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).

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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.

709, 165 N.Y.S. 887 (1917); *In re Beresford's Estate*, 183 App. Div. 947, 170 N.Y.S. 1068 (1918); *In re Greim's Estate*, 183 N.Y.S. 149 (Sur. Ct. 1920); 26 A.L.R. 1461, 1466. But New York refused to impose a tax on the surviving tenant's right to exclusive possession at the death of the other spouse where the tax was passed after the tenancy by the entirety had been created. *Matter of Dunn*, 236 N.Y. 461, 141 N.E. 915 (1923); *In re Carnegie's Estate*, 203 App. Div. 91, 196 N.Y.S. 502 (1922), affd. 236 N.Y. 516, 142 N.E. 265 (1922). The courts held such taxes unconstitutional as an arbitrary attempt to diminish the value of an estate fully vested in enjoyment. The court drew a sharp distinction between tenancies by the entirety and joint tenancies, however, upholding retroactive taxes on the latter. *Matter of McKelway*, 221 N.Y. 15, 116 N.E. 348 (1917). By the decision in the principal case the New York court has extended the retroactive scope of the estate tax, without referring to the former decisions thereon. The decision is based on the federal court's interpretation of the federal estate tax, 43 Stat. 304 (1926), 26 U.S.C.A. § 1094 (e) (1928), which New York substantially adopted in place of its former inheritance tax. N.Y. Laws (1930), c. 710, N.Y. Cahill's Cons. Laws (1931 Supp.), c. 61, § 249 r. The principal case, however, has gone beyond the position adopted by the federal courts. In *Tyler v. United States*, 281 U.S. 497, 50 Sup. Ct. 356, 74 L. Ed. 991 (1929), 18 Cal. L. Rev. 302 (1930), 16 Corn. L. Quar. 114 (1930), the estate apparently was created after the enactment of the tax, although the language adopted by the court is somewhat broader. The objection to a retroactive tax in *Phillips v. Dime Trust & Safe Deposit Co.*, 284 U.S. 160, 52 Sup. Ct. 46, 76 L. Ed. 68 (1931) was held untenable because the law which imposed the tax merely increased the rate of a prior tax which was in operation at the time the tenancy by the entirety was created. 11 Ore. L. Rev. 213 (1932); 6 St. Johns L. Rev. 418 (1932). In *Milliken v. United States*, 283 U.S. 15, 51 Sup. Ct. 324, 75 L. Ed. 809 (1931), the court held that the creator of the estate by the entirety is deemed to be aware that the rate of an already existing tax may be raised. In *Third National Bank & Trust Co. v. White*, 287 U.S. 577, 53 Sup. Ct. 290, 77 L. Ed. 505 (1932) the court *per curiam* held valid a retroactive tax on the interest of a tenant by the entirety, citing *Gwinn v. Commissioner of Internal Revenue*, 287 U.S. 224, 53 Sup. Ct. 157, 77 L. Ed. 270 (1932), where the court held a retroactive tax on a joint tenancy was valid because the joint tenancy could be terminated by the voluntary act of either tenant. A tenancy by the entirety, however, may not be terminated by voluntary act of either party. It is significant that the court in the present case cited both the *White* and *Gwinn* cases without comment, although it had previously differentiated joint tenancies and tenancies by the entirety.

The position which the New York court has taken, however, seems to be a reasonable furtherance of the policy of the legislature to tax arrangements made for the purpose of avoiding taxes on testamentary dispositions. Since the Married Woman's Property Acts, either spouse may convey to both spouses an estate by the entirety without going through the formality of a conveyance through a third person, thus conveniently accomplishing a testamentary disposition of property without paying an inheritance or estate tax. *In re Klatzl's Estate*, 216 N.Y. 83, 110 N.E. 181 (1915); *In re Vogelsang's Estate*, 122 Misc. 599, 203 N.Y.S. 364 (1924); *Boehringer v. Schmid*, 133 Misc. 236, 232 N.Y.S. 360 (1928).

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