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FUTURE INTERESTS - TAXATION - EVIDENCE - PRESUMPTION AS TO THE POSSIBILITY OF A WOMAN BEARING CHILDREN

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FUTURE INTERESTS — TAXATION — EVIDENCE — PRESUMPTION AS TO THE POSSIBILITY OF A WOMAN BEARING CHILDREN — Testatrix, a resident of Massachusetts, set up a trust of her residuary estate for her two daughters, the principal to be paid to their issue, but if either should die without issue, her share to be paid to certain named charities. On probate, the remainder to charity was held to be void. The income tax law of Massachusetts imposed a three per cent levy on income accumulated for contingent future interests, but exempted from taxation certain interests of nonresidents, including vested remainders not subject to being divested. The daughters, nonresidents, contended that their interests should not be taxed as contingent and introduced evidence before the appellate tax board to show that they were unmarried and had never borne issue, that one of them was sixty-two years of age, that the other was fifty-two years old and had undergone a surgical operation which made it impossible for her to bear children. *Held*, for the purpose of the income tax statute, it is permissible to introduce medical evidence to rebut the presumption that a woman is always capable of bearing issue. *Commissioner of Corporations and Taxation v. Bullard*, (Mass. 1943) 46 N.E. (2d) 557.

Doubtless the observation of Lord Coke that "the law seeth no impossibility of having children" [1] expressed the viewpoint at early common law with respect to the capacity of a female to bear children.[2] It has been suggested that this presumption was adopted because of the uncertainty stemming from the imperfect medical knowledge of the times and because of the many not-too-well authenticated stories of births at very advanced ages which were then current.[3] Today the cases presenting the problem of continuing capacity of a woman to bear children usually fall into one of five major groups: (1) those dealing with the application of the rule against perpetuities, (2) those involving the distribution of property, (3) those where termination of a trust is sought, (4) those involving the marketability of titles to land, and (5) those dealing with the taxation of contingent future interests. For the purpose of the rule against perpetuities,[4] the courts both in England and the United States seem to regard

[1] Co. Litt. 28 a.

[2] The presumption of the possibility of issue in men has never been held to be rebutted. See note to Apgar's Case, 37 N.J. Eq. 501 (1883).

[3] United States v. Provident Trust Co., 291 U.S. 272 at 283, 54 S. Ct. 389 (1934). Coke tells of a woman in his time who bore a child at the age of 70 and refers to the fact that "as women in ancient times have had children at that age, whereunto no woman doth now attain, the law cannot adjudge that impossible which by nature was possible." Co. Litt. 40 a. The Biblical story of the birth of Isaac to Sarah at the age of 90 is also occasionally referred to as proof of the capacity of very aged women to bear issue. See Re Dougan, 139 Ga. 351, 77 S.E. 158 (1913).

[4] Lovering v. Lovering, 129 Mass. 97 (1880) [the authority of this case is somewhat weakened by the fact, disclosed in Dorr v. Lovering, 147 Mass. 530 at 532, 18 N.E. 412 (1888), that counsel conceded that the gift was too remote if afterborn children were included in the limitation over]; Blackhurst v. Johnson, (C.C.A. 8th, 1934) 72 F. (2d) 644; Gettins v. Grand Rapids Trust Co., 249 Mich. 238, 228 N.W. 703 (1930), woman 52 years old; Reasoner v. Herman, 191 Ind. 642, 134 N.E. 276 (1922), age not given; Rozell v. Rozell, 217 Mich. 324, 186 N.W. 489 (1922), age 50; Jee v. Audley, 1 Cox 324, 29 Eng. Rep. 1186 (1787), woman 70 years old; Re Dawson, 39 Ch. Div. 155 (1888), age 60; Griffiths v. Deloitte, [1926]

as conclusive the presumption that the possibility of issue continues until death. In cases where an estate or fund is to be distributed, depending upon whether the possibility of issue is extinct, the rule is not so well settled, the English courts and some of the American courts permitting evidence of the improbability of issue to be introduced for the purpose of rebutting the presumption.[5] In cases involving the termination of trusts and the marketability of titles, the courts are again divided, with perhaps a slightly greater commitment in favor of the conclusiveness of the presumption where specific performance is asked [6] than where termination of a trust is sought.[7] The last group of cases, those involving taxa-

Ch. 56 (65 years of age); annotations 48 L.R.A. (N.S.) 865 (1914); 67 A.L.R. 538 (1930); 2 SIMES, FUTURE INTERESTS, § 497 (1936). *Contra:* Cooper v. La Roche, 17 Ch. Div. 368 (1881). This case has never been followed either in England or America and is severely criticized by GRAY, RULE AGAINST PERPETUITIES, 3d ed., § 215a (1915). And see discussion of the case in Re Dawson, 39 Ch. Div. 155 at 163 (1888), to the effect that Vice Chancellor Malins was taken by surprise.

[5] The English cases are represented by Reynolds v. Reynolds, 1 Dick. 374, 21 Eng. Rep. 314 (1764), woman 62 years old; Hamilton v. Brickwood, 5 L.J.(Ch.) (N.S.) 144 (1836), 65 years old; Lyddon v. Ellison, 19 Beav. 565, 52 Eng. Rep. 470 (1854), 56 years old; Maden v. Taylor, 45 L.J. (Ch.) (N.S.) 569 (1876), 60 years of age; Re Lowman, [1895] 2 Ch. 348 (70 years old); Re Belt, 37 L.T.N.S. 272 (1877), 52 years old and medical evidence that she could not bear children. The English courts have sometimes demanded that security be given to guard against subsequent births—Reynolds v. Reynolds, supra; Leng v. Hodges, Jacob 585, 37 Eng. Rep. 971 (1822)—but the practice has been discontinued, probably because there was no record of issue born after the distribution in previous cases. Re Dawson, 39 Ch. Div. 155 (1888). Following the English view are Male v. Williams, 48 N.J. Eq. 33, 21 A. 854 (1891), woman 68 years old; Frank v. Frank, 153 Tenn. 215, 280 S.W. 1012 (1925), bond demanded of two unmarried sisters 58 and 64 years old respectively; Johnson v. Beauchamp, 5 Dana (35 Ky.) 70 (1837), woman 47 years old; Gowen's Appeal, 106 Pa. 288 (1884), woman 56 years old, but here there was a statute providing for the distribution of personalty on security being given. Representative of the American cases refusing evidence to rebut the presumption are Riley v. Riley, 92 N.J. Eq. 465, 113 A. 777 (1921), 40 years old; Hill v. Sangamon Loan & Trust Co., 295 Ill. 619, 129 N.E. 554 (1920), age 63; Hill v. Spencer, 196 Ill. 65, 63 N.E. 614 (1902), averment that the woman was beyond the age of child bearing; Weberpals v. Jenny, 300 Ill. 145, 133 N.E. 62 (1921), age 69; Towle v. Delano, 144 Mass. 95, 10 N.E. 769 (1887), ages 51 and 53. And see annotations 48 L.R.A. (N.S.) 865 at 868 (1914); 67 A.L.R. 538 at 541 (1930); also 3 SIMES, FUTURE INTERESTS, § 747 (1936).

[6] Azarch v. Smith, 222 Ky. 566, 1 S.W. (2d) 968 (1928), age 50; Aulick v. Summers, 186 Ky. 810, 217 S.W. 1024 (1920), age 63; Williams v. J. C. Armiger & Bro., 129 Md. 222, 98 A. 542 (1916), 68 years old; Westhafer v. Koons, 144 Pa. 26, 22 A. 885 (1891), 56 years old; List v. Rodney, 83 Pa. 483 (1877), age 75. Holding that the presumption is not conclusive are: Bacot v. Fessenden, 130 App. Div. 819, 115 N.Y.S. 698 (1909) age 59; Whitney v. Groo, 40 App. D.C. 496 (1913), 70 years old; Landers v. People's Building & Loan Assn., 190 Ark. 1072, 81 S.W. (2d) 917 (1935), agreement of counsel that the woman was past the age of child-bearing.

[7] Refusing termination are Byers v. Beddow, 106 Fla. 166, 142 So. 894 (1932), medical testimony that the woman could not bear children; May v. Bank of Hardinsburg & Trust Co., 150 Ky. 136, 150 S.W. 12 (1912), age 75; Brown v. Owsley, 198

tion, is as yet rather small, but, with one exception,[8] the introduction of evidence to show that the possibility of issue is extinct has been permitted.[9] The courts seem to have felt that taxation is an eminently practical matter and that an interest should not be taxed as contingent if there is actual evidence that it cannot be divested.[10] There has as yet been no tendency to extend the liberal principles of the tax cases to a general principle covering all litigation,[11] but it would seem that the reasons [12] for refusing such evidence in cases other than those involving the devolution of a title [13] are not too well founded. In the

Ky. 344, 248 S.W. 889 (1923), 60 years old; Re Richards Trust Estate, 97 Md. 608, 55 A. 384 (1903), age 53. See 3 SCOTT, TRUSTS, § 340.1 (1939).

Permitting termination where no objection is raised to the evidence are Magrath v. Magrath, 184 S.C. 243, 192 S.E. 273 (1937), 60 years old; Whitney v. Groo, 40 App. D.C. 496 (1913), 70 years old; and cases cited in 3 SCOTT, TRUSTS, § 340.1, note 4 (1939). The English courts are again more liberal in admitting such evidence. See cases cited in 67 A.L.R. 538 at 549 (1930).

[8] Farrington v. Commissioner of Internal Revenue, (C.C.A. 1st, 1929) 30 F. (2d) 915, cert. denied 279 U.S. 873, 49 S. Ct. 513 (1929). The authority of this case is considerably weakened, if not obliterated, by the fact that it was decided prior to United States v. Provident Trust Co., post, note 9.

[9] United States v. Provident Trust Co., 291 U.S. 272, 54 S. Ct. 389 (1934), age 63 and surgical operation; City Bank Farmers' Trust Co. v. United States, (C.C.A. 2d, 1935) 74 F. (2d) 692, 59 years old. Cf. Humes v. United States, 276 U.S. 487, 49 S. Ct. 347 (1927). See note in 43 YALE L. J. 1193 (1934).

[10] "Tax laws are to be construed as imposing taxes with respect to matters of substance and not with respect to mere matters of form." Commissioner of Corporations and Taxation v. Second National Bank of Boston, 308 Mass. 1 at 6, 30 N.E. (2d) 889 (1941). It would seem that more weight is given to evidence of a surgical operation which makes birth of issue impossible than to advanced age or infirmity. "The important point to be emphasized is that the question arises with respect to a surgical operation, the inevitably destructive effect of which upon the power of procreation is established by tangible and irrefutable proof." United States v. Provident Trust Co., 291 U.S. 272 at 285, 54 S. Ct. 389 (1934).

[11] The American Law Institute has taken the position that, in the cases discussed herein, other than those involving the rule against perpetuities, the presumption can be rebutted "by relevant evidence as to such person and by past experience concerning births to persons of like age and physical condition." 3 PROPERTY RESTATEMENT, § 274 (1940).

[12] Apart from the argument that one can never be certain as to the *possibility* of having issue, the reasons given for this view are that admission of such evidence is an unwarranted and immodest inquiry into intimate and personal affairs and that to permit proof of incapacity will stimulate surgical operations to create impotence. In reply, it is said that matters of equal indelicacy are commonly proved in court and that the risk of women submitting themselves to such operations simply to evade a tax law is indeed slight. The court in the principal case went further and said that liability to taxation was based on the fact of capacity and that such operations would not constitute an evasion of tax law. 46 N.E. (2d) at 570. Another reason sometimes given for refusing admission of evidence of incapacity is that such a policy makes for uncertainty in the law and thereby increases litigation.

[13] It is suggested that a line should be drawn refusing such evidence only where the devolution of a title is involved, that there the question should be the possibility rather than the probability of issue. 3 SIMES, FUTURE INTERESTS, § 747 (1936). In

absence of important policy considerations,[14] there would seem to be little justification for an unqualified refusal to take cognizance of the facts which have been exposed since Coke's day by an advance in medical knowledge and an increase in statistical data.[15]

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answer, it may be argued that it is quite as feasible to give after-born children their share in these cases as in other instances; e.g., where specific performance is decreed on the assumption that the title is marketable.

[14] In United States v. Provident Trust Co., 291 U.S. 272 at 285, 54 S. Ct. 389 (1934), the court clearly stated that there exists no policy which called for the strict application of the presumption to a particular physical condition.

[15] Statistics compiled by the United States Department of Commerce and referred to in City Bank Farmers' Trust Co. v. United States, (C.C.A. 2d, 1935) 74 F. (2d) 692 at 693,694 show that of 20,389,873 births between 1923 and 1932, not one was to a woman 55 years old or over and that the chance of a woman between 50 and 54 years of age bearing children is .0001.

The principal case has also been noted in 43 COL. L. REV. 407 (1943). For other law review discussion of the problem, see 18 BOST. UNIV. L. REV. 199 (1938); 49 JURID. REV. 75 (1937); 186 L. T. 311 (1938); 2 MO. L. REV. 100 (1937); 11 TEMP. L. Q. 259 (1937); 23 VA. L. REV. 214 (1936); 43 YALE L. J. 1193 (1934).