

June 2014

## Estate Tax--Succession Tax--Power to Retroactively Tax Future Interests--Contracts (*Collidge v. Long*, 51 S. Ct. 306 (1931))

St. John's Law Review

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Mr. Justice Holmes has consistently held that there is nothing unconstitutional in double taxation and that the Fourteenth Amendment has been stretched too far in the cases above referred to. In these views, Justice Brandeis has concurred. Nevertheless, they acquiesce in the case under discussion in view of the failure of their previous views to obtain the concurrence of a majority. The failure of the dissent to reiterate its position affords the conclusion that double taxation may now definitely be stated to be beyond the power of the states under the Constitution. In vain did Justice Holmes remark:

"It seems to me to be exceeding our powers to declare such a tax a denial of due process of law. And what are the grounds? Simply, as far as I can see, that it is disagreeable to a bond owner to be taxed in two places."<sup>15</sup>

And again, in suggesting a remedy he says:

"Very probably it might be a good policy to restrict taxation to a single place and perhaps the technical conception of domicile may be the best determinant. But it seems to me that if that result is to be reached it should be reached through understanding among the states, by uniform legislation or otherwise, not by evoking a constitutional prohibition from the void of 'due process of law' when logic, tradition and authority have united to declare the right of the state to lay the now prohibited tax."<sup>16</sup>

The judicial vacillation with regard to the meaning of due process of law is now familiar learning. But the extent of federal control over state legislation which the Fourteenth Amendment has made possible, is still to be fully realized.

FRANCES MASLOW.

ESTATE TAX—SUCCESSION TAX—POWER TO RETROACTIVELY TAX FUTURE INTERESTS—CONTRACTS.—By an irrevocable trust created in 1907, settlors retained a life income during their joint lives, the principal to be paid over to their five sons on the death of the survivor of the settlors. If any of the sons should predecease the survivor then, over to those entitled to take his intestate property. In 1917, the settlors assigned their interest in the trust to their sons, all of whom survived the termination of the trust. The settlors died in 1921 and 1923 respectively, and Massachusetts sought to tax

<sup>15</sup> *Baldwin v. Missouri*, 281 U. S. 586, 50 Sup. Ct. 436 (1930); see also (1930) 5 St. John's L. Rev. 136.

<sup>16</sup> *Baldwin v. Missouri*, at p. 596; Dissenting opinion of Holmes, J.

the beneficiaries under a 1921 succession tax.<sup>1</sup> Its imposition was upheld by the Massachusetts Supreme Judicial Court. On appeal, *Held*, reversed. Statutes imposing excise tax on succession to property under trust deeds taking effect before amendment repugnant to contract and due process clauses of the Federal Constitution. *Coolidge v. Long*, 51 Sup. Ct. 306 (1931).

This decision is a significant one involving the succession tax statutes of nearly all the states in the Union.<sup>2</sup> Since trust deeds disposing a fund on the death of settlors, without power of revocation are contracts, a state is without authority, by subsequent legislation, to impair or destroy rights *vesting* thereunder.<sup>3</sup> But, to be obnoxious to the contract clause a statute must act upon the contract so as to interfere with the rights of enforcement.<sup>4</sup> The power to tax property, or a right, status, or privilege, enjoyed by virtue of a contract, is in no wise impeded by the fact of the existence of the contract, whether it antedates or follows the effective date of the taxing act, though it makes less valuable the fruits of a private contract.<sup>5</sup> Whether the interest of the beneficiaries were so completely vested is the fundamental question, asserts the Court.<sup>6</sup> When a privilege has ripened into a right it cannot be impaired<sup>7</sup> is the touchstone of the Court's argument but the method utilized begs the

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<sup>1</sup> Mass. Gen. Laws c. 65, Sec. 1: "All property within the jurisdiction of the commonwealth \* \* \* which shall pass by \* \* \* deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or moneys worth \* \* \* made or intended to take effect in possession or enjoyment after his death \* \* \* to any person, absolutely or in trust \* \* \* shall be subject to a tax."

Sec. 36: "This chapter shall apply only to property or interests therein passing or accruing upon the death of persons dying on or after May fourth, nineteen hundred and twenty."

<sup>2</sup> Twenty-one states and territories have statutes containing provisions substantially similar to those of Massachusetts involved in this appeal. New York's statute is contained in ch. 60, Sec. 249b, Consol. Laws 1930.

<sup>3</sup> *Dartmouth College v. Woodward*, 4 Wheat. 518, 624, 656, 4 L. ed. 629 (U. S. 1819); *Carondelet Canal Co. v. Louisiana*, 233 U. S. 362, 378, 34 Sup. Ct. 627, 58 L. ed. 1001 (1913); *Appleby v. City of New York*, 271 U. S. 364, 46 Sup. Ct. 569, 70 L. ed. 992 (1925). These cases do not, however, remotely bear on the questions here raised, whether a tax levied in respect of the future enjoyment of property which chanced to be acquired under an earlier contract impairs the contract.

<sup>4</sup> *Moffit v. Kelly*, 218 U. S. 402, 403, 31 Sup. Ct. 79, 54 L. ed. 1086, 30 L. R. A. (N. S.) 1179 (1910).

<sup>5</sup> *North Missouri R. R. v. Maguire*, 20 Wall. 46 22 L. ed. 287 (U. S. 1873); *Clement National Bank v. Vermont*, 231 U. S. 120, 34 Sup. Ct. 31, 58 L. ed. 147 (1913); *Lake Superior Mines v. Lord*, 271 U. S. 577, 46 Sup. Ct. 627, 70 L. ed. 1039 (1925).

<sup>6</sup> *Butler, J.* at p. 309—He decides in the affirmative since " \* \* \* upon the happening of the event specified \* \* \* the trustees were bound to hand over the property to the beneficiaries. \* \* \* The succession when the time came, did not depend upon any permission or grant of the commonwealth."

<sup>7</sup> *Matter of Pell*, 171 N. Y. 48, 63 N. E. 589, 57 L. R. A. 540, 89 A. S. R. 791 (1902); *Matter of Craig*, 97 App. Div. 289, 89 N. Y. Supp. 971 (2nd

question. It is submitted that the position of the majority is untenable on the grounds of both reason and authority. To consider a future interest of the beneficiaries completely vested under circumstances making it vested subject to complete divestiture does violence to hitherto accepted classification of future interest,<sup>8</sup> as well as contrary to most of the previous Supreme Court decisions.<sup>9</sup> Also disregarded, is a long line of Massachusetts cases<sup>10</sup> which the Court was bound to consider.<sup>11</sup> The Supreme Court has reasserted that the legal abstraction does not preclude a succession tax on the occasion of acquiring actual possession and enjoyment of the property.<sup>12</sup> For centuries, the receipt or fruition of possession or control has been the taxable occasion.<sup>13</sup> So to consider the succession tax applicable only at the inception of the future interest is as startling as it is unique. In all its decisions touching death duties whether succession or transfers<sup>14</sup> the Court has constantly disregarded the technical aspect of a transfer for its reality and substance.<sup>15</sup> The "vesting" in the instant case was clearly technical. Drawing an analogy from income tax decisions, a tax on succession after a future interest has been created, but before actual enjoyment is no more a denial of due process than a tax upon income accrued prior to the adoption of the taxing statute but received after its passage, which is clearly constitutional.<sup>16</sup> Viewed from the doctrine

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Dept., 1904), *aff'd* 181 N. Y. 551, 74 N. E. 1116 (1905); *Hunt v. Wicht*, 174 Cal. 205, 162 Pac. 639 (1917).

<sup>8</sup> R. R. Powell, *Cases in Future Interests*, (1929) p. 35 *et seq.*

<sup>9</sup> *Cohen v. Brewster*, 203 U. S. 543, 27 Sup. Ct. 174, 51 L. ed. 310, 8 Ann. Cas. 215 (1906); *Orr v. Gilman*, 183 U. S. 278, 22 Sup. Ct. 213, 46 L. ed. 196 (1901); *Chanler v. Kelsey*, 205 U. S. 466, 27 Sup. Ct. 550, 51 L. ed. 882 (1906).

<sup>10</sup> *Atty.-Gen. v. Stone*, 209 Mass. 186, 95 N. E. 395 (1911); *Magee v. Com. of Corp.*, 256 Mass. 512, 153 N. E. (1926) and cases cited.

<sup>11</sup> *Michel v. Cole*, 256 U. S. 222, 41 Sup. Ct. 467, 65 L. ed. 900 (1920); *Saltonstall v. Saltonstall*, 276 U. S. 260, 48 Sup. Ct. 225 (1927); *Stebbins v. Riley*, 268 U. S. 137, 45 Sup. Ct. 424, 69 L. ed. 884, 44 A. L. R. 1454 (1924).

<sup>12</sup> *Clapp v. Mason* 94 U. S. 589, 23 L. ed. 212 (1876); *Vanderbilt v. Erdman*, 196 U. S. 480, 492, 25 Sup. Ct. 331, 49 L. ed. 563 (1909); *Hertz v. Woodman*, 218 U. S. 205, 30 Sup. Ct. 621, 54 L. ed. 1001 (1909).

<sup>13</sup> *Digby*, *History of the Law of Real Property* (5 ed.) 40. defines feudal relief; *Gleason & Otis*, *Inheritance Taxation* (4 ed.) 243; *Nielson v. Johnson*, 279 U. S. 47, 49 Sup. Ct. 223 (1928).

<sup>14</sup> For distinction between Transfer and Succession Tax see Note (1930) 5 *St. John's L. Rev.* 147.

<sup>15</sup> *Chase Nat. Bank v. U. S.*, 278 U. S. 327, 49 Sup. Ct. 126, 73 L. ed. 405, 63 L. R. A. 338 (1928); *Tyler v. U. S.*, 281 U. S. 497, 50 Sup. Ct. 356, 74 L. ed. 991 (1929) and cases cited; see also (1930) 5 *St. John's L. Rev.* 135.

<sup>16</sup> *Brushaber v. U. P. R. R.*, 240 U. S. 1, 36 Sup. Ct. 236, 60 L. ed. 493, L. R. A. 1917 D. (1915); *Lynch v. Hornsby*, 247 U. S. 339, 38 Sup.

of whether "economic benefits shifted" to the beneficiaries at the survivor's death, the decision is without one instance of soundness.<sup>17</sup>

W. H. S.

ESTATE TAX—TRANSFER TAX—DISCRETION IN REMITTING ASSETS TO FOREIGN STATE TO PERMIT IMPOSITION OF FOREIGN TAX.—The State of Connecticut petitioned the Surrogate's Court to direct the executor of the will of the decedent Alice C. Martin, to remit certain securities of the estate to an administrator c.t.a. appointed in Connecticut, the testatrix's domicile. The purpose was to permit the assessment and collection in Connecticut of a tax upon the transfer of securities (now in N. Y. State) effected by the will. *Held*, petition denied. Return of assets to another state is not a relief to be demanded as of right but is entirely discretionary. The exercise of the discretion having been approved by the Appellate Division, may not be revised except for manifest abuse. *Matter of Martin*, 255 N. Y. 359 (1931).

In comity, courts should not aid foreign estates which seek to deprive the state of the testator's domicile of property rights.<sup>1</sup> But comity does not require the remittance of assets to the state of domicile merely in order that distribution may be there made.<sup>2</sup> In all events, the Surrogate's power, if any, to direct the transfer of assets to a foreign state rests within his discretion.<sup>3</sup> Since in the instant case compliance with the petition would result in the depletion of the assets by unnecessary and wasteful duplication of administrations and accounting, the Surrogate's discretion is clearly sound. The question of comity in the administration of taxes on intangibles made significant by recent U. S. Supreme Court decisions<sup>4</sup> was politely deferred, since no assessment or claim of any lien presently enforceable was present.

W. H. S.

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Ct. 543, 62 L. ed. 1149 (1917); *Cooper v. U. S.*, 280 U. S. 409, 50 Sup. Ct. 164, 74 L. ed. 516 (1929).

<sup>17</sup> *Rothschaeffer, Taxation of Transfer Intended to Take Effect in Possession or Enjoyment at Grantor's Death*, (1930) 14 Minn. L. Rev. 453 and 603; also *supra* note 14.

<sup>1</sup> *Loucks v. Standard Oil Co.*, 224 N. Y. 99, 120 N. E. 198 (1918).

<sup>2</sup> *Parsons v. Lyman*, 20 N. Y. 103 (1859); *Despard v. Churchill*, 53 N. Y. 192 (1873); *Higgins v. Eaton*, 202 F. 75 (C. C. A., 2nd, 1912).

<sup>3</sup> *Matter of Hughes*, 95 N. Y. 55 (1884); *People ex rel Liggett v. Fetherston*, 223 N. Y. 679, 119 N. E. 1069 (1918); *Surrogate's Court Act*, Sec. 309; C. P. A., Sec. 589.

<sup>4</sup> *Farmer's Loan and Trust Co. v. Missouri*, 280 U. S. 204, 50 Sup. Ct. 98 (1930); *Baldwin v. Missouri*, 281 U. S. 586, 50 Sup. Ct. 439 (1930); *Beidler v. S. Car. Tax. Comm.*, 282 U. S. 1, 51 Sup. Ct. 54 (1930), which overrule *Blackstone v. Miller*, 188 U. S. 189, 23 Sup. Ct. 277 (1903).