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RECENT DEVELOPMENTS IN STATE TAXATION OF INTANGIBLES

Two decisions handed down by the Supreme Court during the current term, *viz.*, *Safe Deposit & Trust Co. v. Virginia*¹ and *Farmers' Loan & Trust Co. v. Minnesota*,² undoubtedly mark a distinct variation in the law relating to the taxation of intangible property. While the decision of each case on the points involved is clear, there is considerable doubt as to what the effect of the two cases will be, since they leave room, as will be seen, for a variety of inquiries relating to the general principles of taxation. Under the Virginia case intangible trust property located in another state may not be taxed as such by the domiciliary state of the beneficiaries; and under the Minnesota case intangible property having a taxable situs in one state by virtue of the application of the maxim *mobilia sequuntur personam*, since it may be taxed at the owner's domicile, is immune from taxation by the state in which a debtor resides or the evidence of indebtedness is located. From this summary of the two cases it can be seen that the court has deliberately taken a stand against double taxation. The same attitude was expressed in the case of *Frick v. Pennsylvania*, decided five years ago, in regard to tangible property,³ and in several cases since;⁴ and while these cases are by no means analogous to each other or to the cases under consideration, it is impossible not to interpret the result in each case as indicating a decided reluctance to sustain an exercise by the states of the taxing power where it operates to tax the owner, as in the case of property taxation, or the legatee, as in the case of inheritance taxation, a second time.

While a different opinion has been expressed on the subject,⁵

¹ (1929) 50 S. Ct. 59, 74 L. Ed. (Adv.) 76.

² (1929) 50 S. Ct. 98, 74 L. Ed. (Adv.) 190.

³ (1925) 268 U. S. 473, in which a transfer tax on tangible personalty located in another state was declared void.

⁴ *Brooke v. Norfolk* (1928) 277 U. S. 27, holding that a beneficiary entitled only to the income for life of a fund controlled and possessed by trustees in another state where the trust was created, is not subject to a tax measured by the value of the whole corpus, in addition to a tax measured by his income. Also *Wachovia Bank & Trust Co. v. Doughton* (1926) 272 U. S. 567, in which the donee of a power of appointment in regard to trust property created and located in Massachusetts resided in North Carolina and exercised the power there. North Carolina sought to levy a transfer tax computed on the value of the whole trust estate which passed under the power of appointment, and the tax was declared unconstitutional.

⁵ See concurring opinion of McKenna, J., in *Wheeler v. Sohmer* (1913) 233 U. S. 434, in which he quotes with approval the language of the court in *Buck v. Beach* (1907) 206 U. S. 392, to the effect that a property tax is of a different nature from an inheritance tax and that decisions involving one are not in point in regard to a case involving the other.

it may now be stated as a general proposition that where a state has no jurisdiction to levy a direct property tax, it likewise has no jurisdiction to levy an inheritance or succession tax; and it follows that cases involving either kind of tax may be cited in connection with the other.⁶ Therefore, in discussing these two cases, it will be necessary to refer to decisions concerning both property and inheritance taxes, since a glance at either opinion will show that the court has followed the view announced in *Rhode Island Trust Co. v. Doughton*.

Taking up as a preliminary matter the maxim of the common law, *mobilia sequuntur personam, i. e.*, "movables follow the person," which is constantly referred to on questions of situs for purposes of taxation, it is found that this expression is merely a legal fiction and is very apt to be misleading in view of the kaleidoscopic treatment it has received at the hands of the courts.⁷ It is not of universal application and does not rest on any constitutional foundation.⁸ It is generally laid down that the doctrine expressed by the maxim is one resting solely on convenience and justice, so that in a proper situation it yields to the established facts.⁹ Thus where tangible personal property has acquired an actual situs outside the state in which the owner is domiciled,¹⁰ or where intangible personalty has acquired a business situs in a state other than the one where the owner is domiciled,¹¹ the courts have found little difficulty in disregarding the

⁶ *Rhode Island Trust Co. v. Doughton* (1925) 270 U. S. 69, in which the court said: ". . . the principle that the subject to be taxed must be within the jurisdiction of the state applies as well in the case of a transfer tax as in that of a property tax. A state has no power to tax the devolution of the property of a nonresident unless it has jurisdiction of the property devolved or transferred. In the matter of intangibles, like choses in action, shares of stock and bonds, the situs of which is with the owner, a transfer tax of course may properly be levied by the state in which he resides." Compare *Kroeger, Constitutional Limitations of State Jurisdiction Over Property for Succession Tax Purposes* (1929) 14 ST. LOUIS L. REV. 99.

⁷ "This rule is subject to so many exceptions and limitations that it is quite as liable to mislead as to furnish a correct guide, when considered alone." *Board of Com'rs. Kingman County v. Leonard* (1896) 57 Kan. 531, 46 Pac. 960, 34 L. R. A. 810.

⁸ *Cooley, TAXATION* (4th ed. 1924) sec. 440; *State v. Pittsburgh Plate Glass Co.* (1920) 147 Minn. 339, 180 N. W. 108; *Pullman Car Co. v. Pennsylvania* (1890) 141 U. S. 18; *State Board of Assessors v. Comptoir National d'Escompte* (1903) 191 U. S. 388; *Buck v. Beach* (1907) 206 U. S. 392.

⁹ *Metropolitan Life Ins. Co. v. New Orleans* (1906) 205 U. S. 395; *Frick v. Pennsylvania* (1925) 268 U. S. 473, 42 A. L. R. 316; *New Orleans v. Stemple* (1899) 175 U. S. 309.

¹⁰ *Union Refrig. Transit Co. v. Kentucky* (1905) 199 U. S. 194.

¹¹ *Liverpool Ins. Co. v. Orleans Assessors* (1910) 221 U. S. 346; *New Orleans v. Stemple*, note 9 above.

maxim and refusing its application, in cases involving either property tax or inheritance tax.¹² It is interesting to note in this connection that in *Farmers' Loan & Trust Co. v. Minnesota* the maxim was applied and the tax denied, and that in *Safe Deposit & Trust Co. v. Virginia* the court expressly refused to apply the maxim to the situation and the tax was likewise denied. The former involved, as will be seen, an inheritance tax, while the latter concerned a property tax. As was said in the Virginia case, quoting with approval an earlier decision of the court,¹³ ". . . the maxim was intended for convenience, and not to be controlling where justice does not demand it."

The case of *Safe Deposit & Trust Co. v. Virginia* involved a property tax assessed against the non-resident trustee domiciled in Maryland and levied on stocks and bonds held in that state. The beneficiaries, two minor children of the settlor, were residents of Virginia, but received neither the income nor any part of the corpus. Under the terms of the trust agreement each beneficiary was to receive one-half of the accumulated income and one-half of the corpus on reaching the age of 25. The settlor reserved a power of revocation which had not been exercised. The trustee was taxed by the State of Maryland for the entire trust estate, and the whole corpus was again taxed by Virginia. This tax was sustained by the special Court of Appeals. On appeal to the Supreme Court the decision was reversed and the tax declared unconstitutional.

Mr. Justice McReynolds, in the majority opinion, bases the decision on the fact that the trustee had complete legal title to the securities in another state, and no person in Virginia had a present right to their enjoyment or power to remove. Therefore, the court says, the maxim *mobilia sequuntur personam* must be disregarded and must yield to the established fact of legal ownership. In discussing the main point, the court says: "Here we must decide whether intangibles—stocks, bonds—in the hands of the holders of the legal title with definite taxable situs at its residence, not subject to change by the *equitable*¹⁴

¹² *Wheeler v. Sohmer* (1913) 233 U. S. 434; *Frick v. Pennsylvania*, note 9 above. ". . . the old rule expressed in the maxim *mobilia sequuntur personam*, by which personal property was regarded as subject to the law of the owner's domicile, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could easily be carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs*, the law of the place where the property is kept and used." *Pullman Car Co. v. Pennsylvania*, note 8 above.

¹³ *State Board of Assessors v. Comptoir National d'Escompte* (1903) 191 U. S. 388.

¹⁴ Italics the writer's.

owner, may be taxed at the latter's domicile in another state. We think not. The reasons which led this court in *Union Refrig. Transit Co. v. Kentucky*, 199 U. S. 194, 50 L. ed. 150, and *Frick v. Pennsylvania*, 268 U. S. 473, 69 L. ed. 1058, 42 A. L. R. 316, to deny application of the maxim *mobilia sequuntur personam* to tangibles apply to the intangibles in appellant's possession. They have acquired a situs separate from that of the beneficial owners. The adoption of a contrary rule would involve possibilities of an extremely serious character by permitting double taxation, both unjust and oppressive." Justices Stone and Brandeis, although upholding Virginia's right to tax the interest of the beneficiaries,¹⁵ which was not done, concur on the ground that the taxation of securities under the exclusive control of a trustee in another state is taxation of property without jurisdiction. Mr. Justice Holmes dissented on two grounds, first, that under the deed of trust the beneficiaries were the absolute owners, and second, that exemption from taxation of property which has acquired an extra-state situs should be limited *in all cases* to tangibles, and should not be extended to intangibles.

It would seem from the statement of the case and from Mr. Justice Holmes' dissent, that the important and controlling point which was practically ignored in the opinion, was whether under the deed of trust the beneficiaries could be deemed "owners" for purposes of taxation. Since the tax was assessed against the trustee it can be said that the question does not arise. But Mr. Justice Holmes says very emphatically in discussing the right of Virginia to tax the beneficiaries on the whole corpus: "I do not understand that any merely technical question is raised on the naming of the trustee instead of the cestui que trust as the party taxed."¹⁶ This language suggests that it is the beneficiaries in fact who are being taxed, and hence that the question whether they are the owners or not, is a decisive one. But the majority opinion passes this question up,¹⁷ and decides the case on the fact of legal ownership.

To one not familiar with the opinion and with the group of cases cited therein, it is perhaps confusing just how far the

¹⁵ See *Maguire v. Trefry* (1920) 253 U. S. 12, note 18 *infra*.

¹⁶ See *Selden v. Brooke* (1906) 104 Va. 832, 52 S. E. 632, in which it is said: "Though the tax is assessed in the name of the trustee, the burden is in reality imposed upon the beneficial owner, a resident of the commonwealth, who enjoys the protection of its laws along with other citizens, and ought in fairness, to contribute her due proportion of revenue for the support of the government."

¹⁷ "We need not make any nice inquiry concerning the ultimate or equitable ownership of the securities or the exact nature of the interest held by the sons. In the disclosed circumstances, we think that is not a matter of controlling importance." 50 S. Ct. at p. 60.

opinion does go.¹⁸ This doubt is augmented in the dissenting opinion of Holmes, J., where, after noting the exception to the rule regarding taxation of personalty in cases involving tangible property permanently situated in another state,¹⁹ he says: "It seemed to me going pretty far to discover even that limitation in the 14th Amendment. It opens vistas to extend the restriction to stocks and bonds in a way that I cannot reconcile with *Blodgett*

¹⁸ The point to bear in mind is that the earlier cases presented widely varying phases of the problem, which the court had to decide as they came up. Thus, in *Kirtland v. Hotchkiss* (1879) 100 U. S. 491, the issue was the right of Connecticut to tax bonds owned by a resident, executed by a non-resident. The tax was sustained under the view that the debt is regarded as situated at the domicile of the creditor. No question was raised as to the right of Illinois, the domicile of the debtor, to tax the bonds. In *New Orleans v. Stemple* (1899) 175 U. S. 309, the power of Louisiana to tax choses in action on deposit in a Louisiana bank, where the owner was a resident of New York, was challenged. The tax was sustained on the ground that the notes and obligations had a "business situs" for purposes of taxation in Louisiana. In *Metropolitan Life Ins. Co. v. New Orleans* (1907) 205 U. S. 395, a tax on the "credits, moneys loaned" etc., by the company, which did business in Louisiana through an agent, was sustained even though the notes were sent to and kept at New York, the main office of the company. The court said: "Moreover, neither the fiction that personal property follows the domicile of its owner, nor the doctrine that credits evidenced by bonds and notes may have the *situs* of the latter, can be allowed to obscure the truth." In *Buck v. Beach* (1907) 206 U. S. 392, notes made and payable in Ohio, owned by a resident of New York, were located in Indiana. Indiana levied a tax on the notes, and the tax was declared unconstitutional on the ground that notes being mere evidences of debts, there was no taxable property within the state, so that the mere presence of the notes gave no jurisdiction to tax. In *Wheeler v. Sohmer* (1914) 233 U. S. 434, notes on deposit in a New York bank, owned by an Illinois decedent, were held subject to an inheritance tax levied by New York. The effect of this decision was to declare notes something more than "mere evidences of indebtedness," with a taxable situs where situated, at least at that time, for succession tax purposes. In *Hawley v. Malden* (1913) 232 U. S. 1, a tax on stock in foreign corporations, owned by a resident, was upheld, even though it had acquired a taxable *situs* in the state of incorporation. In *Maguire v. Trefry* (1920) 253 U. S. 12, Massachusetts taxed the income of a resident beneficiary, from trust property under the control of a trustee resident in Pennsylvania. The maxim was applied and the interest of the beneficiary as measured by the income was held subject to taxation. The court said: "The case presents no difference in principle from the taxation of credits evidenced by the obligations of persons who are outside of the state which are held taxable at the domicile of the owner. *Kirtland v. Hotchkiss*, 100 U. S. 491." In *Blodgett v. Silbermann* (1927) 277 U. S. 1, Connecticut levied an inheritance tax on bonds and choses in action owned by a resident decedent, which had an actual situs in New York. The tax was sustained under the rule of *mobilia sequuntur personam*.

¹⁹ *Union Refrig. Transit Co. v. Kentucky* (1905) 199 U. S. 194.

v. Silberman, 277 U. S. 1, 72 L. ed. 749." But a study of the opinions concerning the power of taxation, as in all cases involving the Fourteenth Amendment,²⁰ shows that the decision is limited in its application strictly to the facts presented, and it cannot be said that the decision is an extension of the principle of the *Frick* case²¹ to intangible property. The situs for taxation of the intangible corpus when the cestui has full beneficial enjoyment is still an open question.²²

The other recent case referred to above is *Farmers' Loan & Trust Co. v. Minnesota*.²³ In that case Minnesota levied an inheritance tax on bonds and certificates of indebtedness issued by the state of Minnesota and by cities in said state. The bonds were located in a New York bank, in which city the decedent was domiciled, and a transfer tax levied by the state of New York had been paid. The court, speaking again through Mr. Justice McReynolds, held the tax unconstitutional as a violation of the Fourteenth Amendment.

The opinion states first that the bonds under consideration were rightfully regarded as ordinary choses in action, presenting a proper case for the application of the maxim *mobilia sequuntur personam*, which would give them situs for taxation in New York. The next step in the decision was expressly to overrule the earlier decision in *Blackstone v. Miller*²⁴ which held that choses in action were properly taxable at both the debtor's and the creditor's domicile. The argument that the laws of Minnesota provided means for enforcing payment of the obligations of Minnesota public corporations, so as to give the debts a situs for taxation in that state, was dismissed as obsolete and untenable. The court then cites the cases supporting the rule that the taxation by a state of property not within its jurisdiction is a violation of the Fourteenth Amendment,²⁵ and the limitations on the

²⁰ Mr. Justice Moody in discussing the due process clause of the 14th Amendment says: "This court has always declined to give a comprehensive definition of it, and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decisions of cases as they may arise." *Twining v. New Jersey* (1908) 211 U. S. 78.

²¹ *Frick v. Pennsylvania* (1925) 268 U. S. 473, holding an inheritance tax on tangibles situated in another state to be illegal.

²² See note (1929) 42 HARV. L. REV. 712.

²³ (1929) 50 S. Ct. 98.

²⁴ *Blodgett v. Silberman* (1927) 277 U. S. 1.

²⁵ (1902) 188 U. S. 189, in which an inheritance tax on a bank deposit in New York owned by an Illinois decedent was sustained. See article by Kroeger, cited note 6 above.

²⁶ *State Tax on Foreign-Held Bonds* (U. S. 1873) 15 Wall. 300; *Union Refrig. Transit Co. v. Kentucky* (1905) 199 U. S. 194; *Safe Deposit & Trust Co. v. Virginia* (1929) 280 U. S. 83; *Rhode Island Trust Co. v. Doughton* (1925) 270 U. S. 69.

taxation of tangibles having an extra-state situs where a property tax is involved²⁷ and where a transfer tax is involved.²⁸ After referring to the doctrine under which tangibles are taxed only by the state in which they are located, the court says: "And, we think, the general reasons declared sufficient to inhibit taxation of them [tangibles] by two states apply under present circumstances with no less force to intangibles with taxable situs imposed by due application of the legal fiction." And again, "We have determined that in general intangibles may be properly taxed at the domicile of their owner and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles." Although restricted to the facts involved, it is manifest that such a holding, if carried to its logical conclusion, would overturn many of the prior decisions involving the taxation of intangibles. For instance, under the decision of *Wheeler v. Sohmer*²⁹ choses in action which were taxed under the maxim by the state in which the decedent resided, were also held to have a taxable situs in a second state solely by reason of their presence in the second state. It is submitted that the court could just as appropriately have overruled *Wheeler v. Sohmer* under the line of reasoning applied in overruling *Blackstone v. Miller*, and have relied on the earlier case of *Buck v. Beach*³⁰ at the same time. Another question that is raised is the application of the rule announced in the opinion to the taxation by the state of the owner of bonds which have acquired a taxable business situs in another state.³¹ The court in this connection says: "The present record gives no occasion for us to inquire whether such securities can be taxed a second time at the owner's domicile."

It is interesting to note the assault against double taxation by the court in overruling *Blackstone v. Miller*. "The inevitable tendency of that view [*i. e.*, the rule of *Blackstone v. Miller* and approving decisions] is to disturb good relations among the states and produce the kind of discontent expected to subside after establishment of the union. . . . The practical effect of it has been bad; perhaps two-thirds of the states have endeavored to avoid the evil by resort to reciprocal exemption laws." This, however, is only dictum, and the decision in *Frick v. Pennsylvania*, holding *inter alia* that double taxation of intangibles

²⁷ *Union Refrig. Transit Co. v. Kentucky*, note 26 above.

²⁸ *Frick v. Pennsylvania*, note 21 above.

²⁹ (1913) 233 U. S. 434.

³⁰ (1907) 206 U. S. 392, in which it was held that choses in action, owned by a New York creditor, merely located in Indiana, had no taxable situs in latter state.

³¹ *New Orleans v. Stemple* (1899) 175 U. S. 309; *Bristol v. Washington County* (1899) 177 U. S. 133; *Liverpool & L. & G. Ins. Co. v. Board of Assessors* (1910) 221 U. S. 346.

for succession tax purposes is constitutionally unobjectionable, is a word to the contrary. Nevertheless, the following language also contained in the opinion is rather convincing: ". . . certainly, existing conditions no less imperatively³² demand protection of choses in action against multiplied taxation whether following misapplication of some legal fiction or conflicting theories concerning the sovereign's right to exact contributions. For many years the trend of decisions has been in that direction."

In connection with the action of the court in overruling *Blackstone v. Miller* it is noteworthy that the attitude of the court as far as the taxation of debts or choses in action is concerned denotes a return to the view of the earlier state decisions which held that for the purpose of an inheritance tax a chose in action is to be regarded as situated with the creditor, so that a debt due from a resident debtor to a nonresident decedent is not taxable.³³ Likewise, a bank deposit has been held a mere debt due from the bank to depositor; as a mere chose in action it is without actual situs. It may be taxed at the depositor's domicile, and the state where the bank is located has refused to tax it.³⁴ Professor Beale in criticizing the *Blackstone* case several years ago³⁵ said: ". . . by the great weight of authority it is agreed that a debt has no territorial situs and can be taxed only as part of the personal tax of the creditor. A creditor may be taxed in the state of his domicile on all debts and choses in action due to him; but the state of the debtor cannot tax a debt due to a nonresident creditor."³⁶

WALLACE V. WILSON, JR., '30.

COMPLAINANT'S MISCONDUCT AS A DEFENSE TO HIS ACTION FOR DIVORCE

So long as Roman Catholicism was the state religion of England, that is, up to the reign of Henry VIII, marriage was re-

³² That is, than tangibles having an extra-state situs.

³³ *Allen v. Philadelphia Sav. Fund Society* (1879) 1 Fed. Cas. 234; *Kintzing v. Hutchinson* (1877) Fed. Cas. No. 7, 834; *Gilbertson v. Oliver* (1906) 129 Ia. 568, 105 N. W. 1002; *Matter of Gordon* (1906) 186 N. Y. 471, 79 N. E. 722; *Orcutt's Appeal* (1881) 97 Pa. 179.

³⁴ *Pyle v. Brennehan* (1903) 122 F. 787; *State v. Clement Nat. Bank* (1911) 84 Vt. 167, 78 Atl. 944; *Pendelton v. Com'th* (1909) 110 Va. 229, 65 S. E. 536. The opposite view was taken in *Matter of Houdayer* (1896) 150 N. Y. 37, 44 N. E. 189, and again in *Blackstone v. Miller* (1903) 188 U. S. 189.

³⁵ (1919) 32 HARV. L. REV. 587 at 603.

³⁶ Citing *Jack v. Walker* (1897) 79 F. 138; *Collins v. Miller* (1871) 43 Ga. 336; *Foresman v. Byrns* (1879) 68 Ind. 247; *McCartney v. Gordon* (1901) 127 Mich. 517, 86 N. W. 1042.