where the new promise was given in the course of a business. See *Harris v. Lucas*, 48 F. (2d) 187 (C.C.A. 5th 1931); 1 Williston, Contracts (1921), § 196.

Although the payment of a debt to be deductible must be an expense or loss connected with a business, the payment of interest need not be on a business debt to be deductible. Rev. Act (1926), § 214 (a) (2), 44 Stat. 26, 26 U.S.C.A. § 955 (a) (2) (1928). As a result, at least the payment of interest in the present case would be deductible if an indebtedness exists, whether in connection with carrying on a business or not.

On the other hand, a new promise made after a *voluntary* composition agreement does not create an enforceable obligation, *Grant v. Porter*, 63 N.H. 229 (1884); *Depuy v. Swart*, 3 Wend. (N.Y.) 136, 20 Am. Dec. 673 (1829); *Taylor v. Hotchkiss*, 81 App. Div. 470, 80 N.Y.S. 1042 (1903); 1 Williston, Contracts (1921), § 159.

The federal appellate courts are stricter than the Board of Tax Appeals in applying the requirement that the loss must have occurred in a transaction entered into for profit before it is deductible. *Goldsborough v. Burnet*, 46 F.(2d) 432 (C.C.A. 4th 1931). The instant case is the latest example of this tendency, which seems the better legal view since the Revenue Act of 1926 requires explicitly that losses to be deductible must at least have occurred in a transaction entered into for profit. Furthermore it is generally accepted today that the doctrine of moral consideration should have no place in our law. *Schnell v. Nell*, 17 Ind. 29 (1861); *Eastwood v. Kenyon*, 11 A. & E. 438 (1840); *Rann v. Hughes*, 7 T.R. 350 (a) (1778); but cf. Ga. Civil Code (1926), § 2741, restricted, however, in *Davis v. Morgan*, 117 Ga. 504, 43 S.E. 732 (1903).

KARL HUBER

Taxation—Presumption of Capacity to Have Issue as Affecting Exemption from Succession Tax—[Federal].—Testator devised property in trust to pay the income to his daughter for life, and on her death to transfer the principal to her lawful issue; if she should have no such issue, then to distribute the property among certain charitable institutions, bequests to which were exempt under the Revenue Act of 1918, § 403(a) (3), 40 Stat. 1098. When testator died, his daughter was fifty years of age, childless, and had undergone an operation which made it impossible for her to have issue; however, in computing the estate tax the total value of the principal amount bequeathed was included, since the remainder to the charities was contingent upon the daughter's death without issue. In a suit to recover the additional tax paid, *held*, the court need not conclusively presume that the daughter was capable of having issue, and the tax should be refunded. *United States v. Provident Trust Co.*, 54 Sup. Ct. 389 (1934).

The court expressly limited its holding to the field of taxation, and emphasized the fact that the sole question before it was the value of the interest of the charities which was exempt from taxation. The decision may have been influenced by the fact that the life tenant had died before the present suit was brought. See opinion of court below, *Provident Trust Co. v. United States*, 2 F. Supp. 472 (1933). An earlier federal decision, on similar facts, had declined to consider evidence as to incapacity to have issue. *Farrington v. Commissioner of Internal Revenue*, 30 F.(2d) 915 (C.C.A. 1st 1929), cert. den. 279 U.S. 873, 49 Sup. Ct. 513, 73 L.Ed. 1008 (1929).

The presumption that the capacity to have issue continues throughout a person's life appears most frequently today in cases involving four classes of problems: (1) the application of the rule against perpetuities; (2) the time at which a trust may be ter-

minated; (3) the distribution of property to members of a class; and (4) the marketability of title. That the presumption is conclusive in cases of the first class seems unquestioned, either in the United States or in England. *Taylor v. Crosson*, 11 Del. Ch. 145, 98 Atl. 375 (1916); *Reasoner v. Herman*, 191 Ind. 642, 134 N.E. 276 (1922); *Jee v. Audley*, 1 Cox C.C. 324 (1787); see *Ward v. Van der Loeff*, [1924] A.C. 653, 664; Gray, Rule Against Perpetuities (3d ed. 1915), §§ 215, 215a; 32 Mich. L. Rev. 414, 702 (1934); 48 L.R.A. (N.S.) 865; 67 A.L.R. 538.

In the other three types of cases, the English courts have held the presumption may be rebutted by proof of advanced age or evidence of sterility. *Urquhart v. Urquhart*, 24 Scot. L. R. 98 (1886) (trust termination); *In re White*, [1901] 1 Ch. 570 (trust termination); *Leng v. Hodges*, Jac. 585 (1822) (distribution of property); *In re Belt*, 37 L.T.N.S. 272 (1878) (distribution of property); *In re Wide Street's Commissioners*, 7 Ir. Eq. Rep. 484 (1845) (distribution of property); *Browne v. Warnock*, L.R. 7 Ir. Eq. 3 (1880) (marketable title); but cf. *Conduit v. Soane*, 24 L.T.N.S. 656 (1871) (trust termination); see 81 Univ. Pa. L. Rev. 879 (1933). Thus in the cases in which a court permits distribution of property the former practice of requiring security for a return of the property in the event that there should be issue has been abandoned, perhaps because that contingency has seemingly never materialized. See *In re Dawson*, 39 Ch. Div. 155, 165 (1888); cf. *Mackenzie v. King*, 17 L.J.Ch.N.S. 448 (1848). On the other hand, the possibility of issue will not be treated as extinct if such a result will deprive a living person of a possible property interest. *In re Hocking*, [1898] 2 Ch. 567. No definite age has been fixed beyond which the court will consider the presumption rebuttable; but in *Groves v. Groves*, 9 L.T.N.S. 533 (1864), where the woman was forty-nine years of age and had been childless for twenty years, the court refused distribution on the ground that the precedents were confined to cases involving ages above fifty.

The American courts have apparently refused to admit evidence of incapacity in the trust termination cases. *Fletcher v. Los Angeles Trust & Savings Bank*, 182 Cal. 177, 187 Pac. 425 (1920); *May v. Bank of Hardinsburg*, 150 Ky. 136, 150 S.W. 12 (1912). In the other two types of cases the courts in this country have split as to the nature of the presumption. The division of authority is almost even in the cases of distribution of property. Cf. *Hill v. Sangamon Loan & Trust Co.*, 295 Ill. 619, 129 N.E. 554 (1920) and *Riley v. Riley*, 92 N.J.Eq. 465, 113 Atl. 777 (1921) (presumption irrebuttable) with *Male v. Williams*, 48 N.J.Eq. 33, 21 Atl. 854 (1891) and *Frank v. Frank*, 153 Tenn. 215, 280 S.W. 1012 (1925) (presumption rebuttable). In cases of marketable title, the weight of authority seemingly follows the rule that the presumption of capacity to have issue is irrebuttable. *Azarch v. Smith*, 222 Ky. 566, 1 S.W. (2d) 968 (1928); *Williams v. Armiger*, 129 Md. 222, 98 Atl. 542 (1916); *List v. Rodney*, 83 Pa. 483 (1877); *contra*, *Whitney v. Groo*, 40 App. D. C. 496 (1913).

The reason most often given for rejecting evidence as to incapacity to have issue is the necessity for a definite, clear-cut rule, and the difficulty of determining the exact age at which capacity to bear children ceases. See *May v. Bank of Hardinsburg*, 150 Ky. 136, 150 S.W. 12 (1912). As to rebuttal by evidence other than that of age, it is urged that indelicate situations might often arise; and, perhaps, operations to effect sterility might be encouraged. Neither argument seems conclusive; see 47 Harv. L. Rev. 1061 (1934).

The rule is too firmly fixed in the cases on perpetuities to admit of any hope of change by judicial decision. Its use in the trust cases is perhaps least objectionable,

since premature termination of trusts is not generally favored. In the other classes of cases the rule is not as firmly established, and it seems possible the American courts may adopt a more realistic attitude. The rarity of the reported instances of the birth of children later in life [see note to *Miller v. Macomb*, 26 Wend. (N.Y.) 229 (1841)], and the experience of the English courts indicate how slight the danger of error would be in acting on evidence of age alone. Other evidence of equal probative value should be equally admissible. As a result, it is to be hoped that the decision in the principal case will be extended generally to other types of evidence and other situations. See 23 Col. L. Rev. 50 (1923).

SAMUEL EISENBERG

Taxation—Retroactive Estate Tax—[New York].—Decedent and his surviving wife were tenants by the entirety of certain real property, toward the acquisition of which the wife had contributed nothing, and which had been acquired before New York enacted an estate tax computed on the full value of property owned by tenants by the entirety. *Held, per curiam*, the tax levied on the tenancy by the entirety at decedent's death is constitutional. *In re Weiden's Estate*, 263 N.Y. 107, 188 N.E. 270 (1933).

It was contended by the executors of decedent's estate that the tax was unconstitutional as a direct tax on property which was not apportioned according to the federal census. U.S. Const., Art. I, § 9, ¶ 4; *United States v. Blount*, 273 U.S. 769, 47 Sup. Ct. 20, 71 L. Ed. 883 (1926); *Appeal of Root*, 5 B.T.A. 696 (1926); *In re Vandergrift's Estate*, 161 Atl. 898 (Pa. Super. 1932); 13 B. U. L. Rev. 141 (1933). This contention is based on the theory that the exclusive estate in the survivor of a tenant by the entirety is created at the time of the grant and not at the date of the other tenant's death; hence no interest is transferred to which an estate tax may attach at death.

Although it may be correct that no technical interest in a tenancy by the entirety is transferred at the death of one tenant, a very substantial economic interest does come into existence at that time. Neither of the tenants has exclusive control of the property as long as the other lives and neither can convey the estate without the other joining. *Ades v. Coplin*, 132 Md. 66, 103 Atl. 94 (1918); *Gasner v. Pierce*, 286 Pa. 529, 134 Atl. 494 (1926); 2 Thompson, Real Property (1924), § 748; 1 Tiffany, Real Property (2d ed. 1920), § 194. At the death of one spouse, the full and exclusive enjoyment, use, possession and control passes to the survivor, and a mere possibility of obtaining the fee becomes absolute ownership. *Tyler v. United States*, 33 F. (2d) 724 (C.C.A. 4th 1929), affd. 281 U.S. 497, 50 Sup. Ct. 356, 74 L. Ed. 991 (1930); cf. *Saltonstall v. Saltonstall*, 276 U.S. 260, 48 Sup. Ct. 225, 72 L. Ed. 565 (1927); *Reinecke v. Northern Trust Co.*, 278 U.S. 339, 49 Sup. Ct. 123, 73 L. Ed. 410 (1928); 10 N.Y. U. L. Quar. 414 (1933); 22 Cal. L. Rev. 277 (1934).

New York has found no difficulty in holding that the interest of a tenant by the entirety is taxable at the death of one spouse where the tax was enacted prior to the creation of the estate. *Matter of Dunn*, 236 N.Y. 461, 141 N.E. 915 (1923); *In re Chase's Estate*, 112 Misc. 684, 183 N.Y.S. 638 (1920); *In re Farraud*, 126 Misc. 590, 241 N.Y.S. 793 (1926). Prior to *In re Lyon's Estate*, 233 N.Y. 208, 135 N.E. 247 (1922), the New York courts had upheld the validity of a tax on one-half the value of the property of a tenancy by the entirety where the estate had been created prior to the Tax Law of 1916, but the tenant had died after its enactment. *Matter of Moebus*, 178 App. Div.