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Inheritance Taxation: Tax Payable at Domicile of Testator on Intangible Personality in Another Jurisdiction [Student Comment]

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er's stock. Hence it does not necessarily follow that the stock of the latter takes an undue burden if denied the right to levy on the former.

And finally, since the weight of federal authority is contrary[14] to the result of the instant case, and the federal courts have jurisdiction of all cases in bankruptcy, the Appellate Court's decision will probably place California under two rulings, the result of any given case depending on whether or not the litigant is so situated that he can prosecute his case in a federal court. This being apparently the pioneer case on this point in California, it is to be hoped that the Supreme Court will avoid this result.[15] *H.B.H.*

INHERITANCE TAXATION: TAX PAYABLE AT DOMICILE OF TESTATOR ON INTANGIBLE PERSONALTY IN ANOTHER JURISDICTION— The universally accepted theory upon which inheritance taxes are imposed is, that the state, which, if it chooses, may become the successor to all the property within its boundaries upon the death of the owner, exacts an excise for the privilege it confers of succeeding to property.[1] A succession to property effected entirely independently of the authority of a particular state is not taxable by that state.[2] However, in the case of intangibles even if the property could have been distributed independently of the taxing state, if the distributees have derived any assistance from that state they must pay for it.[3] The inclusion of tangible personal property outside the state for purposes of inheritance taxes violates the due process clause of the

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[14] See cases, supra, n. 8. The federal jurisdiction covers all cases in bankruptcy and includes the power of passing on claims. National Bankruptcy Act, § 2 (2), 30 U. S. Stats. at L. 545, U. S. Comp. Stats. §§ 9585 ff, 1 Fed. Stats. Ann. 521.

[15] The following articles and notes give further information on this subject: Oppenheimer, R. (1924) Rights and Obligations of Customers in Stockbrokerage Bankruptcies, 37 Harvard Law Review, 860; Smith, E. I. (1922) Margin Stock, 35 Harvard Law Review, 485; see also 22 Columbia Law Review, 155, 1 A. L. R. 667.

[1] "Thus the tax is not upon the property in the ordinary sense of the word but upon the right to dispose of it, and it is not until it has yielded its contribution to the state that it becomes the property of the legatee." United States v. Perkins (1895) 163 U. S. 625, 628, 41 L. Ed. 287, 16 Sup. Ct. Rep. 1073.

[2] Woodruff v. Att'y Gen. [1908] App. Cas. 508, 24 T. L. R. 912; Moore v. Ruckgaber (1901) 184 U. S. 593, 46 L. Ed. 705, 22 Sup. Ct. Rep. 521; Estate of Bowditch (1922) 189 Cal. 377, 208 Pac. 282; Walker v. Treasurer (1915) 221 Mass. 600, 109 N. E. 647.

[3] Keeney v. New York (1911) 222 U. S. 525, 56 L. Ed. 299, 32 Sup. Ct. Rep. 105; People v. Union Transit Trust Co. (1912) 255 Ill. 168, 99 N. E. 377. See notes, 46 L. R. A. (N. S.) 1179; 38 L. R. A. (N. S.) 1139.

Fourteenth Amendment.[4] Real estate in a foreign jurisdiction is never subject to an inheritance tax at the domicile of the owner.[5]

In applying these principles the Supreme Court of California, in the case of *In re Dillingham's Estate*[6] was confronted with the question of the legality of an inheritance tax on shares of stock,[7] the corpus of a trust fund, of which testatrix was a beneficiary, in the hands of a trustee domiciled in another state. The decedent was a resident of Los Angeles County and her will was admitted to probate in that county. The third codicil of the will disposed of the

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[4] Frick v. Pennsylvania (1925) 69 L. Ed., Adv. Ops. 692, 45 Sup. Ct. Rep. 609. This latest decision of the United States Supreme Court makes unconstitutional many inheritance taxes heretofore approved by several states including California. Estate of Hughes (1915) 170 Cal. 492, 150 Pac. 344; Hopkins's Appeal (1905) 77 Conn. 644, 60 Atl. 657; Gallup's Appeal (1904) 76 Conn. 617, 57 Atl. 699. It was contended that inasmuch as Pennsylvania was not taxing the property but the privilege of succeeding to it, it was admissible to measure the tax on this privilege by combined value of chattels within and without the state. In view of the decisions since 1910 which have rejected this measurement theory with regard to corporation franchise taxes it is not at all surprising that the theory was likewise rejected in the case of inheritance taxes. In answer to the contention it was declared, "This ground in our opinion, is not tenable. It would open the way for doing indirectly what is forbidden to be done directly, and would render important constitutional limitations of no avail . . . . Without question each state had power to tax the transfer of so much of the estate as was under its jurisdiction and also had some discretion in respect of the rate; but none could use that power and discretion in accomplishing an unconstitutional end, such as indirectly taxing the transfer of the part of the estate which was under the exclusive jurisdiction of others." 69 L. Ed., Adv. Ops. 692, 695-6. In support of this view the opinion cites the corporation tax cases in which the measurement theory was first rejected. Western Union Telegraph Co. v. Foster (1917) 247 U. S. 105, 62 L. Ed. 1006, 38 Sup. Ct. Rep. 438, 1 A. L. R. 1278, P. U. R. 1918 D 865; Looney v. Crane Co. (1917) 245 U. S. 178, 62 L. Ed. 230, 38 Sup. Ct. Rep. 85; International Paper Co. v. Massachusetts (1917) 246 U. S. 135, 62 L. Ed. 624, 38 Sup. Ct. Rep. 292, Ann. Cas. 1918 C 617, etc. As to the probable influence of the Frick Case upon California Inheritance Tax Law see article by Delger Trowbridge, Recent Inheritance and Estate Tax Decisions, 14 California Law Review, 1.

[5] The reason given by the courts is that in the case of foreign realty the title is transferred by the law of the state wherein the land lies, that the law of the state of the owner's domicile does not furnish any factor or incident necessary to the efficacy of the transfer of title, and that the law of one state cannot control the transfer of land situated in another state. Orr v. Gilman (1901) 183 U. S. 278, 46 L. Ed. 196, 22 Sup. Ct. Rep. 213; Clarke v. Clarke (1899) 178 U. S. 186, 44 L. Ed. 1028, 20 Sup. Ct. Rep. 873; Re Swift (1893) 137 N. Y. 77, 32 N. E. 1096, 18 L. R. A. 709.

The real basis of distinction would seem to be indicated in the following: "Logically there is no reason why, in taxing its residents, the state may not measure such tax by reference to their realty outside the state, as well as by any other method. The reason it cannot be done in fact is that such taxation would be so contrary to the settled habits of our government and peoples as to be a denial of due process of law." Gray, Limitations of Taxing Power, § 168a.

[6] (July 30, 1925) 70 Cal. Dec. 139, 238 Pac. 367.

[7] Under the law as it stands at present at least four different states may legally tax the inheritance of shares of stock: (1) The state of the decedent shareholder's domicile. This is upon the basis of the doctrine criticized in the present note, namely that succession takes place according to the law of

stock held subject to the trust. It was held that inasmuch as the transfer was accomplished by the will which was rendered effective by the laws of California it was for that reason liable to taxation. There is no doubt the decision has long practice and authority to support it. In fact the same decision was reached by the United States Supreme Court in Bullen v. Wisconsin,[8] a case in almost every respect similar to the instant case. Furthermore in the recent case of Frick v. Pennsylvania,[9] the Supreme Court expressly excludes intangibles from the application of its new rule against the inclusion of tangible personal property outside the state in computing an inheritance tax at the owner's domicile.[10]

If succession to real estate and tangible personal property not in the state of the decedent's domicile cannot there be taxed why should not foreign intangibles also be exempt? By foreign intangible is meant a claim which, barring the possibility of the debtor coming into the state, can be realized upon only by going into another jurisdiction. Why is the law of the testator's domicile needed any more in the case of succession to intangibles than to tangibles or realty? In either case is it not the state which controls the beneficial use of the property that makes the privilege effective rather than the state of the domicile of the owner? In the case of tangibles it is the state of physical location which controls the beneficial use, in the case of intangibles it depends upon whether the intangibles are

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the domicile and for the use of that law payment must be given. People v. Union Trust Co., supra, n. 3; Welch v. Treasurer (1916) 223 Mass. 87, 111 N. E. 774. (2) The state of incorporation. McDougal v. Lilienthal (1917) 174 Cal. 698, 164 Pac. 387; Estate of Bronson (1896) 150 N. Y. 1, 44 N. E. 707; Palmer's Estate (1905) 183 N. Y. 238, 76 N. E. 16. (3) The state where the certificates of stock are located. New Orleans v. Stempel (1899) 175 U. S. 309, 44 L. Ed. 174, 20 Sup. Ct. Rep. 110. In the case of Wheeler v. Sohmer (1913) 233 U. S. 434, 58 L. Ed. 1030, 34 Sup. Ct. Rep. 607, an inheritance tax on notes of non-resident owner kept in the state was declared constitutional although it is doubted if the state could constitutionally levy an inheritance tax upon title deeds or the evidences of an ordinary contract. (4) The state where the transfer books are kept. See note 38 Harvard Law Review, 809, 815.

[8] (1915) 240 U. S. 625, 60 L. Ed. 830, 36 Sup. Ct. Rep. 473.

[9] Supra, n. 4.

[10] The English courts hold that with regard to personal property inheritance taxes are laid solely according to the principle of domicile, and that therefore the tax is not payable in respect of personal property situated in England belonging to the estate of one who was domiciled out of England. Wallace v. Att'y Gen. (1865) 1 Ch. 1, 35 L. J., Ch. (N. S.) 124, 13 L. T. (N. S.) 480; Thomson v. Advocate Gen. (1845) 12 Clark & F. 1, 6 Eng. Rep. R. 816. Furthermore chattels situated out of England at the time of the death of a non-resident, though subsequently remitted to England are not taxable. Arnold v. Arnold (1837) 2 Myl. & C. 256, 6 L. J., Ch. (N. S.) 218, 1 Jur. 255; Logan v. Fairlie (1925) 2 Sim. & Stu. 291, 3 L. J., Ch. 152. "There is however, an exception to the English rule when the final disposition of the property of a non-resident is superseded by an English trust, so that the final devolution of the property at the termination of the trust estate takes place by virtue of the law of England, and not by the law of the testator's domicil. In such case, upon the devolution of the property at the termination of the trust, it becomes liable to the succession of duty." 46 L. R. A. (N. S.) 1167, 1172, and cases there cited.

"clothed" or "unclothed". If the intangible is "clothed" there is an instrument which must be surrendered or accounted for in any suit to collect the claim. There are thus two states which might control the beneficial use of the property: (1) the state where the instrument is, (2) the state where the debtor is.[11] If the intangible is "unclothed" an instrument is not necessary in a suit to collect and the state where the debtor is controls the beneficial use of the property. The law of the domicile is inapplicable save as the state of "control" expressly or tacitly adopts it, its bearing then being attributable to such adoption and not to any force of its own.[12] The taxation of succession to property is lawful only when the law of the taxing state forms a necessary incident of the succession. If the property can be transferred without the assistance of the laws of the taxing state, and if no prohibition of that state could prevent the succession then there is no just basis for an inheritance tax by that state. Suppose that in the present case the laws of Wisconsin do not permit the stock to be obtained by the legatees designated by the will who would however take under California laws. Is not California helpless unless Wisconsin chooses to follow California law of succession in this matter? Or on the other hand suppose that California law forbids the legatees to take, is there anything to prevent Wisconsin from giving them the stock notwithstanding the contrary law of California? In the last analysis it is the state which controls the beneficial use of the property that controls the succession and the law of the decedent's domicile is applied merely for the sake of convenience. This is in effect recognized in California for here the general rule that personalty in a foreign state passes by the law of the decedent's domicile and is therefore subject to an inheritance tax at the domicile is held subject to the limitation that there be no rule to the contrary in the state where the personalty is actually situated.[13]

It has been argued further that by reason of the fiction *mobilia sequuntur personam* personal property has its situs at the domicile of the owner. The courts have declared several times that this maxim should only be resorted to when convenience and justice demand it,[14] as expressed by Mr. Justice Holmes and oft times repeated since then, "When logic and the policy of a State conflict

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[11] It might be contended that if the creditor has property in the state where he lives that state might tax his foreign held intangibles by refusing to allow him to enjoy the property within its borders until he paid the tax on the foreign held property. This would be clearly invalid with regard to a tax on foreign held realty and tangible personalty and should for the same reasons be invalid with regard to intangibles. See supra, n. 5.

[12] Tilt v. Kelsey (1907) 207 U. S. 43, 52 L. Ed. 95, 28 Sup. Ct. Rep. 1; Blackstone v. Miller (1902) 188 U. S. 189, 204, 47 L. Ed. 439, 23 Sup. Ct. Rep. 277; Eidman v. Martinez (1901) 184 U. S. 578, 46 L. Ed. 697, 22 Sup. Ct. Rep. 515; Hilton v. Guyot (1895) 159 U. S. 113, 40 L. Ed. 95, 16 Sup. Ct. Rep. 139.

[13] Re Hodges (1915) 170 Cal. 492. 499, 150 Pac. 344, L. R. A. 1916 A 837.

[14] Liverpool Ins. Co. v. Orleans (1911) 221 U. S. 346, 55 L. Ed. 762, 31 Sup. Ct. Rep. 550; Metropolitan L. Ins. Co. v. New Orleans (1906) 205 U. S. 395, 51 L. Ed. 853, 27 Sup. Ct. Rep. 499.

with a fiction due to historical tradition, the fiction must give way".[15] The fiction remains a fiction whether applied to tangibles or intangibles. There is apparently no reason that can be urged in support of an inheritance tax at the testator's domicile on intangibles that could not be just as well employed to justify such a tax upon extraterritorial tangibles. If the tax is invalid with regard to the latter it is difficult to see how it is valid in the case of the former. It is urged that due to the nature of intangibles they will escape taxation if not taxed at the owner's domicile. That cannot be the real reason for even when an inheritance tax is imposed by the state where the property is, and there is thus no doubt that there can be no escape from a succession tax, an additional tax is none the less levied at the testator's domicile.[16] It is submitted that as in the case of realty and tangible personal property the state which controls the beneficial use of the intangibles should be the only one having jurisdiction to levy an inheritance tax. If the inheritance tax is upon the privilege of succession then the determining consideration is whether the beneficiary came into possession of the property by virtue of the laws of the taxing state. If he did not the tax should not be sustained. All courts lament about the undesirability of double taxation. Indeed, in the last analysis it is this aversion to double taxation that lies at the basis of the decision holding unconstitutional property taxation and inheritance taxation upon foreign tangible property at the domicile of the owner. Double taxation is just as obnoxious levied upon intangibles as it is if levied upon tangibles. In either case the same economic interest ultimately bears the burden. Neither abstract and theoretical notions on the one hand nor outgrown historical fictions on the other should stand in the way of necessary and beneficial results universally desired.

R. J. T.

MUNICIPAL CORPORATIONS: LIABILITY FOR TORTS: MAINTENANCE OF A GARAGE AS PROPRIETARY FUNCTION—In discussing the liability of a municipal corporation for injuries resulting from the negligence of its agents in performing their duties, it has become the universal procedure of bench and bar to distinguish between those functions of a city which are governmental or public in nature and those functions which are proprietary or private.[1] The principle, simply stated, is that a municipality is not liable in a private action

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[15] Blackstone v. Miller, 188 U. S. 189, 206.

[16] Bullen v. Wisconsin, supra, n. 8. A property tax on intangibles at domicile was also upheld even though taxed at situs in Fidelity & Columbia Trust Co. v. Louisville (1917) 245 U. S. 54, 62 L. Ed. 145, 38 Sup. Ct. Rep. 40. See Thomas Reed Powell, Extra-territorial Inheritance Taxation, 20 Columbia Law Review, 1, 280, 303.

[1] This principle was first stated in Russell v. Men of Devon (1798) 2 Term Rep. 667, 100 Eng. Rep. R. 359. At common law no action on the case was permitted to a private individual against the city, the proper remedy being by indictment. Bro. Abr., Accion sur le case, pl. 93; *Quod nato per Hedon* (1404) 5 Edw. IV, 3.