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NOTES

PENNSYLVANIA TRANSFER INHERITANCE TAX—FUTURE INTERESTS

Pennsylvania enacted its first inheritance tax law in 1826.[1] Since that date many other statutes have been passed, modifying or enlarging the framework set out in the original. The Joint State Government Commission's Task Force on Decedents' Estates Laws, which has done commendable work in synthesizing and codifying the law in a number of areas in this field, has now turned its attention to the inheritance tax and will submit its recommendations to the General Assembly when it convenes for the 1959 session. A great deal of the confusion that existed under the prior laws and which continues under the present act revolved about the imposition of the tax on the transfer of future interests. How well the proposed law will cope with this problem cannot be stated with any degree of certainty, but some indication can be obtained by analyzing its provisions in the light of former controversies.

All inheritance tax statutes enacted to date imposed the tax on the transfer of property from a decedent who died "seised or possessed" thereof. At common law seisin was defined as the possession or the right to possession of an estate of freehold.[2] Since seisin carried with it the obligation of rendering the feudal services, some ascertained person had to be seised at all times. If there was a life estate with a remainder in fee, the life tenant was seised since his estate was one of freehold. The remainderman in this situation could not be seised, because only the holders of one estate could have the seisin at any one time. If, however, there was a term of years with a remainder in fee,[3] the remainderman was seised since the term of years was not an estate of freehold.[4] In view of this, the phrase "seised or possessed" as used in the statutes seemed to describe with relative precision what property was subject to the tax. Accordingly, if the decedent owned a fee and devised it to A for life, remainder to B, the tax was due both on the transfer to A and on the transfer to B since the *decedent* was seised. But if the decedent held only a remainder interest

[1] Act of April 7, 1826, P.L. 146.

[2] Tiffany, Real Property § 20 (3d ed. 1939).

[3] Technically speaking, the "remainderman" in this situation has a freehold in possession subject to a term of years rather than a freehold in remainder expectant upon a term of years, but since the freeholder is deprived of the immediate use and occupation by reason of the term of years it is usual to describe his present freehold as a remainder.

[4] *Supra*, note 2.

which had not become possessory during his lifetime because of the existence of a prior estate of freehold, no tax was due on the transfer because the *decedent* was not seised.

The early cases [5] adhered quite consistently to this reasoning and held that a decedent who owned a future interest subject to an existing life estate was not seised. But around the turn of the century there were indications that this was changing and that the transfer of such future interests could be subject to the tax.[6] This resulted from broadening the interpretation of the language of the statutes. The initial result was the imposition of the tax on vested remainders and the later effect was the inclusion of contingent remainders within the scope of the tax.

The transfer of a vested remainder was first taxed in *Gelm's Estate*.[7] There was a devise to A for life with a remainder to B and three others nominatim. B predeceased the life tenant and his interest passed by intestacy to his heirs. The Superior Court held that B's interest was absolutely vested, *i.e.*, that it carried with it an absolute right of future enjoyment, and was therefore taxable. The opinion stated the definition of seisin to be possession or the right to immediate possession, but went on to say that the life tenant held the possession for the remainderman so that the latter was constructively possessed and, therefore, seised.

This concept had its foundation in a common law fiction which the court misapplied or at least extended beyond its original application. At common law a remainderman could be seised only when the outstanding estate was less than a freehold. Since the remainderman in such a case did not have the possession or the right to immediate possession, he didn't have seisin as it was defined at common law. Consequently, it was said that the tenant in possession held it for the remainderman so that the latter had constructive possession.[8] But where, as in *Gelm's Estate*, the present existing estate was one of freehold, the remainderman could not be seised and there was no need to find constructive possession.

In *Starr's Estate*,[9] decided in the same year as *Gelm's Estate*, the transfer of a reversion was involved. T had devised ground rents to A for life, remainder to A's issue. Since there was no gift over upon failure of issue, a reversion resulted in T's heirs, of which B was one. B predeceased A and his reversionary

[5] Townsend's Estate, 2 Del. 164 (Orphan's Court of Delaware County, 1875), *In Re* Swann's Estate, 12 Pa. County Ct. 135 (1892), Matthiessen's Estate, 17 Pa. Dist. 201 (1908), Gebhard's Estate, 20 Pa. Dist. 529 (1911), Commonwealth v. Thomas, 21 Pa. Dist. 350 (1912).
[6] The first case to give this indication was Nixon's Estate, 53 Pitts. L.J. 117 (1905).
[7] 61 Pa. Super. 228 (1915).
[8] *Supra*, note 2.
[9] 25 Pa. Dist. 55 (1915).

interest passed to his heirs. *Gelm's Estate* was cited to the court by representatives of the Commonwealth, but the court distinguished it on the ground that the interest involved in that case was absolutely vested whereas the one in this case is not, since it would have been divested by the birth of issue to A. The interest, therefore, did not carry with it an absolute right of future enjoyment, and its transfer was not subject to the tax.

These cases were decided under the 1887 inheritance tax law,[10] and according to their rulings, extended the definition of seisin from the right to demand immediate possession to an indefeasible right to demand future possession. In 1919 a new inheritance tax law was passed,[11] incorporating virtually the same language regarding seisin and possession as the 1887 statute. The legislature was apparently cognizant of the rulings in *Gelm's Estate* and *Starr's Estate* for they inserted in Section 1 (d) of the act a provision to the effect that the tax was also imposed on the transfer of an estate in expectancy which is contingent or defeasible.[12] With the definition of seisin stated in *Gelm's Estate,* Section 1 (d) of the new law, appeared to subject all future interests to the tax.

Moss's Estate,[13] in result at least, seemed to follow the new law but the court apparently did not realize it. There was a devise in trust for A for life with remainder to his surviving children with a gift over to B upon failure of surviving issue. B devised this interest to C who devised it to A, the life tenant who was advanced in age and childless. The Commonwealth contended that a tax was due and payable and cited *Gelm's Estate* as authority for the taxing of remainders. The court discussed *Gelm's Estate* and held that it didn't apply since the interest there was absolutely vested in contrast to the one involved here which was not vested at all, but contingent on A's dying without issue. This seemed to indicate that the transfer was not presently taxable, and the court definitely stated that it was not. But they went on to hold that if the remainder ever takes effect in enjoyment the tax will then be due and payable. The ruling, therefore, resulted in imposing the tax on the transfer of a contingent interest, for the Act of 1919 [14] did not obligate any transferee to pay the tax until his interest took effect in enjoyment.

The court did not mention Section 1 (d) of the Act of 1919, nor did they even indicate that they were aware of its provision. On the contrary, they ap-

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[10] Act of May 6, 1887, P.L. 79.

[11] Act of June 20, 1919 P.L. 521, PA. STAT. ANN. tit. 72, §§ 2301 et seq.

[12] The original version of this section stated that the tax was due on estates in expectancy which are "contingent or defeasibly transferred". By the Act of May 14, 1925, P.L. 717, § 1 (d) the word "defeasibly" was changed to "defeasible".

[13] 80 Pa. Super. 323 (1923).

[14] Act of June 20, 1919, P.L. 521, § 3, PA. STAT. ANN. tit. 72, § 2304.

peared, at first glance, to limit the application of the section. They indicated that not all contingent interests were subject to the tax, but only those which were transmissible. Pennsylvania law [15] holds that the only interests which are not transmissible are those where the contingency is a condition precedent such as a requirement of survival which affects the capacity of the holder to take. Hence, if an interest is not transmissible it is neither devisable nor inheritable and cannot possibly be subject to the tax.

The decision in *Moss's Estate* resulted in taxing the transfer of a contingent interest, but it was not based on the authority of Section 1 (d) of the Act of 1919. It was based on a judicial determination of what future interests should be taxable. The question now was how far the courts would be willing to extend this decision without the aid of the statute. This question seemed to be presented in bold relief in *McGlensey's Estate.*[16] In that case, A was the life beneficiary of a testamentary trust with a remainder to his issue, there being no gift over on failure of issue. B, one of the heirs of the testator, left his interest in the reversion to C who was alive when A died without issue. The facts seemed to be almost exactly in line with those in *Starr's Estate* and the court relied on this prior case in holding that the transfer from B to C was not taxable. The Commonwealth pressed *Gelm's Estate* on the court but it was held not to apply because it dealt with an absolutely vested interest. *Moss's Estate* was also cited but was distinguished on the basis that it concerned, not a reversion, but a contingent remainder. Once again there was no mention of Section 1 (d) of the Act of 1919, although it appears that it was clearly applicable. This is even more surprising in light of the fact that the provision in the section was apparently intended by the legislature to overrule the decision in *Starr's Estate.* Viewing *Moss's Estate* and *McGlensey's Estate* together, it appears that not only were the courts willing to extend the imposition of the tax without referring to the statute but they were willing to limit it as well.[17]

In 1938 this area of the law was still unsettled. The legislature had attempted to clarify it by the Act of 1919, but the decisions of the courts which in effect ignored Section 1 (d) of the act only tended to make the situation more confused. It was not until 1938 that any case involving the question reached the Pennsylvania Supreme Court. The case was *Mayer's Estate* [18] and it concerned the devise of two life estates and a vested remainder. A, the remainder-

[15] Kelso v. Dickey, 7 W. & S. 279. For a general discussion of such interests see 42 DICK. L. REV. 92.

[16] 7 Pa. D. & C. 519 (1926).

[17] A further limitation seems to appear in Buechley's Estate, 26 Pa. D. & C. 47 (1936), in which the transfer of an expectancy in the proceeds of life insurance was held not taxable. The case can, however, be distinguished on the ground that it involved a third party beneficiary to a contract of insurance and not a remainderman.

[18] 330 Pa. 39, 198 Atl. 439 (1938).

man, devised his interest to B who subsequently devised it to C before the life estates terminated. The court followed *Gelm's Estate* and held that the interest of A was absolutely vested, and that the transfers of that interest from A to B and from B to C were taxable. This decision affirmed the ruling of *Gelm's Estate,* but since the taxation of absolutely vested remainders was never seriously disputed after that decision, *Mayer's Estate* did little to clarify the law regarding taxability of contingent remainders. It should be noted, however, that *Moss's Estate* was cited with apparent approval.

The most recent case dealing with the general problem was also called *Mayer's Estate.*[19] A was the life beneficiary of a testamentary trust and had the power to consume. B was the remainderman and predeceased A, who subsequently died leaving a surplus which was paid to B's heirs. The Commonwealth relied on *Moss's Estate* and insisted that a tax was due on the transfer of the remainder to the heirs of B. The court ruled that the remainder was contingent since the life tenant could consume the whole estate, and relied on *Moss's Estate* in holding that the transfer was taxable.

Although the result of the case is in accordance with the statute, the court's ruling that the remainder was contingent seems to conflict with prior case law. Pennsylvania has followed the rule that where a life tenant is given the power to consume and the only uncertain element about the remainder is the quantum of the estate of which it will consist, the interest will be deemed vested subject to divestment if the whole estate is used up.[20] Viewing the case in this light, it appears that the tax was imposed not on a contingent remainder, but on a vested remainder, subject to a power (in the beneficiary) to consume.

It can be said definitely that the transfer of an absolutely vested remainder is subject to the tax. Although it has never been decided, this would probably be true also of an absolute reversion. Defeasible reversions, according to the case law and apparently in contradiction to Section 1 (d) of the Act of 1919, are not subject to the tax. Remainders which are not absolutely vested, however, are taxable if we recognize the remainder in the second *Mayer's Estate* as defeasible rather than contingent. Contingent remainders, according to *Moss's Estate* and Section 1 (d) of the Act of 1919, are also subject to the tax. Since executory interests are by their nature contingent, they too would probably be taxable. Although there have been no cases concerning them, possibilities of reverter and rights of entry for condition broken, under the 1919 Act, would also be taxable.

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[19] 48 Pa. D. & C. 622 (1943).

[20] *In Re* Walker's Estate, 277 Pa. 444, 121 Atl. 318 (1923).

Viewing the decisions of a quarter century of litigation on this problem, it is difficult to understand how some of the results could have been reached. The traditional meaning of seisin was discarded in *Gelm's Estate* and the definition substituted by the court in that case has apparently never been questioned. Moreover, the legislature appears to have adopted it by implication. Although the results in *Moss's Estate* and the second *Mayer's Estate* have been in conformity with the Act of 1919, the courts deciding them did not seem to be aware of Section 1 (d) or at least did not refer to it. The ruling in *McGlensey's Estate* is clearly contrary to the statute and cannot be explained except on the ground that the court ignored the statute and made its own determination of what constitutes a taxable future interest, using as authority a case decided under a prior statute.

Section 211 of the proposed law [21] uses virtually the same language regarding seisin and possession as that used in the present act. So many different meanings have been placed on this word "seisin" that it is no longer capable of definition. Consequently, it should be deleted from the act. Its retention will only continue to confuse and mislead the unwary. There is no section of the proposed law comparable to Section 1 (d) of the Act of 1919, with the result that the proposed law is less certain as to the taxability of future interests than is the present law. The courts would be free to continue determining the taxability of future interests on the basis of prior decisions, extending the tax liability or limiting it as they see fit. Of course, it can be said that they have been doing that anyway in spite of Section 1 (d) of the Act of 1919. But there is a possibility, however slim, that the courts will return to the common law definition of seisin and hold that the transfer of future interests is not taxable. Because of the increasing demand for revenue, it is highly unlikely that the legislature would want this result and would knowingly enact a statute which excludes contingent and defeasible interests from the scope of the tax.

Not only should the words "seised or possessed" be left out of the proposed law, but the legislature should express in unambiguous terms its intent on the subject of future interests. Are all such interests—vested and contingent, defeasible and indefeasible, in remainder and in reversion—to be taxed, or only some of them? It is true that the legislature attempted to express this intent in the 1919 Act, but in light of the decisions since that time, it is apparent that clearer and more forceful language must be used. If the legislature does not clarify the situation, the only foreseeable result is more needless litigation increasing uncertainty in an already confused area.

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[21] Proposed Inheritance and Estate Tax Act of 1959, A Report of the Task Force on Decedents' Estates Laws, Joint State Government Commission, June 1958.