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Jurisdiction to Levy Inheritance Taxes

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each case) so affected by the amendment shall be necessary for its adoption. (Section 34, C)

(3) The term for which a corporation is created may be extended by amendment. (Section 34, A)

(4) Any amendment which might be adopted at a meeting may be adopted without a meeting if written consent to the amendment has been given by all members entitled to vote. (Section 34, E)

NOTE D. *Section 35 requires the filing of articles of amendment with the parish recorders of mortgages and the Secretary of State, and sets forth the prescribed manner.*

ARTICLE XIII. INCORPORATORS

THE NAMES AND ADDRESSES OF THE INCORPORATORS OF THIS CORPORATION ARE AS FOLLOWS:

SEE SECTION 3, A (6))

(The articles should conclude with the signatures of all incorporators, two witnesses and the notary's attestation of authenticity. See Section 3, A.)

JURISDICTION TO LEVY INHERITANCE TAXES

The problem of jurisdiction to tax is one of constitutional law. In the field of death taxes,[1] the jurisdictional question is of importance to the taxpayer, his estate planner, and the state legislator, especially in view of the possibility of multiple taxation.

Prior to the beginning of the present century, it was generally conceded in the United States that the entire movable estate[2] of a decedent would be taxed only by the domiciliary state. This practice was applied to tangibles as well as intangibles under the doctrine of *mobilia sequuntur personam.* How-

1. Forty-seven states have some form of death tax; Nevada is the only state that does not impose any such taxes. An inheritance tax is not a tax upon the property itself but on the privilege or right to inherit. Succession of Papp, 146 La. 464, 83 So. 765 (1919). Estate taxes are based on the power to transmit or the transmission from the dead to the living. Frick v. Lewelleyn, 298 Fed. 803 (W.D. Pa. 1924).

2. It is well settled that only the state where the land is located may collect an inheritance tax as applied to land. Therefore the taxability of real estate is not discussed. See Succession of Westfeldt, 122 La. 836, 48 So. 281 (1909) and authorities cited therein.

ever, in 1903, in *Blackstone v. Miller*,[3] the United States Supreme Court held that there was no constitutional prohibition[4] against multiple taxation, and that, therefore, both Illinois, the state of the domicile of the decedent, and New York could collect inheritance taxes on a bank deposit in the latter state. The court sustained the tax levied by New York on the ground that power over the person of the debtor confers jurisdiction.

In *Frick v. Pennsylvania*,[5] decided in 1925, the state of the decedent's domicile was denied the power to collect an inheritance tax based on tangible personal property located permanently out of the state. The court held that the property, by reason of its character and situs, was wholly under the jurisdiction of other states (Massachusetts and New York) and was not under the jurisdiction of Pennsylvania simply because the decedent was domiciled there. The court assumed the power to allocate jurisdiction among the states and thus gave new meaning to its expression, taxation "without such jurisdiction is mere extortion, and in contravention of due process of law."[6]

The power of the states to resort to multiple taxation of intangibles was denied in *Farmers Loan and Trust Company v. Minnesota*,[7] expressly overruling *Blackstone v. Miller*. Minnesota, the state of the domicile of the debtor, attempted to collect an inheritance tax on an obligation owed to a nonresident decedent. In holding the tax to be repugnant to the Fourteenth Amendment, the court reasoned that the general grounds precluding taxation of tangibles by two states should apply with equal force to intangibles with taxable situs imposed by due application of the legal fiction of *mobilia sequuntur personam*.[8] In his dissenting opinion, Mr. Justice Holmes declared that there is no constitutional objection to the taxation of a transaction by two states, if the laws of both must be invoked to give legal effect to the transaction.[9] The dissent also observed, "a good deal has to be read

3. 188 U.S. 189, 23 S.Ct. 277, 47 L.Ed. 439 (1903).

4. As to the constitutional issues the court held: "The tax does not deprive the plaintiff in error of any of the privileges and immunities of the citizens of New York," and "It does not violate the Fourteenth Amendment." 188 U.S. 189, 207, 23 S.Ct. 277, 279, 47 L.Ed. 439, 445.

5. 268 U.S. 473, 45 S.Ct. 603, 69 L.Ed. 1058, 42 A.L.R. 316 (1925). Cf. Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 26 S.Ct. 36, 50 L.Ed. 150 (1905).

6. 268 U.S. 473, 492, 45 S.Ct. 603, 605, 69 L.Ed. 1058, 1063 (1925).

7. 280 U.S. 204, 50 S.Ct. 98, 74 L.Ed. 371, 65 A.L.R. 1000 (1930). See also Baldwin v. Missouri, 281 U.S. 586, 50 S.Ct. 436, 74 L.Ed. 1056, 72 A.L.R. 1303 (1930).

8. 280 U.S. 204, 211, 50 S.Ct. 98, 100, 74 L.Ed. 371, 375 (1930).

9. 280 U.S. 204, 216, 50 S.Ct. 98, 102, 74 L.Ed. 371, 377.

into the Fourteenth Amendment to give it any bearing upon this case."[10]

The doctrine of "exclusive power to tax," apparently based on the Fourteenth Amendment, was applied to corporate stock in *First National Bank of Boston v. Maine*,[11] in which the state of incorporation was denied the power to collect an inheritance tax upon the death of a nonresident stockholder. Affirming the "single tax" theory, the court held: "A transfer from the dead to the living of any specific property is an event single in character and is effected under the laws, and occurs within the limits, of a particular state; and it is unreasonable, and incompatible with a sound construction of the due process of law clause of the Fourteenth Amendment, to hold that jurisdiction to tax that event may be distributed among a number of states."[12] Again, a minority of the court was of the opinion that no principle of constitutional interpretation would warrant the conclusion that taxation by both states, reaching the same economic interest with respect to which the stockholder has sought and secured the benefits of the laws of both, is so arbitrary or oppressive as to merit condemnation as a denial of due process of law."[13]

Under the doctrine established by the foregoing cases, the problem of multiple taxation no longer existed regarding tangible or intangible personalty, and the estate planner could act with reasonable certainty. But in 1939 history began to repeat itself and multiple taxation of intangibles was sustained in *Curry v. McCanless*.[14] A decedent, domiciled in Tennessee, transferred to a trustee in Alabama certain securities to be held in trust. In an action for a declaratory judgment, it was held that both Tennessee and Alabama could validly subject the trust property to transfer taxes. It was found that both states extended protection to the various legal relations springing from the trust and that the testatrix invoked the aid of the law of both states, and her legatees must do likewise in order to enjoy the benefits of the succession. As to the constitutionality of the taxes, the court held: "We can find nothing in the history of the Fourteenth Amendment and no support in reason, principle, or au-

10. 280 U.S. 204, 218, 50 S.Ct. 98, 103, 74 L.Ed. 371, 378.
11. 284 U.S. 312, 52 S.Ct. 174, 76 L.Ed. 313, 77 A.L.R. 1401 (1932).
12. 284 U.S. 312, 327, 52 S.Ct. 174, 177, 76 L.Ed. 313, 319.
13. Dissenting opinion of Mr. Justice Stone in which Mr. Justice Holmes and Mr. Justice Brandeis concurred. 284 U.S. 312, 333, 52 S.Ct. 174, 179, 76 L.Ed. 313, 323.
14. 307 U.S. 357, 59 S.Ct. 900, 83 L.Ed. 1339 (1939).

thority for saying that it prohibits either state, in the circumstances of this case, from laying the tax."[15]

Three years after the *Curry* case, the "single tax" theory was completely destroyed in *State Tax Commission of Utah v. Aldrich.*[16] Utah, the state of incorporation, attempted to collect an inheritance tax after the death of a non-resident stockholder. In overruling *First National Bank v. Maine*, the court said that any state which has extended benefits or protection or can demonstrate the practical fact of its power or sovereignty as respects the shares may constitutionally make its exaction, and that Utah was not restrained by the Fourteenth Amendment from taxing the transfer. The court was little concerned with any ill effects of multiple taxation and clearly stated that it was not within its province to provide any other system, for to do so "would violate the first principles of constitutional adjudication to strike down state legislation on the basis of our individual views or preferences as to policy, whether the state laws deal with taxes or other subjects of social or economic legislation."[17] Once again it is a matter of state concern to provide against multiple taxation. The various states have used several devices to avoid multiple taxation with the principal method being reciprocal exemption and immunity statutes.[18]

In expressing its attitude toward multiple taxation, the Louisiana Legislature in 1940 passed an act declaring the transfer of intangibles owned by nonresident decedents not to be subject to taxation.[19] As a result of this legislation it has been said that Louisiana is among the nineteen American jurisdictions which "have optimistically rested upon exemption or immunity statutes, without reciprocal features to lessen the impact of multiple state taxation."[20] Thus all transfers of intangibles of a non-resident decedent escape taxation in Louisiana, even though the transfer of intangibles of Louisiana residents may not escape taxation elsewhere, since the Louisiana statute does not contain

15. 307 U.S. 357, 372, 59 S.Ct. 900, 908, 83 L.Ed. 1339, 1351.

16. 316 U.S. 174, 62 S.Ct. 1008, 86 L.Ed. 1358, 139 A.L.R. 1436 (1942).

17. 316 U.S. 174, 181, 62 S.Ct. 1008, 1012, 86 L.Ed. 1358, 1370.

18. For an analysis and classification of the reciprocal exemption and immunity features of the laws of all the states, see Freedman, Practical Aspects of Multiple State Taxation of Intangibles of Nonresident Decedents Since the *Aldrich* Case (1948) 24 Notre Dame Lawyer 41, and Note (1940) 26 Iowa L. Rev. 694.

19. "No tax [shall] be imposed upon any transfer of intangibles, however used or held, whether in trust or otherwise, by a person, or by reason of the death of a person, who was not domiciled in this state at the time of his death." La. Act 67 of 1940, § 1 [Dart's Stats. (Supp. 1949) § 8556.1].

20. Freedman, supra note 18, at 43.

a reciprocity clause. Apparently our exemption statute has worked satisfactorily, for in their comments on the Louisiana Inheritance Tax Act[21] the Commissioners of the Revenue Code have not recommended any substantial changes in this respect.[22] Any loss of revenue to the state because of the flat exemption provision is probably offset by the resulting inducement to nonresidents to invest capital in Louisiana.

Although the transfer of intangibles owned by nonresidents are exempt from taxation, the transfer of those owned by Louisiana residents are subject to the tax regardless of the location of such intangibles.[23] In *Succession of Rosenthal*,[24] where the resident testator bequeathed to a nonresident bonds which were never physically within the state, the transfer was held subject to Louisiana inheritance tax. Since the rights evidenced by the bonds were held to be intangibles, Louisiana unquestionably has the jurisdiction to collect such taxes.

The transfer of tangible personal property of nonresidents having a situs in Louisiana is subject to the Louisiana inheritance tax.[25] This is in accord with well-established rules of jurisdiction to tax. However, the same section of the act declares that the tax shall be imposed with respect to all personal property owned by the residents of the State of Louisiana, wherever situated. The statute as worded is broad enough to include tangible personal property permanently situated out of the state.[26] Yet, under the rule of the *Frick* case, Louisiana is without jurisdiction to tax the transfer of such property. The inconsistency of a rule which allows the domiciliary state, in the case of transfers upon the death of a resident, to levy a tax with respect to intangibles wherever situated but not with respect to tangibles has been pointed out in several instances.[27] However, the United States Supreme Court has recently reaffirmed the rule of the

21. La. Act 127 of 1921 (E.S.) as amended [Dart's Stats. (1939) § 8556 et seq.]. See Comment (1948) 22 Tulane L. Rev. 635.

22. Projet of a Revenue Code for the State of Louisiana (1948) § 964.

23. La. Act 127 of 1921(E.S.) § 2 [Dart's Stats. (1939) § 8557].

24. 163 La. 673, 112 So. 525 (1927).

25. La. Act 127 of 1921 (E.S.) § 2 [Dart's Stats. (1939) § 8557].

26. The wording in the projet is even more explicit: "Said tax shall be imposed with respect to . . . all movable property, tangible or intangible, owned by residents of the State of Louisiana, wherever situated." Projet of a Revenue Code for the State of Louisiana (1948) § 964.

27. See, for example, Annotation, Succession tax at domicil of debtor or corporation as to credits or corporate stock belonging to estate of nonresident (1942) 139 A.L.R. 1458, 1462.

Frick case allowing only one state to collect succession taxes with respect to tangible personalty.[28]

In addition to the inheritance tax, Louisiana has an estate transfer tax.[29] The legislatively declared purpose of the act is "to obtain for this state the benefit of the credit allowed under the provision of Title III, Section 301, Subsection (b) of the Federal Revenue Act of 1926, or under Subsection (b) of Section 813 of the Federal Internal Revenue Code, to the extent that this state may be entitled under the said provisions, by imposing additional taxes; and this subchapter shall be liberally construed to effect that purpose."[30] Thus, the tax is not levied with respect to any particular property of a decedent but with respect to the federal basic estate tax. As such it would comprehend all of the property of the deceased which was included in the gross estate for federal purposes. To the extent that the federal tax is based on tangible personalty with a permanent situs outside of this state, the Louisiana act should be inapplicable.[31] However, the administrator or executor would gain nothing by raising such an objection. If Louisiana could not collect the tax, the federal credit would then be reduced, resulting in a payment to the federal government instead of the state government.

The shortcomings of the inheritance taxes are not as evident in the written law as in its enforcement. In their preliminary report, the code commissioners noted: "We feel constrained, if not compelled, to observe that the present enforcement of these taxes is so lax as to constitute, in many sections of the state, little or no enforcement at all."[32] In reference to the Estate Transfer Act they said: "The most glaring and inescapable observation compelled by the practical operation of the law is that *here exists an available source of substantial amounts of additional revenue for the State of Louisiana, to which it is justly entitled, and which would cost the taxpayers of Louisiana nothing*, because where the tax is not paid to Louisiana, it must be and is paid to the Federal Government."[33]

Louisiana has one of the lowest inheritance tax rates in the

28. Treichler v. Wisconsin, 70 S.Ct. 1 (U.S. 1949).

29. La. Act 119 of 1932 [Dart's Stats. (1939) § 8581 et seq.]

30. La. Act 119 of 1932, § 4 [Dart's Stats. (1939) § 8584].

31. Frick v. Pennsylvania, 268 U.S. 473, 45 S.Ct. 603, 69 L.Ed. 1058, 42 A.L.R. 316 (1925). See Treichler v. Wisconsin, 70 S.Ct. 1 (U.S. 1949), where the challenged tax was computed with reference to the Wisconsin and federal taxes.

32. Preliminary Report of the Louisiana Revenue Code Commission (1946) 117.

33. Id. at 118.

country and should it be found that the revenue therefrom is not what it should be, it is hoped that the legislature will provide for proper enforcement of the tax rather than increase the rates or extend the tax to transfers of property which are not now subject to it.

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COMPUTATION OF THE LEGITIME WHEN ESTATE OF DECEASED CONSISTS OF ASSETS IN SEVERAL STATES

Limitations on freedom of testation are common in this country.[1] Provisions which reserve some portion of a decedent's estate to the surviving spouse are found in some form in all states, varying from the ancient institutions of dower and curtesy to the idea of "forced portion" as provided by the Louisiana Civil Code,[2] or "hell-fire" statutes limiting a testator's freedom to leave his estate to charity where he either is survived by close relatives or attempts to make the charitable gift during his last illness.[3]

Two main types of statutes which restrict freedom of testation must be distinguished at this point: First, those statutes which reserve an "indefeasible share" to "forced heirs,"[4] exemplified by Article 1493 of the Louisiana Civil Code;[5] second, those statutes which limit to a certain fraction of the estate the share disposable by the testator either generally or in favor of certain recipients, especially charities, but do not reserve any defeasible share to specific members of the testator's family.[6] The California "hell-fire" statute is a good illustration of the second type.[7] That statute provides, in effect, that a testator who leaves certain

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1. Kuhn, Comparative Commentaries on Private International Law (1937) 333; Rheinstein, Cases on Decedent's Estates (1 ed. 1947) 403; Breslaur, Conflict of Laws in Restriction on Freedom of Testation (1942) 27 Iowa L. Rev. 425, n. 3, 426 n. 4, 5, 6, 7, 8, 9, 10, 11.

2. Arts. 1493, 1494, La. Civil Code of 1870.

3. Cal. Prob. Code (Deering, 1937) § 41.

4. Rheinstein, op. cit. supra note 1, at 439: "In contrast to the laws of the Civil Law countries, the laws of the several states of the United States, with the sole exception of Louisiana, do not grant an undefeasible share to the descendants of a testator. However, American law has developed some devices by which some measure of protection against disinheritance is established for all, or for certain groups of, the descendants."

5. "Donations inter vivos or mortis causa can not exceed two-thirds of the property of the disposer, if he leaves, at his decease, a legitimate child, one-half, if he leaves two children; and one-third, if he leaves three or a greater number. . ."

6. Bordwell, Statute Law of Wills (1928) 14 Iowa L. Rev. 1, 172, 196-198.

7. See note 3, supra.