requires that all taxes be uniform, upon the same class of subjects and decrees that all laws exempting property from taxation

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<sup>8</sup>Pennsylvania Constitution of 1873, Article 2, Section 3.

<sup>9</sup>*Idem.*

<sup>10</sup>*Leach's Estate*, 276 Pa. 459 (1923). On this point the recent case of *Tyler v. U. S.*, 281 U. S. 497, 74 L. Ed. 991 is highly interesting and may presage the answer on this point by the Pennsylvania Supreme Court. The federal inheritance tax was imposed specifically on the interest held by a decedent as tenant by the entirety except such part as was shown to have originally belonged to the survivor and never to have belonged to the decedent. The contentions of the taxpayers were that such a tax levied on a supposed transfer from the decedent to the surviving tenant by the entirety was in reality a direct and unapportioned tax on the property itself since there was no transfer and hence that the tax was unconstitutional under Article 1, Section 2, clause 3 and Section 9, clause 4 of the U. S. Constitution; and that the tax was so arbitrary as to amount to the taking of property without due process of law under the Fifth Amendment. The Court held, however, that in the case of the death of one of the tenants by the entirety, the death was a "generating source" of rights in the survivor; that actually as the result of the death new rights not theretofore possessed came into existence; that as a result of the death the survivor was entitled to exclusive possession, use and enjoyment of the property; that then and then only the survivor acquired the power to hold and enjoy the property absolutely as his or her own; that the death of one of the parties became the "generating source" of important and definite accession to the property rights of the other; and that whether technically a transfer or not, such accession was taxable and was plainly an indirect tax needing no apportionment and as plainly not arbitrary or unreasonable. If such be true with tenants by the entirety it is equally true in the case of joint tenants and such the Pennsylvania Supreme Court is likely to decide.

other than the enumerated ones shall be void.<sup>11</sup> If *Cope's Estate*<sup>12</sup> is still the law the exemption would seem to be invalid as this exemption is no different than the exemption of small estates. If the *Cope* case is not now controlling and it has been questioned<sup>13</sup> the exemption must still meet the objection of unreasonable classification. There seems to be no reason for exempting a transfer from husband to wife or vica versa in these cases and not in the other cases where a direct tax is assessed. In any event, the mere fact of the relationship of husband and wife would not justify a tax exemption.<sup>14</sup> It might be contended that there is no transfer under the survivorship doctrine in husband and wife cases while there is such a transfer in joint tenancy case.<sup>15</sup> But the *Leach* case had denied any distinction in the two cases. We conclude that the constitutionality of the provision and of the exemption may well be doubted.

It is to be noted that the act distinguishes the cases of joint deposits in banks or other depositories. Is this an expression of the legislature that joint bank deposits are not joint tenancies of personal property? It is a reasonable conclusion that the legislature thought that such were not "the holding of any property, real or personal, in the names of two or more persons".

As to property held in the joint names of two or more persons, the act excepts property held *as tenants by the entirety*. As to property deposited in banks or other institutions in the joint names of two or more persons, the act excepts property deposited *as husband and wife*. Was

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<sup>11</sup>Pennsylvania Constitution of 1873, Article 9, Sections 1 and 2.

<sup>12</sup>191 Pa. 1 (1899).

<sup>13</sup>Knowles' Estate, 295 Pa. 571, 589 (1929).

<sup>14</sup>It must not be forgotten that the Supreme Court has held that distinctions based on the nearness in relationship to the decedent of the one taking the property are justifiable distinctions for inheritance tax exemptions, *Commonwealth v. Randall*, 225 Pa. 197. But the query still remains, why the exemption on relationship in tenancies by the entireties and none where the property was separately owned by the deceased spouse—the relationship being the same in both cases.

<sup>15</sup>Cf. *U. S. v. Robertson*, 183 Fed. 711 (1910), writ of certiorari denied in 220 U. S. 616 (1911).

the change in language intentional or merely accidental? That the latter is not to be presumed is axiomatic in statutory construction. If the change was intentional, did the legislature intend the latter exception—as husband and wife—to be more inclusive than the former—as tenants by the entirety? That the legislature could have intended the contrary implication—that the latter exemption was to be less inclusive—seems impossible. The fact that the language was changed in the latter exception leads to an inference that the legislature believed that husband and wife might own joint deposits other than as tenants by the entirety and wished to include such other holdings in the exemption from taxation. It has been held that husband and wife may hold real property concurrently as tenants in common.<sup>16</sup> Certainly such property is not within the exception of the act. It has been contended that the usual form of bank deposit in the names of husband and wife in which either has the right of checking does not create a tenancy by the entirety but creates an ordinary joint tenancy.<sup>17</sup> If this be true, the deposit is excepted from the act as effectively as if it were a tenancy by the entirety since it is still a deposit in the names of husband and wife. But why should a joint bank deposit with survivorship between husband and wife be excepted and not a joint tenancy with survivorship of real or other personal property? There seems to be no justification for such distinction and yet the wording of the act would result in such a distinction.

The act states, "*the right of the surviving person or persons \* \* \* shall be deemed, prima facie, a transfer of one-half,*" etc. The act might have said more properly that *the right shall be deemed to be the result of a transfer* and this transfer shall be taxable, etc.

The transfer is to be regarded as of one-half, one-third, etc. as the number of survivors shall be one or two, etc. But that it is such a transfer is merely a rebuttable presumption, the act saying "prima facie." By what facts may this presumption be rebutted and the transfer be

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<sup>16</sup>Blease v. Anderson, 241 Pa. 198 (1913).

<sup>17</sup>34 Dickinson Law Review 156 et seq. (March, 1930).

shown to have been of more or less than one-half? The act is silent on the subject. The only facts that would seem to be relevant to rebut the presumption would be the facts as to the actual, original ownership of the property.<sup>18</sup> If the survivor shows that the property was originally his and that the joint ownership form resulted from his gift, the conclusion would be that no tax is due as there is no transfer. But is there not actually as much a transfer by death in such a case as where the property was paid for equally by both? Is the presumption rebuttable by the Commonwealth? May it show that the survivor originally owned none of the property and that, therefore, the transfer is of all of the property? There is no reason to distinguish the two situations. It is inevitable that the question will give rise to much dispute in the collection of taxes. It is to be regretted that the act did not make the presumption irrebuttable.

Harold S. Irwin

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## DISTRIBUTION OF EXTRAORDINARY DIVIDENDS IN CORPORATE STOCK TRUSTS

Where a trust consists of corporate stocks an interesting question is presented as to whether the life tenant or the remainderman or both are to benefit by the extraordinary dividends. The majority rule<sup>1</sup> commonly called

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<sup>18</sup> The expression used in the federal act is a nicer one. The act imposes the tax on the whole of the property held by the deceased joint tenant or tenant by the entirety but creates an exception, with the burden on the taxpayer to show such exception, "such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth . . ." See 26 U. S. C. A. sec. 1094 (e).

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<sup>1</sup>Discussion of Pennsylvania rule up to 1928, see 33 Dickinson Law Review 31; review of Pennsylvania decisions (1927) Nirdlingers Estate 290 Pa. 457. General discussion of all rules—notes (1921) 13 A. L. R. 1004; (1923) 24 A. L. R. 9; (1926) 42 A. L. R. 448; (1927) 50 A. L. R. 375; (1928) 56 A. L. R. 1287, 1315; (1929) 59 A. L. R. 1532.