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Income Tax--Taxability of Income Left Widow in Lieu of Dower (People ex rel. Kight v. Lynch, 255 N.Y. 323 (1931))

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termed a government instrumentality. *Willcuts v. Bunn*, 51 Sup. Ct. 125 (1931).

The lower courts while holding the tax as one on a government instrumentality, attempted to bring the present case within the constitutional prohibition as exempt from taxation since affecting the borrowing power of the state.³ Taxation is as essential to the existence of government as is the borrowing of money. State bonds are exempt from Federal taxation since they constitute a contract of the state, and a tax upon the amount payable bears directly on the borrowing power of the state.⁴ But the sale of bonds by purchasers after issuance by the state, is a transaction distinct from the contract of the government,⁵ and the exemption on the obligation of the state does not extend to profits realized by a private sale.

There has been much discussion regarding "government instrumentalities." The courts have held that the states may not tax directly incomes from patents and copyrights,⁶ though they may utilize incomes from such instrumentalities as an element in ascertaining the value of the privilege of doing business.⁷ Thus while patent royalties may not be taxed the income derived from the manufacture and sale of a patented article is not exempt.⁸ The problems presented in the *Macallen* case,⁹ where the Court refused to distinguish between direct and excise taxes when levied on government instrumentalities, are not involved here. The tax is not levied directly or indirectly on an *instrumentality*, for obviously this is a private business transaction. The question presented is a practical one. The states or their subdivisions will suffer no additional burden; the individual is bearing his share of the cost of government by paying a tax upon the profits arising from the sale of government bonds as he would were industrial securities the subject of the sale.

C. A. B.

INCOME TAX—TAXABILITY OF INCOME LEFT WIDOW IN LIEU OF DOWER.—The relator, a widow, accepted in lieu of dower the income from a trust estate created by the last will and testament of her

³ *Supra* note 2; *Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429, 15 Sup. Ct. 675 (1894); *National Life Ins. Co. v. U. S.*, 227 U. S. 508, 48 Sup. Ct. 59 (1928).

⁴ *Weston v. Charleston*, 2 Pet. 449, 468 (U. S. 1829).

⁵ *Trefry v. Putnam*, 227 Mass. 522, 529, 116 N. E. 904, 907 (1917).

⁶ *Long v. Rockwood*, 277 U. S. 142, 48 Sup. Ct. 463 (1928); see (1930) 4 St. John's L. Rev. 311, 313.

⁷ *Educational Films Inc. v. Ward*, 51 Sup. Ct. 170 (1931); See also *Powell, Indirect Incroachment on Federal Authority* (1918) 31 Harv. L. Rev. 321.

⁸ *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115 (1878); *Webber v. Virginia*, 103 U. S. 344 (1880).

⁹ *Macallen v. Mass.*, 279 U. S. 620, 49 Sup. Ct. 432 (1929).

deceased husband. She included in her income tax return the income received under such will. In this action she sought a refund, *Held*, that such income is subject to payment of an income tax under sections 365 and 359 of the New York Tax Law.¹ *People ex rel. Kight v. Lynch*, 255 N. Y. 323 (1931).

The exemptions under the New York State Income Tax Law are identical with the provisions of the Federal Revenue Act², yet the Court refused to follow the federal rule as established, in the absence of any final construction of the statute by the U. S. Supreme Court. The U. S. Circuit Courts have held this class of income exempt under the Federal Revenue Act on the theory that a widow's election made her a purchaser for value of an annuity not taxable until the income therefrom equals the amount or value of the principal payment, namely her dower interest,³ or in other words that such income is a non-taxable annuity until the value of dower right or capital investment is returned to the widow. The Appellate Division in unanimously holding for the plaintiff followed the federal rule for the practical reason that there should not be a contradictory rule relating to the same income.⁴ While the instant Court appreciates the value of practicable conformity of state and federal regulations for the same income it suggests that the question has not been fully presented to the federal courts, and that by reason of the New York dower statutes it must adopt another conclusion. Payments from a trust fund created under a will is income taxable to the

¹ The Tax Law (Consol. Laws, c. 60), Section 365, provides that the tax on incomes shall apply to estates and trusts "which tax shall be levied, collected and paid annually upon and with respect to the income of estates or of any kind of property held in trust, including:

"* * * d. Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals. * * *" Subdivision 1. This tax shall not be paid by the *fiduciary, but there shall be included in computing the net income of each beneficiary his distributive share, whether distributed or not, of the net income of the estate or trust for the taxable year. Section 365, Subd. 4. Certain items are exempt from taxation, and are enumerated in Section 359 (Subd. 2); they include:

"a. The proceeds of life insurance policies and contracts paid upon the death of the insured to individual beneficiaries or to the estate of the insured.

"b. The amount received by the insured as a return of premium or premiums paid by him under life insurance, endowment or annuity contracts, either during the term or at the maturity of the term mentioned in the contract or upon surrender of the contract.

"c. The value of property acquired by gift, bequest, devise or descent (but the income from such property shall be included in gross income)."

² Section 359, Subd. 2, Pars. a-c; Consol. Laws, Ch. 60. Rev. Act of 1916, Sec. 4; Rev. Act. of 1918, Sec. (b) (1-3).

³ *Warner v. Walsh*, 15 F. (2d) 367 (C. C. A., 2nd, 1926); *U. S. v. Bolster*, 26 F. (2d) 760 (C. C. A. 1st, 1928); *Allen v. Brandeis*, 29 F. (2d) 363 (C. C. A., 8th, 1928).

⁴ *People ex rel. Kight v. Lynch*, 228 App. Div. 861, 240 N. Y. Supp. 790 (3rd Dept., 1930).

recipient, since payments are income when in the hands of trustees.⁵ A widow in electing to take under the will makes an election allowed by law.⁶ She purchases nothing, since the estate is not a vendor nor is she a vendee of anything. Under our statutes if a widow elects to take a gross sum instead of rents⁷ the sum is exempt from taxation.⁸ But it is also true that if such sum is invested the income from such investment is taxable.⁹ If she elects to take dower, and has admeasured to her a specific piece of property the rents from such property is income, and not payments as part of her principal. The same is equally true if she received one-third of the rental value annually for life. It is all income irrespective of the manner in which a widow receives her dower interest. It is not a capital payment in any sense of the word asserted the main court unanimously. Another consideration moves the Court. The inchoate right of dower has been abolished.¹⁰ Where there is a will she has numerous elections even though the right is not provided for in the will. It is logical to say as does the Court here that "every election made by a widow under the law would not metamorphose income into principal."¹¹ On principle and argument the reasoning of the Court is sound, and establishes the better rule.

J. M. P.

⁵ Irwin v. Gavit, 268 U. S. 161, 45 Sup. Ct. 475 (1924).

⁶ N. Y. Real Property Law, Sec. 200.

⁷ *Ibid.*, Sec. 480.

⁸ N. Y. Tax Law, Sec. 359.

⁹ *Supra* note 5.

¹⁰ Laws 1929, c. 229; amending the Decedent Estate Law, the Surrogate's Court Act, the Real Property Law, the Civil Practice Act, and the Personal Property Law, generally in relation to decedent's estates, taking effect Sept. 1, 1930.

¹¹ Per Crane, *J.* at p. 328.