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Taxation-Inheritance Tax, Intangible Property-Due Process of Law

TAXATION—INHERITANCE TAX—INTANGIBLE PROPERTY—DUE PROCESS OF LAW—Included in the estate of deceased, a subject of Great Britain, and resident of Cuba, not engaged in business in the United States, were bonds and certificates of stock of foreign governments and corporations, bonds of domestic corporations and a domestic municipality, and a deposit with a domestic banking concern. The Commissioner of Internal Revenue included these in the gross estate of deceased subject to Federal estate tax under the Revenue Act of 1924. The Board of Tax Appeals decided the Act did not apply to such intangibles,[1] and the Circuit Court of Appeals affirmed this decision.[2] The Supreme Court granted certiorari and *held*, first, that the Act was intended to include such property, and second, that the due process clause of the Fifth Amendment did not make the tax invalid because of lack of jurisdiction; judgment of lower courts reversed.[3]

Under the due process clause of the Fourteenth Amendment, the Supreme Court decided in *Farmers' Loan & Trust Co. v. Minnesota*[4] that negotiable bonds and certificates of indebtedness issued by State or municipal governments, some registered, and others negotiable, are rightly regarded as if ordinary choses in action, and a death duty can be placed on them only by the State of the domicile of the owner. *Baldwin v. Missouri*[5] extended this rule to include bank deposits, Federal coupon bonds and promissory notes; *Beidler v. South Carolina Tax Commission*[6] extended

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[16] *Kirk v. Rich* (1910), 156 Ill. App. 483; *Sprager v. Reilly* (1907), 34 Pa. Super. Ct. 332; *Pile v. Carpenter* (1907), 118 Tenn. 288, 99 S. W. 360.

[17] *Becker v. Peru Trust Co.* (1912), Ind. App. 184, 97 N. E. 23; *Sandage v. Studebaker Bros. Mfg. Co.* (1895), 142 Ind. 148, 41 N. E. 380; *Horning v. McGill* (1919), 188 Ind. 332, 116 N. E. 303; *Wells v. Indianapolis Co.* (1928), 88 Ind. App. 231, 161 N. E. 687.

[1] 22 B. T. A. 71.

[2] 60 Fed. (2nd) 690.

[3] *Burnet, Commis. of Internal Revenue, v. Brooks,* March 13, 1933, 53 Sp. Ct. 457.

[4] 280 U. S. 204, 50 Sp. Ct. 98 (1930).

[5] 281 U. S. 586, 50 Sp. Ct. 436 (1930).

[6] 282 U. S. 1, 51 Sp. Ct. 54 (1931).

it to open accounts; and *First National Bank of Boston v. Maine*[7] to corporate stock. Thus, it is safe to say that today under the due process clause of the Fourteenth Amendment, the Supreme Court has decided that State is without jurisdiction to place a tax on the transfer of intangible property by death unless the deceased owner was domiciled there.

It is thus obvious that the rule as to jurisdiction to tax intangibles under the due process clause of the Fifth Amendment, as applied to the Federal Government is the exact opposite of the rule as applied to the States under the due process clause of the Fourteenth Amendment. The Court, however, in its fully reasoned opinion, recognizes this inconsistency, but justifies it on the ground that it is the necessary consequence of the difference between the natures of the sovereignties of the State and Federal Governments. As to the argument that because the rule established in the principal case is different from the one applied to the States it ought not to be upheld, the opinion states: "The argument is specious, but it ignores an established distinction. Due process requires that the limits of jurisdiction shall not be transgressed. That requirement leaves the limits of jurisdiction to be ascertained in each case with appropriate regard to the distinct spheres of activity of state and nation. The limits of state power are defined in view of the relation of the states to each other in the Federal Union. The bond of the Constitution qualifies their jurisdiction." But, "the criterion of state taxing power by virtue of the relation of the states to each other under the Constitution is not a criterion of the taxing power of the United States by virtue of its sovereignty in relation to the property of non-residents. The Constitution is not the criterion of the taxing power of the United States and foreign countries as it creates between the states themselves."

The same idea was expressed by the Court as long ago as 1914, when, in the case of *United States v. Bennett*,[8] it said: "The application to the States of the rule of due process relied upon comes from the fact that their spheres of activity are enforced and protected by the Constitution, and it is therefore impossible for one State to reach out and tax property in another without violating the Constitution, for where the power of one ends the authority of the other begins. But this has no application to the Government of the United States so far as its admitted taxing power is concerned. It is coextensive with the limits of the United States; it knows no restriction except where one is expressed in or arises from the Constitution and therefore embraces all the attributes which appertain to sovereignty in the fullest sense. Indeed the existence of such a wide power is the essential resultant of the limitation restricting the States within their allotted spheres, for if it were not so then government in the plenary and usual acceptation of that word would have no existence. Because the limitations of the Constitution are barriers bordering the States and preventing them from transcending the limits of their authority and thus destroying the rights of other States and at the same time saving their rights from destruction by the other States, in other words of maintaining and preserving the rights of all the States, affords no ground for constructing an

[7] 284 U. S. 312, 52 Sp. Ct. 174 (1932). See also 7 Ind. L. J. 495 (1932); and 30 Col. L. Rev. 405.

[8] 232 U. S. 299, 34 Sp. Ct. 433; see also *Cook v. Tait*, 265 U. S. 47, 44 Sp. Ct. 444.

imaginary constitutional barrier around the exterior confines of the United States for the purpose of shutting that government off from the exertion of powers which inherently belong to it by virtue of its sovereignty." This same language was quoted by Chief Justice Hughes in his opinion in the principal case as supporting the decision.

It is clear, then, that the due process clause of the Fourteenth Amendment as to jurisdiction of the States to tax intangibles means one thing, and that the due process clause of the Fifth Amendment has an altogether different meaning when applied to the jurisdiction of the Federal Government. As to the latter, due process as to substance apparently has no meaning, but is a restraint on the Federal Government's power only as to matters of procedure.

But is this inconsistency in fact justified? In *Farmers' Loan & Trust Co. v. Minnesota*,[9] the Court said: "Primitive conditions have passed; business is now transacted on a national scale. A very large part of the country's wealth is invested in negotiable securities whose protection against discrimination, unjust and oppressive taxation, is matter of the greatest moment." Do not these same arguments apply with nearly equal force today in international commerce? The Court notes the fact that "jurisdiction (to tax) may exist in more than one government, that is, jurisdiction based on distinct grounds," and cites *Winans v. Attorney-General*,[10] an English case, to show that England has upheld the same tax on the same ground—that there is no international limitation preventing—and further states that the nations at present recognize the fact that double or multiple taxation raises a problem, and are working together in an effort to find a solution for it.

There is an even more important question to consider. What effect will the case have on American business? Is it not obvious that many subjects and residents of other countries who, in the past, have kept property of the nature involved here in this country, allowing the income to be collected and deposited in American banks, will, in the future, take this property out of the country for the purpose of avoiding the tax? Regarding the matter from a business standpoint alone, is it not probable that the government would eventually profit most by allowing what money it could collect from such estates as death duties to be lost, and keep such property in the country?

W. T. H.

TRUSTS—INSOLVENT BANKS—TRACING TRUST PROPERTY—April 18, 1930, the City Trust Company, as executor of the will of James Fordice French, paid over to itself as trustee under a trust created by the same will, the sum of $90,000 in cash. This money was commingled with all other money in the hands of the Company and turned over to the banking department as cash. All but $38,679.68 was invested by the Company for the benefit of the trust. October 23, 1930, the City Trust Company went into hands of a receiver with cash on hand amounting to $18,255.76. The cash on hand was never less than that amount after the trust fund was deposited. Claimant is the duly appointed present trustee of the French trust and claims a pre-

[9] Note 4, *supra*.
[10] (1910) A. C. 27.