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State InheritanceTax on Foreign Chattels

James Parker Hall

COMMENT ON RECENT CASES

CONSTITUTIONAL LAW—TAXATION—SUCCESSION TAX ON FOREIGN CHATTELS OF RESIDENT DECEDENT.—[United States] *Frick* v. *Pennsylvania*[1] decides several important and interesting points in the law of inheritance taxation contrary to the practice of a number of states. Henry C. Frick, a testator domiciled in Pennsylvania, disposed by will of a large amount of tangible personalty located in Massachusetts and New York (the "Frick Art Collection"), and a large number of valuable shares of stock in corporations chartered in states other than Pennsylvania. The Pennsylvania statute purported to tax at a certain rate the transfer at death of all such property, without making any deduction for similar taxes paid to the United States or to any other state, and was upheld in the local courts.[2] The United States Supreme Court held: (1) that the tax on tangible personalty outside of Pennsylvania was wholly invalid for lack of jurisdiction; (2) that the state could only tax such value of the stock of foreign corporations as remained after deducting the taxes imposed by the states of their charters as a condition of the transfer of the stock to the control of the Pennsylvania executor; and (3) that the federal inheritance tax need not be thus deducted.

The more generally accepted argument against point (1) above runs as follows: A tax upon succession at death is a tax upon the privilege of succeeding to the property of a decedent, and can be levied by any state whose consent to such succession is in fact necessary to its successful assertion. In the case of New York land of a Pennsylvania decedent, the law of New York says decisively how it shall descend on the death of the owner, without any reference to the law of Pennsylvania; but, in the case of New York chattels owned by a Pennsylvania decedent, the law of New York permits them to descend according to the law of Pennsylvania—the decedent's domicil. In consequence, anyone claiming the New York chattels must show the consent of two states—New York, where the chattels are actually situated and physically controllable, and also Pennsylvania, which is permitted by the law of New York to say how the New York chattels may descend. Unless *both* states permit a particular devolution to take place, it will not, and so each may charge for such permission—i. e., may levy a succession tax.

This argument had apparently been approved in the opinions of Mr. Justice Holmes in *Blackstone* v. *Miller*[3] and in *Bullen* v. *Wisconsin*.[4] In the former case an Illinois decedent left a deposit in a New York bank, the succession to which was taxed by both Illinois and New York. In upholding the New York tax, Mr. Justice Holmes said:

1. (1925) 45 S. Ct. 603.
2. *Frick's* Estate (1923) 277 Pa. 242.
3. (1903) 188 U. S. 189.
4. (1916) 240 U. S. 625.

"No one doubts that succession to a tangible chattel may be taxed wherever the property is found, and none the less that the law of the situs accepts its rules of succession from the law of the domicil, or that by the law of the domicil the chattel is part of a universitas and is taken into account again in the succession tax there. . . . The fact that two states, dealing each with its own law of succession, both of which the plaintiff in error has to invoke for her rights, have taxed the right which they respectively confer, gives no cause for complaint on constitutional grounds. . . . The universal succession is taxed in one state, the singular succession is taxed in another. The plaintiff has to make out her right under both to get the money."[5]

In *Bullen* v. *Wisconsin* a revocable trust, established by a Wisconsin decedent with an Illinois trust company, having already been subjected to an Illinois succession tax, was held also subject to a Wisconsin one, Mr. Justice Holmes again saying:

"The power to tax is not limited in the same way as the power to effect the transfer of property. If this fund had passed by intestate succession, it would be recognized that by the traditions of our law the property is regarded as a universitas, the succession to which is incident to the succession to the persona of the deceased. As the states where the property is situated, if governed by the common law, generally recognize the law of the domicil as determining the succession, it may be said that, in a practical sense at least, the law of the domicil is needed to establish the inheritance. Therefore the inheritance may be taxed at the place of the domicil, whatever the limitations of power over the specific chattels may be, as is especially plain in the case of contracts and stock. . . . The same would be true of a universal succession established by will."[6]

In the *Frick* case the unanimous court, speaking through Mr. Justice Van Devanter, distinguished the *Blackstone* and *Bullen* cases as relating to intangible personalty, and said that the acceptance by New York of the succession law of the domiciliary state, Pennsylvania, did not have the effect of making that law, as such, applicable to the transfer. The domiciliary law in itself could have no force outside of that state. "Only in virtue of its express or tacit adoption by the states of the situs could it have any force or application in them. Through its adoption by them it came to represent their will, and this was the sole basis of its operation there." The transfers occurring, therefore, by virtue of the laws of New York and Massachusetts and not by the laws of Pennsylvania, the latter could not tax the transfer. In fact, ancillary proceedings to administer the New York and Massachusetts property were taken in those states, local succession taxes were paid there, and none of the property was taken to Pennsylvania.

The soundness of this reasoning seems to depend upon the conception of the part actually played by the law of Pennsylvania in the devolution of the New York chattels. The court is quite right in saying that *as law* it cannot operate in New York, where all operative state law must be New York law, either by initiation or

5. (1903) 188 U. S. at 204, 206-7.
6. (1916) 240 U. S. at 631.

adoption. But as a *de facto consent* to a certain disposition of the New York chattels, permitted to be effective by the law of New York, it is operative and indeed essential to the legatee's success under the law of New York. Of course, the law of New York might be different, if New York so willed, and might dispose of the New York chattels regardless of the Pennsylvania law, as does the law of some states in the case of intestacy of a non-resident decedent. But if, in fact, the law of New York will dispose of the local chattels as Pennsylvania law directs, cannot Pennsylvania make a charge for its consent, in the form of a succession tax measured by a percentage of the value of the New York property? It may be argued, somewhat technically, that there is no way for Pennsylvania to collect the tax from the New York chattels, if left to a New York legatee, and that, if the tax is conceived as wholly on the legatee's right to succeed, it ought not to be collected from other parts of the estate. But the tax may be conceived as on the testator's right to bequeath,[7] and as such may be made a lien on the Pennsylvania part of the estate. This in fact was the construction given the tax law by the Pennsylvania Supreme Court.[8] And if it be said that the right to bequeath New York chattels is also governed by New York law, it may be answered that, if New York law gives effect to Pennsylvania's will about how they may be bequeathed, Pennsylvania may make a charge for willing one way rather than another.

On the other hand, suppose a power of appointment over New York chattels were given to a resident of Pennsylvania, such power, when exercised, however, to take effect by the law of New York. Very likely it would be held that Pennsylvania could not tax the exercise of this power by the Pennsylvania resident and measure it by the value of the New York property affected. May it be thought that the expressed consent of Pennsylvania to a certain devolution of New York chattels by New York law is to be treated like the exercise of this hypothetical power of appointment—and so not a proper basis for taxation?

Another argument more easily disposed of by the court was that Pennsylvania could measure the tax on the part of the estate that did not have a situs in Pennsylvania by the value of the estate everywhere. Counsel for Pennsylvania cited *Maxwell* v. *Bugbee*,[9] holding that New Jersey could tax the succession to the New Jersey property of a non-resident decedent at a *rate* graduated according to the size of the entire estate everywhere. This, of course, was readily distinguishable as a not irrational method of fixing a graduated rate upon the testator's right to bequeath (upon a theory of marginal utility akin to those which support progressive taxation generally), and as not at all equivalent in result to imposing the ordinary tax on all foreign as well as domestic property as would be the rule contended for by Pennsylvania. The latter, if valid, was located to tax it on the basis of the value of the entire estate everywhere.

7. *Knowlton* v. *Moore* (1900) 178 U. S. 41, 48-51.
8. *Frick's Estate* (1923) 277 Pa. 242, 250-52.
9. (1919) 250 U. S. 525.

A point of the utmost importance implicitly decided here is that a state has no absolute power over the conditions of devolution upon death, even of property within its borders. There have been many dicta in the state courts and a few in the United States Supreme Court that the right to transmit or succeed to property at death was but a statutory right that might be wholly abrogated or controlled by legislative authority.[10] If such were the case the pecuniary power of the state over inheritances would not be limited by the ordinary canons of due process as applied to taxation, but it would be free to impose such pecuniary conditions as it saw fit as the price of its indispensable consent to a particular devolution. It has this arbitrary power to exclude foreign corporations (not doing interstate, foreign, or federal business or exercising any federal privilege) and may therefore validly impose a pecuniary condition (often called a tax) upon their right to do business in the state, measured by the value of all their property everywhere,[11] though an impost on property outside of the taxing state is not valid considered purely as a tax.[12] And it may, of course, impose similarly measured pecuniary conditions upon franchises granted by it to domestic corporations,[13] which it could withhold altogether at pleasure. The present decision, then, that a state may not measure the price of its consent to a particular devolution of property within it by the total value of the decedent's estate everywhere, is a logical death-blow to the doctrine that the control of inheritances is absolutely within the power of a state under the Fourteenth Amendment. In this aspect it is perhaps second in importance to no other decision of the current year.

Point (2) was elaborated as follows: The Pennsylvana decedent owned stock in corporations of other states, which subjected their transfer on death to a tax which was made a condition precedent to their control by the executors and a first lien upon the stock on the books of the corporations. These taxes had to be paid to bring the stock into the Pennsylvania administration of the estate, and the court held that they must therefore be deducted as a part of the value of the stocks beyond the control of Pennsylvania. But, point (3), the United States having no power to *control* the devolution of property at death within a state, the federal estate tax upon such stocks was not thus deductible, as it merely applied, concurrently with the Pennsylvania tax, upon property equally subject to both taxes. There being ample estate to satisfy both, no question arose as to which might be preferred if there were a deficiency.

As a substantial step toward checking the plurality of taxes now levied upon personal property at death in this country, the

10. See (1906) 9 L. R. A. (N. S.) 121-23, note; *U. S.* v. *Perkins* (1896) 163 U. S. 625, 628-30. Contra: *Nunnemacher* v. *State* (1906) 129 Wis. 190; Brewer, J., dissenting, in *Magoun* v. *Ill. Trust & Sav. Bank* (1898) 170 U. S. 283, 302-3.

11. *Horn Silver Mining Co.* v. *New York* (1892) 143 U. S. 305.

12. *Union Refrigerator Transit Co.* v. *Ky.* (1905) 199 U. S. 194.

13. *Kansas City, etc., Ry* v. *Stiles* (1916) 242 U. S. 111.

decision of points (1) and (2) should be welcome. As a corollary to point (2) it may be asked: If T, domiciled in Pennsylvania, bequeaths specific stock in an Ohio corporation to A, domiciled outside of Pennsylvania, and, by the laws of Ohio, such a bequest is effective irrespective of the laws of Pennsylvania, can Pennsylvania levy any tax upon the bequest? Or, perhaps, in the case of any specific bequest of foreign stock, would not this be true, as of foreign chattels, even though the law of Ohio recognizes the succession law of Pennsylvania to the same extent as in the case of chattels?

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COURTS—JURISDICTION TO VACATE ORDER OF ADOPTION AFTER TERM.—[Indiana] *A* filed a petition in *B* County for the adoption of a minor child.[1] The petition alleged that the child's mother was dead, but that an adoptive father was still living. The written consent of the adoptive father was filed as required by the statute. The court entered an order of adoption. Two weeks later and within the term at which the order of adoption was made, *C*, the guardian of the child, filed a verified application asking leave to appear as amicus curiae for the purpose of presenting certain facts which he believed would lead the court to vacate the order of adoption. The court entered an order that notice be given to *A* of the filing of the petition by *C*, and that the court would hear the petition on the first day of the next term of the court. *A* appeared on the first day of the next term and filed a motion to strike from the files the petition of *C*. This motion was over-ruled and *C* was then given leave to appear as amicus curiae. *A* refused to introduce any evidence. After considering the facts alleged in the petition of *C*, and on a reconsideration of the evidence originally given, the court found the facts set forth in the application of *C* to be true, and vacated the order of adoption: *held*, that the judgment vacating the order of adoption was void for the reason that the petition of *C* was not sufficient to keep the matter in fieri, and the court lost jurisdiction of the proceedings at the close of the term.[2]

A judgment rendered at one term of court can not be modified or vacated at a subsequent term of court, unless the proceedings are kept in fieri by the filing of a motion for a new trial or a motion to modify or vacate the judgment.[3]

The instant case holds that the guardian was not a proper or necessary party to the adoption proceedings,[4] and that, therefore, the filing by him of a petition to be heard as amicus curiae was not sufficient to keep the proceeding in fieri so as to give the court jurisdiction of the matter at a subsequent term.

On the principal point, Nichols, J., dissented, upon the ground that the court should, under the circumstances of the case, hold that the filing of the petition by the guardian was sufficient to keep the petition in fieri. The peculiar circumstances of the case to

1. (1914) Under Burns' Ann. Ind. Stat., secs. 868-872.
2. In re *Perry* (Ind. App.) 148 N. E. 163.
3. *McClellan* et al. v. *Binkley* 78 Ind. 502.
4. Following *Shirley* v. *Grove et al.* 51 Ind. App. 17, 98 N. E. 874.