

would not apply in such a case because the defendant, by his own act, waives any objection that he might have made to the qualification of the magistrate that may exist because of pecuniary interest to hear and determine the cause. The court having both jurisdiction of the subject matter and of the person of the defendant could therefore render final judgment.

3. The subject matter involved in your third inquiry involves the private rights of litigants in civil actions and is not a matter in which the state is directly or indirectly interested and I, therefore, do not deem it proper here to express my opinion thereon.

4. In the last paragraph of your letter you list a number of offenses over which, as provided in section 13423, General Code, a justice of the peace, police judge or mayor has final jurisdiction within their respective counties.

In this connection your attention is directed to Opinion No. 392, dated April 27, 1927, Opinions, Attorney General, 1927, which in substance states:

“Justices of the peace have final jurisdiction in cases involving those classes of offenses enumerated in Section 13423, General Code, except where a felony is charged. In these classes of cases if no security for costs be demanded from complainant under the provisions of Section 13499, General Code, and the defendant raises seasonable objection to the qualification of the justice of the peace because of his direct, substantial, pecuniary interest in the outcome, such objection should be sustained and the complaint withdrawn and filed in a proper court where such disqualification does not exist. If, as provided in Section 13499, General Code, the costs are secured, no such interest exists and therefore, an objection may be properly overruled and final judgment rendered.”

Respectfully,

EDWARD C. TURNER,

Attorney General.

578.

INHERITANCE TAXATION—HOUSE BILL NUMBER 136 HAS NO APPLICATION TO SUCCESSIONS TO ESTATE OF DECEDENTS DYING PRIOR TO EFFECTIVE DATE OF SAID BILL.

SYLLABUS:

House Bill No. 136 providing for the reciprocity in inheritance taxation, passed March 22, 1927, and effective June 30, 1927, has no application to successions to estates of decedents dying prior to the effective date of such act.

COLUMBUS, OHIO, June 6, 1927.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your recent communication which reads:

“Enclosed we send you a copy of the act providing for reciprocity in inheritance taxation as passed at the recent session of the General Assembly and to become effective June 30, 1927.

Some doubt exists in the mind of the commission as to the extent to which this act will apply to cases where the death will have taken place prior

to the date just given. Will you therefore advise us in reply to the following:

In case of the death prior to June 30th of a transferor resident of a state entitled to the benefits of the act, can this commission require inheritance tax to be assessed and paid on transfers of intangibles heretofore taxable in Ohio.

1. If no inheritance petition is filed in any court in this state until after June 30th?

2. If a petition has been filed but no adjudication made thereon until after that date?

3. If a petition has been filed and adjudication had thereon but no tax paid?"

Original supplemental Section 5334-1 reads as follows:

"When assessing tax upon a succession passing from a nonresident decedent the court shall determine the value of the aggregate succession, which shall be the fair market value of all the property, real or personal, whether within or without the state, passing to the successor from the estate of the decedent after making the deductions computed as though the decedent had been a resident of this state and all of his property were located in this state. It shall further determine the value of the Ohio succession, which shall be the fair market value of that part of the aggregate succession which passes to the successor in property subject to the inheritance tax under this chapter, after allowing the deductions aforesaid. Out of the Ohio succession so determined the successor shall be allowed such a proportion of the exemption to which he would be entitled under Section 5334 as is represented by the ratio borne by the value of his Ohio succession to the value of his aggregate succession. Tax shall then be assessed on the balance of the Ohio succession remaining at the rates and in the method provided for by Section 5335 of the General Code."

The only change in this section as amended is that the word "a" following the word "such" and before the word "proportion" in the sentence reading:

"Out of the Ohio succession so determined, the successor shall be allowed such a proportion of the exemption to which he would be entitled under section 5334 as is represented by the ratio borne by the value of his Ohio succession to the value of his aggregate succession"

is omitted. Also there is added the following:

"Except that the inheritance tax imposed by this chapter in respect of personal property, except tangible personal property having an actual situs in this state, shall not be payable if the laws of the state, territory or country of residence of the transferor at the time of his death contained a reciprocal exemption provision under which non-residents were exempted from transfer or death taxes of every character in respect of personal property, except tangible personal property having an actual situs therein, provided the state, territory or country of residence of such non-residents allowed a similar exemption to residents of the state, territory or country of residence of such transferor. For the purposes of this section the District of Columbia and possessions of the United States shall be considered territories of the United States."

Section 5334 of the General Code relates to the exemption of certain successions. Original supplemental section 5334-1 relates to the taxation of successions on balance remaining after deducting the proportionate amount of Ohio exemptions. Amended supplemental Section 5334-1 provides for reciprocity in regard to exemptions. The amended supplemental section becomes effective June 30, 1927.

It is fundamental that legislative acts are always construed as prospective in their operation unless by their plain language it can be seen that it was the legislative intention that they should have retroactive effect.

The Ohio Inheritance Tax Law, Section 5331, provides:

"A tax is hereby levied upon the succession to any property passing in trust or otherwise to or for the use of a person, institution or corporation
* * *"

Section 5336 provides that:

"Taxes levied under this subdivision of this chapter shall be due and payable at the time of the succession, except as herein otherwise provided, but in no case prior to the death of the decedent."

The rule for determining the time when a succession took place is furnished by the statutory and common law relative to the kinds of successions taxed.

The interest of a legatee or distributee of personal property and of all vested interests in real estate becomes taxable immediately on the death of the testator or intestate. Opinions of the Attorney General, 1919, Vol. I, page 818.

Section 5338 provides:

"Taxes levied by this subdivision of this chapter shall be paid to the treasurer of the county in which the court having jurisdiction of proceedings under this subdivision of the statute is held by the person or persons charged with the payment thereof if such taxes are not paid within one year after the accrual thereof, interest at the rate of eight per cent per annum shall thereafter be charged and collected thereon."

The inheritance tax law of 1919 became effective June 5th, and it was provided in section 4 of said act that:

"This act shall not affect pending proceedings for the assessment and collection of collateral inheritance taxes under the original sections hereby amended, nor the duty to pay, nor the right to collect any such tax which has accrued prior to the approval of this act but all successions occurring subsequently to the approval of this act shall be affected by and taxable under it, whether the death of the decedent occurred prior to its approval or not, unless a tax has already accrued thereon under the provisions of the original sections hereby amended."

All vested interests in land passing from testators or intestates prior to June 5, 1919, are not taxable under the act of that year. The interest of the legatee or distributee in personalty becomes taxable immediately on the death of the testator or intestate. The test as to whether or not the act of 1919 applies is, did the succession take place before or after June 5, 1919?

In Sutherland on Statutory Construction, Vol. I, page 20, it is stated that:

“To pass new rules for the regulation of new controversies is in its nature a legislative act; but if these rules interfere with the past or present, and do not look wholly to the future they violate the definition of a law as a rule of civil conduct; because no rule of civil conduct can with consistency operate on what occurred before the rule itself was promulgated. * * *”

An act passed June 15th exempted certain property from taxation, it was held not to apply to an assessment required to be made as of May first of the same year although the tax had not been extended when the act was passed. *Insurance Co. vs New York*, 153 N. Y. 331.

Generally a law imposing or charging an inheritance tax does not retroact so as to affect estates already in existence. *Hariott vs. Pattee*, 115 Iowa, 648; 89 N. W. 91.

An act exempting adopted children from the payment of an inheritance tax was held not to apply in case of the estates of persons who died before the act was passed. *Matter of Miller*, 110 N. Y. 216; 18 N. W. 139.

In the latter case it was held that:

“Act of New York, June 25, 1887, amending laws 1885, Section 483, so as to exempt legacies to adopted children from the collateral inheritance tax does not exempt from the tax bequest made to adopted children before the date of the act. * * *”

The surrogate and the supreme court, however, thought the case made by the petitioner should be decided as if the act of 1887 had not been passed and we are of that opinion. The rule is considered settled in this state that neither original statutes nor amendments have any retroactive force unless in exceptional cases the legislature so declared. The act before us contains no such declaration and there seems no reason to give the amendment any other force than would be due other provisions of an independent statute. It was so held in *Ely vs. Holton*, 15 N. Y. 585, where referring to a similar formula the court said: ‘The portions of the amended sections which are merely copied without change are not to be considered as repealed and again enacted but to have been the law all along; and the new parts of the changed portions are not to be taken to have been the law at any time prior to the passage of the amended act.’ The appellant desires, however, to give the effect as of the date of the act of 1885. This construction would by force of the latter statute render void not only the order in question which was valid when made but all other similar proceedings, although regular when taken; and would as said in *Ely vs. Holton*, supra, ‘lead to the grossest absurdity.’ No legislative intent to that effect is discoverable in the act of 1887. * * * So far as the order is concerned and the rights and liabilities of the parties thereunder, it was a transaction complete and closed before the passage of the amendatory act; and being in that condition we may properly apply the words quoted in *Butler vs. Palmer*, 1 Hale, 335; ‘the law itself may be disannulled by the author but the right acquired by the virtue of that law while in force must still remain.’”

In the case of *Sherill, County Treas., vs. Church*, 25 N. E. 50, it was held that:

“Act N. Y. 1890 C. 553, providing that the personal estate of certain corporations * * * shall be exempt from taxation, and that the collateral inheritance act shall not apply to them, does not apply to a tax due and payable before its passage. * * *”

It is true that the state could, by an act of the legislature duly passed, release taxes already due. But legislative acts are always construed as pros-

pective in their operation, unless by their plain language it can be seen that it was the legislative intention that they should have retroactive effect. This act was clearly prospective in its operation, and applied only to the future, and as this tax became due and payable before its passage, it may still be enforced in the manner provided in the collateral inheritance act."

In *Blakemore and Bancroft, Inheritance Taxes*, Section 87 reads:

"The tax is governed by the statute in force at the death of the testator, although this may be repealed or amended before the imposition of the tax."

Section 88 reads:

"An amendment extending exemption has no effect on an estate of one dying before the passage of the amending act unless expressly so provided."

In *Provident Hospital & Training Association vs. People*, 198 Ill. 495, part 2 of the syllabus reads:

"A tax under the inheritance tax law becomes due and payable at the death of the testator, and hence if the testator died before the amendatory act of 1901 exempting legacies to hospitals, took effect, the county court has power to make the appraisal and assessment upon a legacy to a hospital, given by the will, and the tax may be enforced even though the will was not probated before the act took effect."

In *Connell, et al. vs. Crosby, County Treas.*, 210 Ill. 380, part 2 of the syllabus reads:

"The amendment of 1901 to the Inheritance Tax Act, exempting bequests for educational purposes from the provisions of the act, is not retroactive, and if a bequest for educational purposes was subject to an inheritance tax at the time of testator's death the tax may be collected, notwithstanding the proceeding was not begun until after said amendment took effect."

Where the tax becomes due before the repealing act the rights of the state under the law existing at the time remain unaffected by the repealing act. *Quessart vs Canough*, 3 La. 560.

In 26 R. C. L., Section 176 of the chapter on taxation it is stated that:

"In the absence of special provision to the contrary an inheritance tax law is not given a retroactive effect. In other words, it is the statute in force at the time of the death of the decedent that governs and not the statute in force when the estate is actually distributed. * * *

The repeal of a statute imposing an inheritance tax does not deprive the state of the right to collect the tax from the estate of one who died before the repealing law took effect, nor does the granting of an exemption by statute in the case of legislation or distributory shares below a set sum apply to the estate of one who died before the enactment of the statute."

Section 26 of the General Code provides as follows:

"Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions, or proceedings, civil

or criminal, and when the repeal or amendment relates to the remedy it shall not affect pending actions, prosecutions or proceedings, unless so expressed, nor shall any repeal or amendment affect causes of such action, prosecutions or proceedings, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act."

The provision of this section to the effect that a repeal and amendment shall not affect pending actions unless otherwise expressly provided is to be construed literally; and it does not mean "unless such inference may be granted from the repealing statute." *Kelly vs. State*, ex rel. 94 O. S. 331.

General Code, Section 26, is a rule of legislative interpretation and is to be construed as a part of any amended act unless such amendment otherwise expressly provides. *State ex rel. vs. Zangerle*, 101 O. S. 236.

It is, I believe, manifest from the language of the act that there is no expressed intention to make its provisions retroactive in effect.

These considerations lead me to the conclusion that the recent enactment of the General Assembly providing for reciprocity in inheritance taxation has no application to successions to estates of decedents dying prior to the effective date of such act.

Respectfully,

EDWARD C. TURNER,

Attorney General.

579.

COURT CONSTABLE—SUBJECT TO REMOVAL AT ANY TIME AT THE INSTANCE OF THE COURT BY AND FOR WHICH HE WAS APPOINTED.

SYLLABUS:

A court constable appointed under authority of Section 1692 of the General Code, is subject to removal at any time, at the instance of the court by and for which he was appointed.

COLUMBUS, OHIO, June 6, 1927.

HON. OTTO J. BOESEL, *Prosecuting Attorney, Wapakoneta, Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication in which you request my opinion with reference to the following:

"In the month of August, 1925, Judge Layton, of the Court of Common Pleas of this county, appointed a Court Constable of the Court of Common Pleas of this county, and fixed his salary at \$1,200.00 per year. No definite time was fixed for said appointment.

Judge Layton subsequently resigned, said resignation to take effect on June 8, 1926, and Hon. Judge C. A. Stueve was appointed as his successor, said appointment being effective June 9, 1926. He immediately qualified, and was re-elected to both long and short terms, in November, 1926, and is now serving as Judge of said county, his term ending on the 9th day of January, 1933.

Will you kindly inform me whether under Sections 1692 and 1693 of the