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Article 27

Taxation--Federal Gift Tax--Estates by the Entirety (Lilly v. Smith, 96 F.2d 341 (9th Cir. 1938))

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obviate the apparent difficulties encountered in seeking relief in tort under the Decedent Estate Law, the plaintiff may have had recourse to contract had he so elected.[18] The action, if such were the case, would be instituted on the sole theory of breach of warranty. Obviously, in following that procedure the plaintiff would be suing for the benefit of decedent's estate [20] rather than in behalf of the next of kin. The damages recoverable in the contract action would have been all the damages suffered by deceased consequentially resulting from the breach. However, the advisability of proceeding under that theory is questionable when one considers the enhanced compensation available in the death action. It is the concensus of judicial opinion that in proceedings for breach of contract the relief afforded should be limited to the actual damages suffered by the injured party himself.[21] This would, obviously, preclude a third party from maintaining suit in his own behalf.[22] In a death action the plaintiff would be allowed to *move* that the jury take into consideration, in computing the damages, such future pecuniary losses that the beneficiaries under the statute would suffer.[23] The comparative desirability, therefore, of proceeding under the Decedent Estate Law rather than in contract is self-evident.

J. R. P.

TAXATION—FEDERAL GIFT TAX—ESTATES BY THE ENTIRETY. —Plaintiff and his wife acquired realty in Indiana as tenants by the entirety. The plaintiff paid the sum of $300,000, personally furnishing the entire consideration. The collector of internal revenue taxed this transaction as a gift of the purchased realty to the wife. Plaintiff recovered in the District Court the $16,582 which he paid under protest. On appeal, *held,* reversed. Where a wife gets realty as a tenant by the entirety, without paying any consideration therefor, she is a

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[18] N. Y. PERS. PROP. LAW § 96.

[19] See note 3, *supra.*

[20] N. Y. DEC. EST. LAW § 116; Hamilton v. Erie R. R., 219 N. Y. 343, 114 N. E. 399 (1916).

[21] Orester v. Dayton Rubber Manufacturing Co., 228 N. Y. 134, 126 N. E. 510 (1920); Hallock v. Becher and Sackett, 42 Barb. 199 (N. Y. 1864).

[22] Because of lack of privity no cause of action arises in favor of or against a stranger to the contract. Chysky v. Drake Bros. Co., 235 N. Y. 468, 139 N. E. 576 (1923).

[23] Oldfield v. Harlem R. R., 14 N. Y. (4 Kern) 310 (1856); Tilley v. Hudson River R. R., 29 N. Y. 252 (1864); Hall v. Germain, 131 N. Y. 536, 30 N. E. 591 (1892); Sternfels v. Metropolitan St. Ry., 174 N. Y. 512, 66 N. E. 1117 (1903) (in an action for wrongful death, mortality tables are admissible to establish decedent's expectancy of life).

recipient of a gift and subject to the Federal Gift Tax.[1] *Lilly* v. *Smith,* 96 F. (2d) 341 (C. C. A. 9th, 1938).

A conveyance or devise [2] of real property [3] to two persons who are validly married [4] at the time of the conveyance creates a tenancy by the entirety,[5] in the absence of a clear intention to create a different type of estate.[6] The essence of such an estate is that each tenant is seized of the entire property, but neither is seized of an individual part thereof.[7] The estate is held by the legal unity of husband and wife, and therefore, neither party has any individual interest therein other than the right to a share in the possession and the rents and profits.[8] The plaintiff in the instant case, relying on the rule that an estate by the entirety is held by the unity of the husband and wife, argued: (1) that there was therefore no gift to his wife, (2) that in the event of her predeceasing him, the tax would in reality be a tax upon himself, (3) that in any event, the tax should only be based on one half the value of the land.

In the light of the intrinsic nature of a tenancy by the entirety it is clear that the wife became seized of the entire fee—and it may properly be said that there are two separate owners of the same fee.[9]

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[1] 47 STAT. 245 (1932), 26 U. S. C. § 537 (1934): "* * * a tax, * * * shall be imposed upon the transfer * * * of property by gift." Tax held valid as excise tax, and not void as direct tax not apportioned. O'Connor v. Anderson, 28 F. (2d) 873 (C. C. A. 2d, 1928), *aff'd,* 280 U. S. 615, 50 Sup. Ct. 81 (1929). See Hilton v. United States, 3 Dall. 171 (U. S. 1796); Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747 (1900).

[2] The tenants must take by purchase, *viz.:* by deed or will, and not by inheritance. WALSH, REAL PROPERY (2d ed. 1927) 359.

[3] Tenancies by the entirety may only be created in real property, and not in personalty. Matter of Blumenthall, 236 N. Y. 448, 141 N. E. 911 (1923); *cf. In re* Jamaica Bay, 252 App. Div. 103, 297 N. Y. Supp. 415 (2d Dept. 1937).

[4] The existence of the marital relation at the time of the conveyance is essential, the conveyance being to the unity in all cases. Bambauer v. Schleider, 175 App. Div. 562, 163 N. Y. Supp. 186 (2d Dept. 1917); Perrin v. Harrington, 146 App. Div. 292, 130 N. Y. Supp. 944 (4th Dept. 1911). However, it is not necessary that the relationship of the parties be declared in the grant, it being sufficient if they are validly married. *In re* Baffa's Estate, 139 Misc. 298, 248 N. Y. Supp. 332 (1931); *In re* Snitkin's Will, 151 Misc. 448, 271 N. Y. Supp. 688 (1934).

[5] This estate gets its name from the legal theory that the marital status is one inseparable thing. EASTERDAY, REAL PROPERTY (1st ed. 1932) 379.

[6] While husband and wife are the only persons who may take and own as tenants by the entirety, it does not follow that they are limited to this kind of estate; they may take and hold any of the other joint estates known to the law. Joos v. Fey, 129 N. Y. 17, 29 N. E. 136 (1891); Miner v. Brown, 133 N. Y. 308, 31 N. E. 24 (1892).

[7] Lang v. Commissioner, 289 U. S. 109, 111, 53 Sup. Ct. 534 (1933), wherein Sutherland, J., said: "An estate by the entirety is held by the husband and wife in a single ownership by single title. They do not take by moities, but both and each take the whole estate, that is to say the entirety." Matter of Klatzl, 216 N. Y. 83, 110 N. E. 181 (1915).

[8] Hiles v. Fisher, 144 N. Y. 306, 39 N. E. 337 (1895).

[9] *Cf.* Sutherland, J., in Lang v. Commissioner, 289 U. S. 109, 111, 53 Sup. Ct. 534 (1933): "An estate by the entirety is held by the husband and wife in a single ownership by *single title.*" (Italics ours.)

Hence the justification for the gift tax. The second contention of the plaintiff is unanswerable, unless we are to say that he may not in fact outlive his wife and that the taxing authority of Congress cannot await a death of one of the parties before it imposes a gift tax. The third contention must likewise give way inasmuch as she has become seized of the entire fee, as previously stated, by the conveyance. Upon the death of either spouse, the Federal Estate Tax [10] could be imposed upon the property.[11] Although it is conceded that each is seized of the whole in his own right, still the enjoyment of the benefits and profits of the property must be shared while both are alive.[12] Hence the courts justify this tax on the theory that the death of one tenant by the entirety results in the enjoyment of additional rights by the survivor.[13] But if it can clearly be shown that the surviving spouse originally owned part of the estate subsequently held by them as tenants by the entirety, then such part of the estate is not included in the Federal Estate Tax.[14] Similarly if a federal gift tax has been paid, the statute specifically permits the crediting of such amount paid to the amount to be paid as the estate tax.[15] It is to be noted that the New York Tax Law [16] expressly provides that upon the death of one tenant by the entirety, the estate is subject to a transfer tax. This tax is separate and distinct from the Federal Estate and Gift Taxes,

[10] 44 STAT. 69 (1926), 26 U. S. C. § 410 (1934): "A tax * * * is hereby imposed upon the transfer of the net estate of every decedent * * * whether a resident or non-resident of the United States."

[11] Goodenough v. Commissioner, 83 F. (2d) 389 (C. C. A. 6th, 1936).

[12] Matter of Klatzl, 216 N. Y. 83, 110 N. E. 181 (1915).

[13] Is there any distinction between the real estate itself, or its owner in respect to it, and the rents or income coming to the owners? 1 JARMON, WILLS (5th ed.) § 798 states that "a devise of the rents and profits or of the income of lands passes the land itself both at law and in equity." Paterson, J., in Hylton v. United States, 3 Dall. 171, 177 (U. S. 1796) states, "* * * land independently of its produce, is of no value." See Levy's Estate v. Commissioner, 65 F. (2d) 412 (C. C. A. 2d, 1933); Matter of Klatzl, 216 N. Y. 83, 110 N. E. 181 (1915).

[14] Foster v. Commissioner, 90 F. (2d) 486 (C. C. A. 9th, 1937).

[15] 47 STAT. 245 (1932), 26 U. S. C. § 537 (1934): "If a tax has been paid * * * on a gift * * * upon the death of donor * * * there shall be credited against the tax * * * so much of the property which constituted the gift."

[16] N. Y. TAX LAW § 220, subd. 5, as amended by Laws of 1915, c. 664, provides that "Whenever property is held * * * as tenants by the entirety * * * upon the death of one of such persons the right of the surviving tenant * * * to the immediate possession and enjoyment of such property, shall be taxable * * * as though * * * one-half of the property belonged absolutely to the deceased tenant * * *." Under this subdivision it has been held that an estate by the entirety is taxable to the extent of one-half the value of the property. Matter of Moebus, 178 App. Div. 709, 165 N. Y. Supp. 887 (2d Dept. 1917). Even before the amendment it was held that the interest of a tenant by the entirety passing to husband or wife was a taxable transfer on the death of either, to the extent of one-half the value of the property. Matter of Klatzl, 216 N. Y. 83, 110 N. E. 181 (1915). See concurring opinion of Bartlett, J., in the same case.

and must be paid regardless of whether the federal taxes have been paid.[17]

H. K.

WORKMEN'S COMPENSATION — INDEPENDENT CONTRACTOR — NEGLIGENCE.—Defendant entered into an agreement with a contracting firm whereby the latter was to do its construction work and furnish all necessary labor. However, defendant was to have the right of general supervision. The purpose of this arrangement was to evade the payment of premiums on accident insurance. Deceased was formerly employed by the defendant, but under the agreement he was discharged by the defendant and hired by the construction firm. He was killed because of the negligence of the defendant and the administratrix brings this action under Section 130 of the Decedent Estate Law. The defense is (1) that although deceased was hired by the construction firm, the defendant retained general supervision over all the work and the employees, and hence deceased was in the employ of defendant; (2) that the contract between defendant and the construction firm did not express the real intent of the parties; and (3) that since in fact deceased was in the employ of defendant, the sole remedy is under the Workmen's Compensation Law.[1] On appeal from a reversal by the Appellate Division of a judgment for the plaintiff, *held,* reversed and new trial granted. The action was properly brought in negligence. The reversal by the Appellate Division on the ground that there was a master and servant relationship was against the weight of evidence; but because of apparently inconsistent findings of fact by the jury, a new trial should be held. *Wawrzonek* v. *Central Hudson Gas and Electric Corp.,* 276 N. Y. 412, 12 N. E. (2d) 527 (1938).

Prior to the passage of the Workmen's Compensation Law in 1922, the common law rule of master and servant was the basis of

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[17] "* * * by the Constitution the States not only gave to the nation the concurrent power to tax persons and property directly, but * * *." Fuller, C. J., in Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 15 Sup. Ct. 673 (1895).
In Lang v. Commissioner, 289 U. S. 109, 53 Sup. Ct. 534 (1933), in commenting upon the possible hardship to individuals subject to both federal and state taxes, the court said, "If the legislation hereunder review results in imposing an unfair burden upon the taxpayer, the remedy is with Congress and not with the courts. Unless there is a violation of the Constitution, Congress may select the subjects of taxation * * *."

[1] N. Y. WORKMEN'S COMPENSATION LAW § 11: "The liability of an employer * * * shall be exclusive and in place of any other liability * * *." Shanahan v. Monarch Engineering Co., 219 N. Y. 469, 114 N. E. 795 (1916) (right to compensation is exclusive remedy where master and servant relationship exists); Lee v. Cranford, Inc., 182 App. Div. 191, 169 N. Y. Supp. 370 (2d Dept. 1918).