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## Taxation--Inheritance Tax--Interest in Joint Tenancy Passing by Survivorship

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happen to think is the best interest of the child. It is socially dangerous to deny the custody of a child to a parent who is suited to the trust, and precedent will not justify the action of a court which so interferes with natural relationships, unless the parent has voluntarily and expressly parted with his rights, and cannot be heard to complain.

"It is one of the cardinal principles of nature and of law that . . . the father . . . if able to support the child in his own style of life, and of good moral character, cannot, without the most shocking injustice, be deprived of the privilege by anyone whatever. . . . It is not enough to consider the interest of the child alone."<sup>24</sup>

The above quotation, substituting only the word "parent" for "father", expresses the law in Kentucky as defined by the better reasoned cases and by statute. It is earnestly submitted that the distinction between "contract" and "non-contract" cases should be rigidly maintained, and the rule that the welfare of the infant is the controlling consideration should be applied only in those cases in which the parent has contracted away his rights, and is seeking to regain custody of his child despite the contract.

Jo M. FERGUSON

#### TAXATION—INHERITANCE TAX—INTEREST IN JOINT TENANCY PASSING BY SURVIVORSHIP

Plaintiff and decedent held certain stocks, bonds, and real estate in joint tenancy with right of survivorship. Plaintiff paid under protest an inheritance tax on one-half of the joint estate and now seeks to have the State Auditor issue a warrant to him for the amount so paid. *Held*: The tax was valid. Thus, the statute<sup>1</sup> providing that the property held by joint tenants and payable to the survivor upon the death of one should be deemed a transfer of one half in the same manner as tho held by them as tenants in common and bequeathed or devised to the surviving tenant by the deceased tenant by will was held constitutional. *DuBois Admr. v. Shannon*, 275 Ky. 516, 122 S. W. (2d) 103 (1938).

The principal contention of the plaintiff was that the law only covered transfers by devise and intestate succession, and, since this was a transfer by survivorship, it did not come within the statute.<sup>2</sup> But the inheritance tax law expressly covers the situation presented in this case.<sup>3</sup> Even if it did not, the transfer of an interest in a joint estate might be taxable as a "deed, grant, bargain, sale or gift. . . . intended to take effect in possession or enjoyment at or after the death of the grantor or donor".<sup>4</sup> The court did not mention this section, but it seems that it could have been cited to meet plaintiff's contention.

<sup>24</sup> *Verser v. Ford et al.*, 37 Ark. 27, 29 (1881).

<sup>1</sup> Carroll's Kentucky Statutes, 1930 Edition, Sec. 4281a-1, subd. 4. Same section in 1936 edition, 4281a-15.

<sup>2</sup> 275 Ky. 516, 518, 122 S. W. (2d) 103, 104 (1938).

<sup>3</sup> *Supra* note 1.

<sup>4</sup> Kentucky Statutes, 1930 Edition, Sec. 4281a-1, subd. 1.

Such a provision has been held sufficient basis for the imposition of a tax upon the transfer at death of an interest in a joint estate.<sup>5</sup>

There are three bases for the holding in this case. The first is that even tho the property passes by survivorship, under the agreement between the parties, there is really a shifting of economic benefit at the death of one of the parties.<sup>6</sup> This is a reason generally given on this point,<sup>7</sup> but it is hardly an answer to plaintiff's contention. The court might also have said that since the legislature can abolish altogether the incident of survivorship in joint estates,<sup>8</sup> it can certainly abolish it for the purpose of taxation. Another basis for the decision is the broad scope of the power of taxation.<sup>9</sup> The legislature can tax almost any kind of transfer,<sup>10</sup> particularly transfers to take effect after death.<sup>11</sup> A third basis is the necessity of such a provision as this to prevent evasion.<sup>12</sup> This is an excellent reason for this particular case, but it would not be at all applicable if the joint tenancy were created before the passage of any act taxing it. Since the statute now in force does not contain the provision that was in the former one (the one under which this case was decided) limiting the taxation to property rights vested after the passage of the act,<sup>13</sup> and under the existing statute it is possible for estates created before the passage of any act to be taxed, the court might very well have omitted this as a reason. Instead, it is the only reason which it takes the trouble to give in its own words.

The decision is in line with decisions in other states<sup>14</sup> and in the federal courts, which have gone much further in upholding a more com-

<sup>5</sup> *Re Orvis*, 223 N. Y. 1, 119 N. E. 88, 3 A. L. R. 1636 (1918); *contra*, *In re Kurnsey's Estate*, 177 Calif. 211, 170 Pac. 402 (1918).

<sup>6</sup> 275 Ky. 516, 522-3, 122 S. W. (2d) 103, 106.

<sup>7</sup> *Tyler v. U. S.* 497, 503 (1930); 80 Pa. L. Rev. 921, 922 (1932); 44 Harv. L. Rev. 130, 131 (1930).

<sup>8</sup> Kentucky Statutes, Sec. 2348.

<sup>9</sup> Cooley, *The Law of Taxation* (1924, 4th ed.) Sec. 57.

<sup>10</sup> "right and authority. . . to tax any transfer of property that it deemed advisable to tax. . ." 275 Ky. 516, 523, 122 S. W. (2d) 103, 106.

<sup>11</sup> 26 R. C. L. Sec. 173, cited in opinion in principal case.

<sup>12</sup> "Any other holding with respect to the taxability of such interests, not held as natural rights, would serve to defeat the inheritance and succession tax law and would clearly open up an avenue of escape from the payment of a tax imposed upon property passing by will or descent through conveying property through joint tenancies, whereby the interest of the dying joint tenant would be passed to the survivor by operation of law and not by will or intestate succession." 275 Ky. 516, 526, 122 S. W. (2d) 103, 108.

<sup>13</sup> Last phrase in Kentucky Statutes Sec. 4281a-1, subd. 1 is not included in present statute which was the basis for the decision in *Commonwealth v. Merritt's Exr.*, 210 Ky. 779, 276 S. W. 802 (1925).

<sup>14</sup> *Marble v. Jackson*, 245 Mass. 504, 139 N. E. 442 (1923); *In re Dolbeer's Estate*, 226 N. Y. 623, 123 N. E. 381 (1919); *Tax Commission of Ohio v. Hutchison*, 120 Ohio St. 361, 166 N. E. 352 (1929); *In re Ray's Will*, 188 Wisc. 180, 205 N. W. 917 (1925); but see *Blodgett v. Union New Haven Trust Co.*, 11 Conn. 165, 149 Atl. 790 (1930) (estate not taxable where right of survivorship created separately); *In re Haggerty's Estate*, 311 Pa. 503, 166 Atl. 580 (1933) (not taxable because of wording of statute—"shall be deemed, prima facie, a transfer . . .").

plete and more complicated statute.<sup>15</sup> The result is a desirable one. Taxation is a practical matter, and the common law theory that a right is extinguished and nothing transferred should not prevail when the actual result is that the survivor has an exclusive ownership where formerly he shared it.

BETTIE GILBERT

CONSTITUTIONAL LAW—EXERCISE OF THE GOVERNOR'S VETO  
—NECESSITY OF AN ACCOMPANYING MESSAGE.—

ARNETT v. MEREDITH.

The Kentucky Legislature passed an act<sup>1</sup> which was sent to the governor for his approval. He wrote on the bill these words: "*This bill is hereby vetoed.*" The attorney-general, believing the governor had not legally exercised his right of veto, demanded a copy of the act from the secretary of state. The request was refused and a declaratory judgment action was filed to compel delivery of the act to the public printer. The lower court sustained the plaintiff's petition, holding that the governor had failed to legally exercise his veto power in not assigning his reasons for vetoing the bill. Defendant appealed. *Held*: Judgment affirmed. A veto message of the governor is not complete, therefore

<sup>15</sup> Tyler v. U. S., 281 U. S. 497 (1930) (tenancy by entirety created after passage of act taxable); Phillips v. Dime Trust & S. D. Co., 284 U. S. 160 (1931), noted 32 Col. L. Rev. 148 (1932) (tenancy by entirety created after passage of first act but before existing one taxable); Gwinn v. Commissioner of Int. Rev., 287 U. S. 224 (1932), noted 21 Calif. L. Rev. 286 (1933) (joint estate created before passage of any act taxable); Griswald v. Helvering, 290 U. S. 56 (1933), noted 32 Mich. L. Rev. 868 (1934) (joint estate created before passage of act taxable); U. S. v. Robertson, 183 Fed. 711 (C. C. A. 7th, 1910) (tenancy by entirety created after passage of act taxable); Third Nat. Bank & Trust Co. v. White, 45 F. (2d) 911 (1930), *aff'd* 287 U. S. 577 (1932), noted 46 Harv. L. Rev. 718 (1933) (entire value of property held in tenancy by entirety created before passage of any act taxable); O'Shaughnessy v. Commissioner of Int. Rev., 60 F. (2d) 235 (1932, C. C. A. 6th) (entire estate created after passage of first act but before existing one taxable. This case is interesting in connection with the principal case because it arose in Ky. and involves our statutes on joint tenancy); White v. Commissioner of Int. Rev., 64 F. (2d) 119 (C. C. A. 8th, 1933) (joint estate created before passage of act taxable); Putnam v. Burnett, 63 F. (2d) 457 (Ct. of App., D. of C., 1933) (tenancy by entirety created before passage of any act taxable); Robinson v. Commissioner of Int. Rev., 63 F. (2d) 652 (C. C. A. 6th, 1933) (same); Clarke v. Welch, 7 F. Supp. 595 (S. D. Calif., 1933) (entire value of joint estate taxable); Richardson v. Helvering, 80 F. (2d) 548 (Ct. of App., D. of C., 1935) (amount contributed by survivor determined of amount taxable); Dimock v. Corwin, 19 F. Supp. 56 (F. D. N. Y., 1937) (entire value of joint estate taxable); Foster v. Commissioner of Int. Rev., 90 F. (2d) 487 (C. C. A. 9th, 1937) (same); Sheets v. Commissioner of Int. Rev., 95 F. (2d) 727 (C. C. A. 8th, 1938) (no consideration given so whole joint estate taxable).

<sup>1</sup> Acts, 1938, c. 275, amending and re-enacting Section 551 of Ky. Stat. (Carroll, 1936), which is a part of the chapter dealing with private corporations.

For text of the statute as amended, see Baldwin's Ky. Stat. Supp., May, 1938, c. 32, Section 551.