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Jurisdiction to Tax-Power of the Settlor's Domicillary State to Subject to an Inheritance Tax the Corpus of a Trust Elsewhere Existing

RECENT CASE NOTES

JURISDICTION TO TAX—POWER OF THE SETTLOR'S DOMICILIARY STATE TO SUBJECT TO AN INHERITANCE TAX THE CORPUS OF A TRUST ELSEWHERE EXISTING. —Deceased while a resident of Colorado had created a trust for the benefit of her daughter with reference to which she retained a power of revocation. The trust res related to intangibles, which were turned over to and kept by trustees who were also resident within the aforementioned state. Thereafter, the deceased moved to and became domiciled in New York where she died without exercising her power of revocation. This appeal concerns the constitutionality of a New York statute under which the state authorities had levied a transfer tax relating to the trust property. *Held*—The statute is unconstitutional under the Fourteenth Amendment. The state had no jurisdiction over the property which was used as a measure of the privilege of transfer, since the fiction, *mobilia sequuntur personam,* is inapplicable when an actual taxable situs is elsewhere established.[1]

Multiple taxation, despite its obvious lack of economic or social justification, was at one time considered a negligible factor in the determination of jurisdiction to tax,[2] and was recognized as legally possible under the Fourteenth Amendment by the Supreme Court of the United States.[3] However, in the last two decades with the closer unification of the states industrially and politically, the highest tribunal enunciated the generalization that multiple taxation operated to deprive the taxpayer of due process of law.[4] At first it was doubtful where the principle thus laid down was applicable to intangibles as well as to tangible personalty.[5] However, in *First National Bank v. Maine* the Court unequivocally stated its position, saying that multiple taxation in the case of intangibles "must be rejected as involving an inherent and logical self-contradiction."[6]

In the case of tangibles the undesirable result of two jurisdictions taxing the same economic interest was escaped by restricting the application of the fiction *mobilia sequuntur personam,* which had operated to give the domiciliary state power to tax the personalty of a resident wherever it be situated. Such personalty was declared taxable only at the place wherein it had acquired a

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[1] In Re Brown's Estate, (1937) 247 N. Y. 10, 8 N. E. (2d) 42. That the deceased became domiciled in New York was assumed by the court for the purpose of rendering the decision.

[2] See for instance Theobald v. Clapp, (1909) 43 Ind. App. 191, 87 N. E. 100.

[3] Kidd v. Alabama, ( ) 188 U. S. 730, 23 Sup. Ct. 401, 47 L. Ed. 669: "It would be a great advantage * * * if principles of taxation could be agreed upon, which did not conflict with each other, and * * * by which taxation of substantially the same property in two jurisdictions could be avoided. But the Constitution of the United States does not go so far." (47 L. Ed. 669 at p. 672.) In accord: Bellows Falls Power Co. v. Commonwealth of Mass., (1915) 222 Mass. 51, 109 N. E. 891, Ann. Cas. 1916C, 834.

[4] First National Bank v. Maine, (1932) 284 U. S. 312, 76 L. Ed. 313, 52 Sup. Ct. 174, 77 A. L. R. 1401.

[5] Frick v. Penn, ( ) 188 U. S. 189, 23 Sup. Ct. 277, 47 L. Ed. 439.

[6] First National Bank v. Maine, (1932) 284 U. S. 312, 76 L. Ed. 313, 52 Sup. Ct. 174, 77 A. L. R. 1401. See also Farmers' Loan and Trust Co. v. Minn, (1930) 280 U. S. 204, 50 Sup. Ct. 98, 74 L. Ed. 371, 65 A. L. R. 1000.

permanent situs.[7] Whether in the case of intangibles an analogous delimitation of the fiction was and is to follow, or whether the other means of establishing a taxable situs will be disregarded is the question so pertinent in the principal case.[8]

Our problem is perhaps somewhat clarified by resort to the similar situation involving the imposition of taxes by other than the domiciliary state because of the existence of a business situs.[9] Although the Supreme Court of the United States has not yet clearly decided as between the business situs theory and the ancient maxim *mobilia sequunter personam,* the reasonable inference from a late decision is that the doctrine of fictional situs will be further restricted.[10] However that may be, it is true that the state courts have of recent years shown an ever increasing tendency to refuse the application of the fiction when ever it is apparent that a taxable business situs has been established elsewhere.[11]

In the light of these decisions what must be our contention relative to the principal case. That the settlor having a power of revocation retained a very valuable interest in the corpus of the trust is not disputable. However, whether that in itself is a taxable interest, and whether the fictional situs doctrine should be considered applicable thereto is another question. The Massachusetts cases and isolated decisions here and there relating to the nature of the beneficiary's interest would tend to support an affirmative answer hereto.[12] Indeed in analogous factual situations the Supreme Court of the United States in *Bullen v. Wisconsin*[13] and the highest court of Minnesota in *In Re Frank's Estate*[14] rendered judgments that are hardly compatible with the result of the instant decision of the New York Court of Appeals.[15] In both cases the courts

[7] Frick v. Penn, ( ) 188 U. S. 189, 23 Sup. Ct. 277, 47 L. Ed. 439; Union Refrigerator Transit Co. v. Commonwealth of Ky., (1905) 199 U. S. 194, 26 Sup. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493. See also Herron v. Keeran, (1877) 59 Ind. 472, 26 Am. Rep. 87.

[8] That a choice must be made see Miami Coal Company v. Fox, (1931) 203 Ind. 99, 176 N. E. 11.

[9] For an interesting case involving the business situs theory see Miami Coal Company v. Fox, (1931) 203 Ind. 99, 176 N. E. 11. For a good definition of business situs see Tax Comm. et al. v. Kelly-Springfield Tire Co., (1931) 38 Ohio App. 109; 175 N. E. 700. See also the annotation in 76 A. L. R. 806. However, in the case of First National Bank v. Maine, supra, note 4, the court refused to restrict the application of the fiction.

[10] Wheeling Steel Corp. v. Fox, (1936) 295 U. S. 193, 56 Sup. Ct. 773, 80 L. Ed. 1143.

[11] Miami Coal Company v. Fox, (1931) 203 Ind. 99, 176 N. E. 11. See the annotation in 79 A. L. R. 344.

[12] Hunt v. Perry, (1896) 165 Mass. 291, 43 N. E. 104; Maquire v. Tax Commission of Commonwealth, (1918) 102 N. E. 162, 230 Mass. 503, aff'd 253 U. S. 12, 40 Sup. Ct. 417, 64 L. Ed. 739; First Nat. Bank of Boston v. Commissioner of Corp. and Taxation, (1932) 279 Mass. 168, 181 N. E. 205. See also Bengham v. Com., (1923) 199 Ky. 402, 251 S. W. 936; and St. Albans v. Avery, (1921) 95 Vt. 249, 114 A. 31. Corliss v. Bowers, (1930) 281 U. S. 376, 50 Sup. Ct. 336, 74 L. Ed. 916 is also interesting.

[13] Bullen v. Wisconsin, (1916) 240 U. S. 625, 36 Sup. Ct. 473, 60 L. Ed. 830.

[14] In Re Franks Estate, (Minn., 1934) 257 N. W. 330.

[15] It is to be admitted that both of these decisions received some added support from the fact that the settlor retained, in addition to the power to terminate the trust, also the right to the income heretofrom during his life. It is submitted, however, that this is hardly sufficient grounds for distinguishing the decisions thereof and that of the principal case, for in any event the present

contended that the maxim was applicable to the interest retained by the settlor in the intangibles now held by the trustee in another state so as to give such interest a taxable situs at his domicile. In the latter case jurisdiction to tax the intangibles upon the death of the settlor was expressly denied the state wherein the trustees were domiciled.

However, the instant case does not lack support in principle and authority. Numerous are the decisions asserting that legal title is the test of jurisdiction to tax and allowing the corpus of the trust to be taxed in its entirety by the state of the trustees' domicile.[16] Thus the courts have tacitly admitted the proposition that the taxable situs of the interests in the corpus that are held by other than the trustees must be taken to be at the situs of the trust—that is to say, it follows the situs of the trustees' interest. If this is to be accepted and retained then of course in view of the unconstitutionality of multiple taxation, the maxim must be restricted in so far as it would operate to give the settlor's state jurisdiction to tax.

It should be noted that the peculiar facts of the principal case lend support to the contention that an actual taxable situs exists at the domicile of the trustee. In addition to the presence of legal title in a resident of Colorado, it appeared that the intangibles were kept there, and that the trust had been created and administered in that state.[17] These facts also strengthen materially the position here taken that the general rule of the application of the fiction "must yield to the established fact of legal ownership, actual presence, or control elsewhere, and ought not to be applied if to do so would result in inescapable and patent injustice whether through double [multiple] taxation or not."[18] In short it does not appear unreasonable to contend that the maxim which was adopted to prevent the escape from taxation should be discarded when taxation is assured, and that the fictitious situs which is but a substitute for an actual situs should be cast aside when the property acquires a locality and is subject to the authority of another state.

In conclusion it might be admitted that the question involved in the principal case is a close one, and will never be definitely settled until passed upon by the Supreme Court. However it is believed that in view of the historical development of the law of taxation, and the trend of judicial opinion as evidenced by the recent decisions, that the Court will in all probability sustain the holding of the New York tribunal. C. D. L.

EQUITY—PERSONAL RIGHTS—CONTRACT NOT TO MOLEST OR ANNOY ENFORCED BY INJUNCTION.—In consideration of the compromise of pending litigation, plaintiff and defendant, sisters, entered inot a contract providing in part that

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right to income is but extrinsic evidence of one possible result from the exercise of the power retained.

[16] Welch v. City of Boston, (1915) 221 Mass. 155, 109 N. E. 174, Ann. Cas. 1917D, 946; McClellan v. Board of Review of D. County, (1902) 200 Ill. 116, 65 N. E. 711; Berry v. Windham, (1879) 59 N. H. 288, 27 Am. Rep. 202.

[17] See reference hereto in the report of the principal case in 8 N. E. (2d) at page 44.

[18] Safe Deposit and Trust Co. v. Virginia, (1929) 280 U. S. 83, 50 Sup. Ct. 59, 74 L. Ed. 180, 67 A. L. R. 86.