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State Inheritance Tax on Shares of Foreign Stock Owned by Non-Resident Decedent

James Parker Hall

agency should serve decent business practice. It would be highly undesirable if insanity or the adjudication thereof made a power to confess a judgment unavailable. In the principal case the judgment was entered long before the sale was made under the order of the county court.

It does not appear that the conservator of George F. Hoots was served with notice to appear in circuit court at the time of entering the judgment. One may venture to think that this was not done since no mention is made and since the judgment was taken "in vacation." No ruling as to the necessity for this has been found. It would be an added protection if it were required.[5]

If Hoots had died it is stated in the opinion under review that no judgment could have been taken against him. It is not believed that the court meant by this that the power would have been revoked by Hoots' death but that in such event it would have been necessary to have summoned his personal representative into court and to have taken judgment against him. In *Fuller* v. *Jocelyn*[6] a judgment was entered against the principal on a warrant of attorney after his death. This was not known to the court at the time, but was called to its attention upon motion to set aside the judgment. The court refused to do so on the unsatisfactory ground that "being the course of the court to enter the judgments as of the first day of the term, they could not alter it on consideration of the circumstances that attend a particular case."[7]

It is generally, but not universally, held that death does not end a power of sale in a mortgage.[8] *Reilly* v. *Phillips*[9] was such a case and in addition the dead mortgagor left minor heirs. No guardian was appointed for them and no notice was given to them otherwise than by the customary publication. It was held that the sale under the power was valid.[10]

However closely insanity may resemble death, the analogy is not aided by the troublesome fiction of "civil death" which was rejected as a basis for refusing to enter a judgment in *Spencer* v. *Reynolds*, supra.

KENNETH C. SEARS.

CONSTITUTIONAL LAW—DUE PROCESS—TAXATION—INHERITANCE TAX ON SHARES IN FOREIGN CORPORATION OWNED BY NON-RESIDENT DECEDENT—[United States] The case of *Rhode Island Hospital Trust Co.* v. *Doughton*[1] decided by the federal Supreme Court last spring finally settles a question much mooted in recent years. One of the alleged grievances of some of our western and

5. Cf. *Lundberg* v. *Davidson* (1898) 72 Minn. 49, 74 N.W. 1018 (sale under power while mortgagor was insane; guardian ad litem unnecessary).
6. (1730) 2 Strange 882.
7. Cf. *Lanning* v. *Pawson* (1861) 38 Pa. 480.
8. *Mechem* "Agency" sec. 659; Tiffany "Agency" (2d ed.) sec. 88.
9. (1894) 4 S. D. 604, 57 N.W. 780.
10. See *Tracey* v. *Lawrence* (1854) 2 Drewry 403. See also *Grandin* v. *Emmons* (1901) 10 N.D. 223, 86 N.W. 723.

1. (1926) 46 S. Ct. 256.

southern states, in their search for new subjects of taxation, has been that so much property within their borders was owned by non-resident stockholders of foreign corporations, thus presenting a legal situation making difficult the levying of inheritance taxes by these states upon the death of such stockholders. A typical case was that of a large New Jersey mining or smelting corporation, whose productive property was all located in Montana while most of its stockholders were in New York and other eastern states. Upon the death of a New York stockholder, New York might levy an inheritance tax upon the transfer of his stock, as might New Jersey, while Montana, where was located nearly all of the physical property that gave actual value to the stock, seemed able to profit nothing from these transfers at death. To meet this situation it was suggested in the tax offices of states like Montana that perhaps the courts might be persuaded to "look through the corporate fiction" and discern an interest of the non-resident stockholder in the physical corporate property within the state, which, under an appropriately worded statute, could be taxed there at his death.

The theoretical arguments for this view were far from contemptible. In various situations familiar in the law of corporations the courts have recognized, where necessary to do justice or to enforce a legislative policy, that a corporation is essentially a form of business organization by means of which associated property interests may be more conveniently dealt with than under the common-law categories of individual ownership, but that the stockholder and the control he (though indirectly) exercises over the corporate property and business are the ultimate realities back of the "corporate entity." In the interpretation of the "due process" clause of the Fourteenth Amendment this reasoning was largely made unnecessary by the early ruling of the federal Supreme Court that a corporation was itself a person within the Amendment, so that it could directly invoke its protection, instead of its stockholders, as "persons," being required to show that their "property" was "taken" by the confiscation of that of the corporation.[2] But the notable opinion of Mr. Justice Field on circuit in 1882 ably maintained that:

"this has been because the property of a corporation is in fact the property of the corporators. To deprive the corporation of its property, or to burden it, is, in fact, to deprive the corporators of their property or to lessen its value. Their interest, undivided though it be, and constituting only a right during the continuance of the corporation to participate in its dividends, and on its dissolution to receive a proportionate share of its assets, has an appreciable value, and is property in a commercial sense, and whatever affects the property of the corporation necessarily affects the commercial value of their interests. . . . Now, if a statute of the state takes the entire property, who suffers loss by the legislation? Whose property is taken? Certainly, the corporation is deprived of its property; but at the same time, in every

2. *Santa Clara County* v. *Southern Pacific R.R. Co.* (1886) 118 U. S. 394, 396.

just sense of the constitutional guaranty, corporators are also deprived of their property."[3]

This has never been denied by the Supreme Court, though the case was affirmed upon other grounds.[4] Indeed, in view of the comprehensive conception of "property" which has been attributed to the due process clause in order fairly to extend its protection to the manifold interests of modern life, it would seem strange to exclude the interest (indirect though it be) which a stockholder has in the corporate property through his control over it by means of the corporate machinery and through the benefit he derives from its corporate use. "Property" in the constitutional sense cannot be confined to those categories of "title" or of "ownership" which the common law had recognized prior to 1868, if due regard is to be had for the realities of modern social and business relationships. It may be entirely convenient and proper to require the stockholder ordinarily and so far as practicable to work out his rights, constitutional or other, through the medium of the corporate form and machinery, but, however they may be classified or administered, that they are fundamentally *his* seems indubitable.

Granted the soundness of this reasoning, cannot the state where corporate property is physically located recognize the indirect property interest in it of the stockholder, not only for the beneficial purpose of protection under the due process clauses (state as well as federal) but for the less welcome purpose of inheritance taxation? In the absence of any other constitutional prohibition, is due process denied by a state's taxation of any existing interest in physical property which it protects within its borders? Logically this argument is somewhat impressive, but deductions from the premises of a practical subject like taxation can in constitutional law rarely be pushed to their apparently logical extremes. The situs of property for taxation of various sorts, particularly the situs of such artificial intangibles as are created by the ingenuity of modern business organization, must in a measure be governed by considerations of convenience and expediency as well as those of logic, and such considerations are strongly against the claim above set forth. If the state could tax the transfer at death of the interests of non-resident stockholders of a foreign corporation in physical corporate property in the state, could it not also tax the transfer of such interests by the sale of stock inter vivos between non-residents (though consummated outside the state), and permit the garnishment of such interests in suits against non-resident stockholders not served with process within the state? The same logic seems applicable here. The truth may well be that business convenience imperatively demands that the *transfer* of such an interest as that of the stockholder in the corporate property—real though it is—be exclusively governed by the jurisdictions that control the stockholder or the

3. *San Mateo County* v. *Southern Pacific R. R. Co.* (1882) 13 Fed. 722, 746-47.

4. (1885) 116 U.S. 138.

corporation, and that to attempt to deal otherwise with them is so unreasonable as to be lacking in due process.

In the principal case a North Carolina statute purported to levy an inheritance tax upon the shares of stock in foreign corporations owned by non-resident decedents, if at least 50 percent of the corporate property was located within the state—the taxable value of such shares being computed at the same proportion of the total value of such shares as the corporate property within the state bore to the total corporate property everywhere. In a unanimous opinion by Chief Justice Taft the decision of the North Carolina supreme court,[5] upholding the tax, was reversed in favor of the executor of a Rhode Island decedent who owned stock in a New Jersey corporation, two-thirds of whose corporate property was in North Carolina. The court said:

> "In this case the jurisdiction of North Carolina rests on the claim that because the New Jersey corporation has two-thirds of its property in North Carolina, the state may treat shares of its stock as having a situs in North Carolina to the extent of the ratio in value of its property in North Carolina to all of its property. This is on the theory that the stockholder is the owner of the property of the corporation, and the state which has jurisdiction of any of the corporate property has pro tanto jurisdiction of his shares of stock. We cannot concur in this view. The owner of the shares of stock in a company is not the owner of the corporation's property. He has a right to his share in the earnings of the corporation, as they may be declared in dividends, arising from the use of all its property. In the dissolution of the corporation he may take his aliquot share in what is left, after all the debts of the corporation have been paid, and the assets have been divided in accordance with the law of its creation. But he does not own the corporate property."[6]

This disposition of the matter seems almost too simple in view of what can be said to the contrary, but it is believed that the decision may be sustained by the argument outlined above, if not entirely satisfactorily by the reasoning of the court. A similar result, either upon constitutional or statutory grounds, has been reached in cases cited by the court from Massachusetts, Illinois, Idaho, Montana, Oklahoma, and Wisconsin, the leading one being *Tyler* v. *Dane County, Wisconsin* (1923) 289 Fed. 843. In its effect the case affords another welcome check upon the too frequent practice of multiple taxation of transfers at death. JAMES P. HALL.

CONSTITUTIONAL LAW—FUTURE INTERESTS—RIGHT OF LEGISLATURE TO TAKE AWAY INCHOATE RIGHT TO DESTROY CONTINGENT REMAINDER—WHAT IS AN INCHOATE RIGHT?—THE MESONOMIC RELATIONSHIP—[Illinois] The Illinois case of *Jennings* et ux. v. *Capen* at al.[1] announces no new or surprising doctrine but

5. (1924) 187 N.C. 263, 121 S.E. 741.
6. 46 S. Ct. at 258.

1. 151 N. E. 900.