matter, does not apply. The construction put upon the contracts did not constitute a preliminary step which simply had the effect of bringing forward for determination the federal question, but was a decision which automatically took the federal question out of the case if otherwise it would be there. The non-federal question in respect of the construction of the contracts, and the federal question in respect of their validity under the Anti-trust Act, were clearly independent of one another. See *Allen* v. *Southern Pacific R. Co.*, 173 U. S. 479, 489–492. The case, in effect, was disposed of before the federal question said to be involved was reached. *Chouteau* v. *Gibson*, 111 U. S. 200; *Chapman* v. *Goodnow*, 123 U. S. 540, 548. A decision of that question then became unnecessary; and whether it was decided or not, our want of jurisdiction is clear.

Writ dismissed for want of jurisdiction.

The CHIEF JUSTICE took no part in the consideration or decision of this case.

BINGHAM ET AL. *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 83. Argued November 22, 1935.—Decided December 9, 1935.

1. Acts of Congress are to be construed, if possible, so as to avoid grave doubts of their constitutionality. P. 218.
2. Section 402 (f) of the Revenue Act of 1918, which declares that amounts in excess of $40,000 receivable by all beneficiaries, other than the executor, as insurance under policies taken out by a decedent upon his own life, shall be included in his gross estate in determining the estate transfer tax, is not to be construed as applicable to a policy taken out and made payable, directly or by assignment, to such a beneficiary long before the Act was passed, where no power was reserved in the decedent to change the bene-

ficiary, pledge or assign the policy, revoke the assignment made, or surrender the policy without the beneficiary's consent; even though, by the terms of the policy or assignment, if such beneficiary had not survived the decedent, the proceeds would have gone to the decedent's estate. *Lewellyn* v. *Frick*, 268 U. S. 238. Pp. 217–219.

3. The title and possession of the beneficiary were irrevocably fixed by the terms of the policy or assignment; and no interest passed to the beneficiary as the result of the death of the insured. *Helvering* v. *St. Louis Union Trust Co.*, *ante*, p. 39; *Becker* v. *St. Louis Union Trust Co.*, *ante*, p. 48. P. 219.
4. Matters pertinent to an issue before the court and which were clearly presented to it, are to be taken as covered by the decision though not mentioned in the opinion. P. 218.

76 F. (2d) 573, reversed.

CERTIORARI* to review a judgment reversing a judgment, 7 F. Supp. 907, in an action to recover the amount of a federal estate tax alleged to have been illegally exacted.

Mr. George S. Fuller for petitioners.

Mr. David E. Hudson, with whom *Solicitor General Reed*, *Assistant Attorney General Wideman*, and *Messrs. Sewall Key* and *Arnold Raum* were on the brief, for the United States.

The issue is not foreclosed by *Lewellyn* v. *Frick*, 268 U. S. 238. Whether § 402 (f) operates retroactively must be considered separately in every case.

Lewellyn v. *Frick* does not prevent the inclusion of every policy taken out before the enactment of the 1918 Act. In certain cases the statute would not have a retroactive effect because of reserved powers in the insured or because of contingencies involved in a beneficiary's interests which became indefeasible only upon the insured's death after the passage of the statute. And in such cases

*See Table of Cases Reported in this volume.

where there would in fact be no retroactive operation of the statute we believe that the all-inclusive language of § 402 (f) is not subject to the exception read into it by the *Frick* decision. Cf. *Heiner* v. *Grandin,* 44 F. (2d) 141; 56 F. (2d) 1082; cert. den., 286 U. S. 561.

That the scope of the *Frick* decision is not as broad as the petitioners herein assert is further evidenced by this Court's combined treatment of *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, and *Chase National Bank* v. *United States,* 278 U. S. 327. In the latter the Court held that § 402 (f) of the 1921 Act (identical with the corresponding provisions of the 1918 Act) was applicable. Since the policies were taken out after the effective date of the Act, that decision, if it stood alone, might not have any significance with reference to the present issue. But the Court on that same day decided the *Reinecke* case holding, *inter alia,* that two trusts, created in 1903 and 1910 respectively, revocable by the settlor, were properly included in his gross estate under the 1921 Act. In reaching that result, the Court relied upon its decision in the *Chase National Bank* case.

The Court employed the *Chase National Bank* case to justify a holding that it was not retroactive taxation to include in a decedent's gross estate transfers made by him before the effective date of any federal estate tax statute, but which became complete only at his death. The inference is plain, that had the policies in the *Chase National Bank* case been taken out before the first federal estate tax statute (or before either the 1918 or 1921 Acts), it would not have been retroactive taxation to include them in the decedent's gross estate. See also *Liebes* v. *Commissioner,* 63 F. (2d) 870, 873.

Reference to the record in the *Frick* case will disclose, it is true, that three of the policies involved therein had been assigned by the insured reserving the right to revoke the assignments, a power comparable to the power to

change the beneficiary, and that in several other policies, the beneficiaries' interests were contingent. But the Government did not make any argument based on that power of revocation or the defeasibility of the beneficiaries' interests, nor did the Court consider or even allude to them in its opinion. Under those circumstances, the decision cannot be regarded as having passed on the effect of such elements. Cf. *Webster* v. *Fall,* 266 U. S. 507, 511; *United States* v. *Mitchell,* 271 U. S. 9, 14. Those circumstances, when considered along with the *Chase National Bank* case, *Reinecke* v. *Northern Trust Co.,* and the denial of certiorari in the *Grandin* case, would seem to indicate that the issue herein is not foreclosed by the *Frick* case.

Section 402 (f) does not operate retroactively as to the policies herein.

Transactions initiated before the effective date of a statute are frequently considered as completed only at the decedent's death occurring after the passage of the statute. A common type of such transactions is a transfer with reserved power to revoke, alter, or amend. It is only upon termination of the power that the transfers are regarded as complete. See *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339; *Saltonstall* v. *Saltonstall,* 276 U. S. 260; *Porter* v. *Commissioner,* 288 U. S. 436; *Gwinn* v. *Commissioner,* 287 U. S. 224. Cf. *Burnet* v. *Guggenheim,* 288 U. S. 280.

But a transfer with reserved powers to revoke, etc., is not the only kind of transaction that may be incomplete until a later date. The creation of an estate by the entirety, for example, gives neither spouse any right of severance, revocation, etc. Yet the whole estate may be included in the gross estate of the spouse who created the tenancy, regardless of when it was created, because the surviving spouse's rights depended upon outliving the other, and became absolute for the first time at the other's

death. *Third Nat. Bank & Trust Co.* v. *White,* 287 U. S. 577, affirming *per curiam,* 58 F. (2d) 1085, affirming *per curiam,* 45 F. (2d) 911; *Robinson* v. *Commissioner,* 63 F. (2d) 652; cert. den., 289 U. S. 758; *Bushman* v. *United States,* 8 F. Supp. 694, cert. den., 295 U. S. 756. Cf. *Tyler* v. *United States,* 281 U. S. 497.

Entirely apart from the decedent's payment of premiums up to the time of his death, the rights of the wife depended on outliving her husband. His death was the indispensable event giving rise to, or at least enlarging, valuable property rights in the wife, not theretofore possessed or enjoyed. *Klein* v. *United States,* 283 U. S. 231, 234. See also *Guaranty Trust Co.* v. *Blodgett,* 287 U. S. 509; *Sargent* v. *White,* 50 F. (2d) 410; *Hoblitzelle* v. *United States,* 3 F. Supp. 331; *Union Trust Co.* v. *United States,* 54 F. (2d) 152, cert. den., 286 U. S. 547; *Commissioner* v. *Schwarz,* 74 F. (2d) 712.

In the Connecticut policy there is an additional feature, namely, the right of cash surrender. Under that policy the insured had it within his power, for a period of thirty days from May 22, 1893, and a similar period at the end of each five years from that date, to wipe out all rights under that policy and to obtain for himself the cash value thereof. Until the moment of death, the beneficiary's interest depended not only upon her surviving the insured, but also upon his failure to live until the end of the five year period, or if he should reach the end of the five year period, upon his failure to exercise his power to cancel the policy and receive the cash surrender value thereof.

The petitioners may point out, however, that the insured died February 27, 1921, and that the last five year period before his death ended May 22, 1918. The possibility that the insured might live until May 22, 1923, and then exercise his right of cash surrender was indeed a substantial obstacle to her rights. That obstacle was in existence while the 1918 Act was in effect.

When the insured's power to call for cash surrender was last effective before his death, there was in existence a comprehensive estate tax law. The mere fact that the estate is being taxed under a later statute should be immaterial on the question of retroactivity. Cf. *Milliken* v. *United States,* 283 U. S. 15, 20 *et seq.* True, the earlier law had no specific provision regarding insurance. But it did present a comprehensive system of death taxes, and was sufficient to put one on notice that transactions testamentary in character, hitherto unprovided for, might be included in a later statute. It would, therefore, not be arbitrary and capricious to include such testamentary transactions in a later Act. Cf. *Fawcus Machine Co.* v. *United States,* 282 U. S. 375, 379; *Cooper* v. *United States,* 280 U. S. 409.

So construed, § 402 (f) is constitutional.

Life insurance is inherently testamentary in character. The policies herein are particularly so because of the contingent character of the beneficiaries' interests, and it is therefore appropriate to include the proceeds in the insured's gross estate.

Mr. Justice Sutherland delivered the opinion of the Court.

This case involves the construction and constitutionality, as applied, of § 402 (f) of the Revenue Act of 1918, which provides that the value of the gross estate of the decedent shall be determined by including the value, at the time of his death, of all property "(f) to the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

Petitioners are the executors of the will of King Upton, who died in 1921 while the Act of 1918 was in force. His wife survived him. Long prior to the passage of the Act, a number of life insurance policies were issued to the decedent, among them four issued by the Berkshire Life Insurance Company of Massachusetts, originally payable to his estate; and one issued in 1883 by the Connecticut Mutual Life Insurance Company of Connecticut, payable to the wife of the decedent with a condition that in case of the predecease of the wife the amount of the policy should be payable to his children, or, if there be no children or descendants of children then living, to the legal representatives of the insured. In 1904, decedent assigned the four Berkshire policies to his wife, " provided she survives me." The decedent had no power, none being reserved, to change the beneficiaries, to pledge or assign the policies after the assignment to his wife, or revoke that assignment, or surrender the policies without the consent of the beneficiaries. *Central Bank of Washington* v. *Hume,* 128 U. S. 195, 205; *Miles* v. *Connecticut Life Ins. Co.,* 147 U. S. 177, 181, 182, 183, compare dissent p. 188; *Commonwealth* v. *Whipple,* 181 Mass. 343; 63 N. E. 919; *Pingrey* v. *National Life Insurance Co.,* 144 Mass. 374, 382; 11 N. E. 562.

After having deducted the specific exemption of $40,000, the Commissioner of Internal Revenue included the proceeds of these five policies in the decedent's gross estate, for the purpose of the federal estate tax. An action was brought in a federal district court to recover the amount of the tax resulting from the inclusion of these proceeds. That court rejected the view of the commissioner and awarded judgment to the taxpayers upon the authority of *Lewellyn* v. *Frick,* 268 U. S. 238. 7 F. Supp. 907.

The court of appeals reversed, holding that the *Frick* case was distinguishable. 76 F. (2d) 573. We think the view taken by the district court is the correct one.

1. Eleven policies were involved in the *Frick* case, all antedating the passage of the act. Among them was one issued by the Berkshire company and another issued by the Connecticut Mutual. These policies in terms were identical with the corresponding policies in question here. The assignment of the Berkshire policy there was the same as the assignments here. This court applied the rule that acts of Congress are to be construed, if possible, so as to avoid grave doubts as to their constitutionality; and said that such doubts were avoided by construing the statute as referring only to transactions taking place after it was passed. In that connection we invoked the general principle "that the laws are not to be considered as applying to cases which arose before their passage" when to disregard it would be to impose an unexpected liability that, if known, might have been avoided by those concerned. The court below sought to distinguish the decision on the ground that this court did not refer to those specific provisions set forth in the policies and assignments which are pertinent here. The government makes the same point, and contends that since this court did not allude to these provisions in the opinion, the decision cannot be regarded as having passed on their effect. It is true that questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents. *Webster* v. *Fall,* 266 U. S. 507, 511. That, however, is not the situation in the present case. In *Lewellyn* v. *Frick* the policies and assignments, in their entirety, were definitely before the court; and this necessarily included each of the provisions which they contained. Moreover, both in the appendix to the government's brief and in the main brief of the taxpayers, the attention of the court was distinctly called to all of the provisions which are now invoked. The latter brief summarized and described the provisions of the

four classes of policies which were involved—one class being policies, it was pointed out, made payable to the Frick estate " subsequently assigned by Mr. Frick to his wife or daughter if she survived him, without reserving power to revoke the assignments." This court, without stopping to recite the various specific provisions that were thus clearly brought to its attention, held that the proceeds of none of the policies were subject to the estate tax under § 402 (f). It fairly must be concluded that in reaching that result these provisions were considered, and that such of them as bore upon the problem, there as well as here presented, were found not to require a different determination. We think the points now urged by the government were decided in the *Frick* case, and find no reason to reconsider them.

2. The principles so recently announced by this court in *Helvering* v. *St. Louis Union Trust Co., ante,* p. 39, and *Becker* v. *St. Louis Union Trust Co., ante,* p. 48, are decisive of the case in favor of the taxpayers. Those principles establish that the title and possession of the beneficiary were fixed by the terms of the policies and assignments thereof, beyond the power of the insured to affect, many years before the act here in question was passed. No interest passed to the beneficiary as the result of the death of the insured. His death merely put an end to the possibility that the predecease of his wife would give a different direction to the payment of the policies.

Judgment reversed.

MR. JUSTICE BRANDEIS, MR. JUSTICE STONE, and MR. JUSTICE CARDOZO concur on the first ground stated in this opinion.

The CHIEF JUSTICE concurs in this opinion, acquiescing in the second ground because of the recent decisions in the cases there mentioned.