

Succession Taxes--Situs of Intangibles--Double Taxation (Two Cases) (Graves v. Elliott, 307 U.S. 357 (1939); Curry v. McCanless, 307 U.S. 350 (1939))

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has never accepted the doctrine¹⁸ although many concluded that it had done so in the *Parnell* case¹⁹ and its adoption was advocated in the *Flaherty* case.²⁰

The trend is toward limiting the application of the doctrine of attractive nuisance and this extends to the United States Supreme Court which has led the jurisdictions following the doctrine.²¹ It is submitted that the doctrine should be limited since its unlimited application would impose a crushing burden of care on property owners. However, the law has always recognized the need to protect minors against their lack of discretion and judgment, both in contracts and in crimes committed against them and involving their consent. It would seem equally logical to afford a modicum of protection to children trespassers where the danger and attractiveness of the instrumentality is obvious to adults and the instrument is easily accessible to children who may reach it despite the care of reasonably watchful parents, and when the danger could, without undue hardship or inconvenience, be eliminated by the owner.

L. D. B.

SUCCESSION TAXES—SITUS OF INTANGIBLES—DOUBLE TAXATION (TWO CASES).—(First Case) Decedent, while a resident of Colorado, created a trust of securities which she delivered to a Colorado trustee, the settlor of the trust retaining the power of revocation. After becoming a resident of New York, she died without exercising

liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if

"(a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and

"(b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unusual risk of death or serious bodily harm to such children, and

"(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and

"(d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein."

Paragraph (d) would appear to be a modification of the general rule of the turntable cases. It would probably be difficult to say that a turntable, for example, is of slight utility to a railroad company as compared with the risk it creates to young children.

¹⁸ *Morse v. Buffalo Tank Corp.*, 280 N. Y. 110, 19 N. E. (2d) 981 (1939); *Walsh v. Fitchburg Ry.*, 145 N. Y. 301, 39 N. E. 1068 (1895).

¹⁹ *Parnell v. Holland Furnace Co.*, 260 N. Y. 604, 184 N. E. 112 (1932).

²⁰ *Flaherty v. Metro Stations, Inc.*, 202 App. Div. 583, 196 N. Y. Supp. 2 (4th Dept. 1922), *aff'd*, 235 N. Y. 605, 139 N. E. 753 (1923).

²¹ Compare *Sioux City and Pacific R. R. v. Harry G. Stout*, 17 Wall. 657 (U. S. 1874), with *United Zinc and Chem. Co. v. Britt*, 258 U. S. 268, 42 Sup. Ct. 299 (1921).

this right of revocation. Because of the presence of the securities in Colorado, that state imposed an inheritance tax. Later, New York tax authorities also sought to tax the trust, but were denied the right to do so by the New York Court of Appeals. On appeal to the United States Supreme Court, *held*, four judges dissenting, reversed. The power to revoke a trust is equivalent to ownership and, therefore, subject to a death tax by the state wherein the deceased was domiciled. *Graves v. Elliot*, 307 U. S. 357, 59 Sup. Ct. 913 (1939).

(Second Case) Decedent, domiciled in Tennessee, transferred to an Alabama trustee certain stocks and bonds, reserving the trust income and a general power of appointment over the corpus of the trust which could be exercised by will. The trust was in all other respects irrevocable. Alabama claimed the right to tax because the intangibles were within her borders. Tennessee asserted her right to tax on the ground that the power of disposition by will is equivalent to ownership, and that the maxim *mobilia sequuntur personam*¹ gave the securities a taxable situs in Tennessee. The Tennessee Supreme Court upheld Tennessee's right to tax and Alabama's taxing jurisdiction was denied. On appeal to the United States Supreme Court, *held*, four judges dissenting, reversed so far as the decree of the Supreme Court denies the power of Alabama to tax. The transfer is taxable in both states. The rule that intangibles are taxed at their situs and not elsewhere, based on the theory that it is the identity or association of intangibles with the person of their owner at his domicile which gives jurisdiction to tax, is not applicable where the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state. *Curry v. McCannless*, 307 U. S. 350, 59 Sup. Ct. 900 (1939).

Both cases concern the determination of the taxable situs of a trust of securities where the settlor of the trust is domiciled in one state and the physical evidences of the corpus, in which she retains certain powers, are in another. Both cases hinge on her relation to the corpus and the court's interpretation of the nature of the intangible. In the first case, the trust (in which the power to revoke is reserved) was created in the settlor's state before she became a New York resident. In the second case, the trust (in which the power to dispose of it by will is retained) was created outside of the donor's domicile. The principal defense in both cases was the claim that the same property was being taxed twice in violation of the Fourteenth Amendment. The due process clause of the Fourteenth Amendment,

¹ *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18, 22, 11 Sup. Ct. 876 (1890) ("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 be easily 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").

however, does not prohibit double taxation.² Consequently, much hardship results in that the "same property is subjected to an inheritance tax in two states".³ Prior to the principle expounded in *Union Refrigerator Transit Company v. Kentucky*⁴ and settled in *Frick v. Pennsylvania*,⁵ the maxim *mobilia sequuntur personam* was applied to tangible as well as intangible property. Property was being taxed by the state wherein it was located and by the state wherein the taxable event (death) took place.⁶ With the *Frick* case, the maxim was limited in its application by strictly denying the state of domicile the power to tax tangible property having an actual situs in another state. However, nothing was said in favor of intangibles and the hardship of double taxation in respect to them still persisted.⁷

In the first of the principal cases, the New York Court of Appeals⁸ followed the decisions of the Supreme Court in *Safe Deposit and Trust Company v. Virginia*⁹ and *Wachovia Bank and Trust Company v. Doughton*,¹⁰ both of which decidedly undermined the law upholding double taxation.¹¹ In the former case, the court gave recognition to the principle set forth in *Blodgett v. Silberman*,¹² that

² *Cream of Wheat Co. v. Grand Forks County*, 253 U. S. 325, 330, 40 Sup. Ct. 558 (1920) (holding that a tax imposed upon intangible property in more than one state to be valid, Justice Brandeis said, " * * * it is sufficient to say that the Fourteenth Amendment does not prohibit double taxation").

³ *Graves v. Elliot*, 307 U. S. 357, 59 Sup. Ct. 913 (1939), Hughes, C. J., dissenting.

⁴ 199 U. S. 194, 26 Sup. Ct. 36 (1905).

⁵ 268 U. S. 473, 45 Sup. Ct. 603 (1925).

⁶ "No doubt, power on the part of two states to tax on different and more or less inconsistent principles leads to some hardship. It may be regretted, also, that one and the same state should be seen taxing on the one hand according to the fact of power, and on the other, at the same time, according to the fiction that, in succession after death *mobilia sequuntur personam* and domicile governs the whole. But these inconsistencies infringe no rule of constitutional law." *Per* Holmes, J., in *Blackstone v. Miller*, 188 U. S. 189, 23 Sup. Ct. 277 (1903). When a state levies taxes within its authority property not in itself taxable could be used as a measure of the tax imposed. *Maxwell v. Bugbee*, 250 U. S. 525, 40 Sup. Ct. 2 (1919).

⁷ The court stated that the reasons and rules applying to taxation of intangibles have no application to the taxation of intangibles; see Note (1926) 42 A. L. R. 330.

⁸ *In re Brown's Estate*, 274 N. Y. 10, 8 N. E. 10 (1937), *rev'd*, 307 U. S. 357, 59 Sup. Ct. 913 (1919).

⁹ 280 U. S. 83, 50 Sup. Ct. 59 (1929) (wherein the state of a decedent's domicile was denied the right to tax a trust of intangibles created by the decedent who retained the power to revoke, but in actual possession of a trustee residing in another state).

¹⁰ 272 U. S. 567, 47 Sup. Ct. 202 (1926). The situation in the second principal case is hardly distinguishable from that of the *Wachovia Bank* case, except for the fact that in the former case the decedent was both donor and donee of the power of appointment. In the latter case, the Supreme Court denied North Carolina, the decedent's domicile, the right to tax. "We think the assets of the trust estate had no situs, actual or constructive, in North Carolina".

¹¹ *Bullen v. Wisconsin*, 240 U. S. 625, 36 Sup. Ct. 473 (1916).

¹² 277 U. S. 1, 48 Sup. Ct. 410 (1927) (In this issue the decedent, a resident

the fiction *mobilia sequuntur personam* may be applied to determine the situs of intangible personal property, with the qualification that the fiction "must yield to established fact of legal ownership, actual presence, and control elsewhere, and ought not to be applied if so to do would result in inescapable and patent injustice whether through double taxation or otherwise". This has often been repeated¹³ and has been applied mainly to the "business situs" cases, where credits acquire an actual situs in a state other than the domicile of the owner if they are used in carrying on a business.¹⁴

However, there came a series of decisions wherein the fiction was arbitrarily applied to avoid the injustice of double taxation by the states as it affected intangibles. These decisions gave full credence to the legal ownership theory. The first case¹⁵ held property in the nature of debts to be taxable at the domicile of the creditor only, and not by the state wherein the physical evidences of the debts had their

of Connecticut, had control and present right to all benefits arising from the property physically within in New York. The *legal title was not held by another* [italics ours] with the duty to return possession. The court did not decide whether the property had a taxable situs in New York. The court said, "It is not enough to show that the written or printed evidence of ownership may, by the law of the state wherein they are physically present, be permitted to be taken in execution or dealt with as reaching that of which they are evidence even without the presence of the owner. While bonds are so often treated, they are nevertheless in their essence only evidence of the debt". Cf. *Virginia v. Imperial Coal Co.*, 293 U. S. 15, 55 Sup. Ct. 12 (1934).

¹³ The Court of Appeals in *In re Brown's Estate*, 274 N. Y. 10, 18, 8 N. E. (2d) 42, 44, *rev'd*, 307 U. S. 357, 59 Sup. Ct. 913 (1939), said that the principle that the situs follows the domicile, frequently arbitrarily and strictly applied, has given way to the logical and rational exception that where "the fact is clear that the intangible property has a situs elsewhere, the fiction will not be followed", citing *New Orleans v. Stempel*, 175 U. S. 309, 20 Sup. Ct. 110 (1899).

¹⁴ *Bristol v. Washington County*, 177 U. S. 133, 20 Sup. Ct. 585 (1899), citing, *In re Jefferson*, 35 Minn. 215, 28 N. W. 256, 259 (1886) ("For many purposes the domicile of the owner is deemed the situs of his personal property. This, however, is only a fiction from motives of convenience and is not of universal application, but yields to the actual situs of the property when justice requires that it should. It is not allowed to be controlling in questions of taxation"); *State Board of Assessors v. Comptoir National d'Escompte*, 191 U. S. 388, 24 Sup. Ct. 109 (1903); *Metropolitan Life Ins. Co. v. City of New Orleans*, 205 U. S. 395, 27 Sup. Ct. 499 (1907); *Buck v. Beach*, 206 U. S. 392, 27 Sup. Ct. 712 (1908); *Liverpool, London and Globe Ins. Co. v. Orleans Assessors*, 221 U. S. 346, 31 Sup. Ct. 550 (1910); *Wheeling Steel Corp. v. Fox*, 298 U. S. 193, 56 Sup. Ct. 773 (1935) (in which case the Court said that as to intangibles no sufficient reason exists for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles).

¹⁵ *Farmers Loan and Trust Co. v. Minnesota*, 280 U. S. 204, 50 Sup. Ct. 98 (1930) (Bonds were issued to a New York resident by the State of Minnesota and kept in New York vaults. *Held*, to be taxable by New York only. "While debts have no actual territorial situs we have ruled that a state may properly apply the rule *mobilia sequuntur personam* and treat them as localized at the creditor's domicile."); cf. *S. B. Laurence v. State Tax Commission of Mississippi*, 286 U. S. 276, 52 Sup. Ct. 556 (1931). *Contra*: *Wheeler v. Sohmer*, 232 U. S. 434, 34 Sup. Ct. 607 (1914).

situs. This was followed in *Baldwin v. Missouri*,¹⁶ wherein the deceased, an Illinois resident, left credits secured by notes and liens in Missouri and bank deposits in Missouri banks. The court denied the power of Missouri to tax, declaring that Illinois was the only taxable situs of the credits. The trend was maintained in a South Carolina case,¹⁷ wherein the court held the indebtedness of a corporation to be subject to an inheritance tax at the deceased creditor's domicile and not by the state of incorporation. Finally, the law was settled as to the transfer tax on corporate stock.¹⁸ It was held that the imposition of a tax by the state of domicile of a corporation, in respect to shares of stock in the corporation forming part of the estate of non-resident decedent, was a violation of the Fourteenth Amendment. In effect, corporate stock was categorized with bonds, notes, and credits when such intangibles are subjected to an inheritance tax in the domicile of the owner where the taxable event occurs. The court¹⁹ unambiguously said: "Shares of stock like other intangibles constitutionally can be subjected to death transfer taxes by one state only."²⁰

Because of the holdings in the instant cases, the effect of those decisions which defeated double taxation has been considerably weakened. Consequently, the *Wachovia*²¹ and the *Safe Deposit and Trust Company*²² cases are in a questionable light, and it appears as if the *Bullen v. Wisconsin*²³ case is once more acceptable law.

To meet the burdensome situation of multiple taxation which these two decisions revitalized, New York²⁴ and many other states²⁵ have enacted reciprocal exemption statutes. In view of the conflict of the courts' decisions, it is evident that legislation is the only panacea.²⁶

B. S.

¹⁶ 281 U. S. 586, 50 Sup. Ct. 436 (1929).

¹⁷ *Beidler v. South Carolina*, 282 U. S. 1, 51 Sup. Ct. 54 (1930).

¹⁸ *First Nat. Bank of Boston v. Maine*, 284 U. S. 312, 52 Sup. Ct. 174 (1931).

¹⁹ *Id.* at 328.

²⁰ *Worcester County Co. v. Reilly*, 302 U. S. 292, 59 Sup. Ct. 911 (1937).

²¹ 240 U. S. 625, 36 Sup. Ct. 473 (1916).

²² 280 U. S. 83, 50 Sup. Ct. 59 (1929).

²³ N. Y. CONST. Art. XVI, § 3. "Moneys, credits, securities and other intangible personal property within the state not employed in carrying on any business therein by the owners shall be deemed to be located at the domicile of the owner for the purpose of taxation, and if held in trust, shall not be deemed to be located in this state for purposes of taxation because of the trustee being domiciled in this state. * * *"

²⁴ Orr, *Reciprocal Exemptions from Inheritance Taxation* (1938) 18 B. U. L. REV. 41, n.25.

²⁵ Justice Holmes, in a dissenting opinion in *Baldwin v. Missouri*, 281 U. S. 586, 596, 50 Sup. Ct. 436 (1929) said: "Very probably it might be a good policy to restrict taxation to a single place, and perhaps the technical conception of domicile may be the best determinant. But it seems to me if that result is reached, it should be reached through understanding among the states, by uniform legislation or otherwise".