University of Chicago Law School
Chicago Unbound

Journal Articles | Faculty Scholarship

1928

Validity of Transfer Tax Levied by State of Decedent's Domicile Upon Bank Deposit in Another State without Deduction for Transfer Tax Paid to that State [In re Scott's Estate, 222 NY Supp 515]

Arthur H. Kent

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles

Part of the Law Commons

Recommended Citation

Arthur H. Kent, Comment, "Validity of Transfer Tax Levied by State of Decedent's Domicile Upon Bank Deposit in Another State without Deduction for Transfer Tax Paid to that State [In re Scott's Estate, 222 NY Supp 515]," 22 Illinois Law Review 537 (1928).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

In this case as well as in *Fairmont Creamery Co.* v. *Minnesota,* the statute was defended on the ground that the industry affected was a well established state industry and that its protection from outside interference and control was necessary to the development of the state's resources; and it is to be noticed that not only Mr. Justice Brandeis dissented in this case, but that in the prior case of *Lemke* v. *Farmers' Grain Co.,*[8] where interstate commerce was held to be affected, he was joined in his dissent by Mr. Justice Holmes and Mr. Justice Clark.

Mr. Justice Brandeis together with Mr. Justice Holmes and Mr. Justice Stone also dissented in *Fairmont Creamery Co.* v. *Minnesota,* which we are now considering, though no reason for the dissents was given and no dissenting opinions were filed.

With these dissents the future of the attempts of the farmers to protect their co-operative and local creameries and mills and other institutions from being crushed out by price discriminations and similar practices of the better organized and more heavily financed private and nearly always foreign corporations is still uncertain, and the question is still open as to how far a state may go in the protection and promotion of its own peculiar industries and the development of its own resources.

ANDREW A. BRUCE.

CONSTITUTIONAL LAW—VALIDITY OF TRANSFER TAX LEVIED BY STATE OF DECEDENT'S DOMICILE UPON BANK DEPOSIT IN ANOTHER STATE WITHOUT DEDUCTION FOR TRANSFER TAX PAID TO THAT STATE.—[New York]. An important question in the law of inheritance taxation was presented recently in *In re Scott's Estate.** The decedent, a resident of New York, died in 1925, leaving a will which was duly admitted to probate in Westchester County, New York. At the time of his death he had a large sum on deposit with a private banking house in Virginia. That state, under its inheritance tax statute,[1] assessed a transfer tax upon this deposit. This tax was paid by the estate, after which the balance of such deposit was paid over to the domiciliary executors and by them brought within the jurisdiction of New York without ancillary administration. In appraising the estate for the purpose of assessing the New York transfer tax, the tax appraiser included the gross amount of this bank account, refusing to deduct the amount paid as transfer tax in Virginia. This action was admittedly in compliance with the provisions of the New York tax law,[2] which directed that no deduction should be made, in determining the value of the net estate, for "any estate, succession, legacy, or inheritance taxes." Surrogate Slater held that this statute, in so far as it denied deduction of transfer tax paid upon

8. (1922) 258 U. S. 50, overruling *State* ex rel. *Gaulke* v. *Turner* (1917) 37 N. D. 635, 164 N. W. 294. See also 21 ILLINOIS LAW REVIEW 50.

*(1927) 222 N. Y. Supp. 515, 129 Misc. 625 (N. Y. Sur.).

1. Laws Va. 1922 ch. 460.

2. New York Tax Law, sec. 249c, as added by Laws 1925 ch. 320.

the bank deposit in Virginia, was violative of the due process clause of the Fourteenth Amendment, as in effect a tax upon a tax, under the principles enunciated by the United States Supreme Court in *Frick* v. *Commonwealth of Pennsylvania*.[3]

The Supreme Court there decided three distinct questions: first, that the state of decedent's domicile could not impose a transfer tax upon tangibles having a permanent situs in another state, nor use such tangibles as the measure of a transfer tax upon property within the jurisdiction; second, that the state of the domicile must deduct any transfer tax upon shares of stock in foreign corporations paid to the state or states of incorporation, in valuing such shares for purposes of its own transfer tax; third, that the federal estate tax need not be deducted. Only the first two points decided, and chiefly the second, are relevant here. It is needless to state that as to both these points the decision came as a distinct surprise to the legal profession and as a rude shock to state taxing authorities, declaring, as it did, to be a violation of due process a taxing practice which was well-nigh universal among the states,[4] which had been sustained by numerous decisions of state courts of high authority,[5] and which had been approved by the Supreme Court itself in strong dicta in several cases.[6] Nevertheless, the decision has been welcomed by critics generally as putting a curb upon an unwholesome plurality of taxation.[7] Taken with the decision in the *Union Transit* case[8] it marks, with minor exceptions,[9] the complete abandonment of the hoary maxim, mobilia sequuntur personam, as a jurisdictional basis for taxing tangible property.[10]

The result reached in the principal case seems a legitimate application of the principles upon which the second question in the *Frick*

---

3. (1925) 268 U. S. 473, 45 Sup. Ct. Rep. 603, 69 L. Ed. 1058, 42 A. L. R. 316.

4. 24 Mich. Law Rev. 50, 51.

5. As to first point, see *Estate of Hodges* (1915) 170 Calif. 492, 150 Pac. 344; Matter of *Swift* (1893) 137 N. Y. 77, 32 N. E. 1096; In re *Sherwood's Estate* (1922) 122 Wash. 648, 221 Pac. 734; *Frothington* v. *Shaw* (1899) 175 Mass. 59, 55 N. E. 623.

As to second point, see Matter of *Penfold's Estate* (1915) 216 N. Y. 163, 171, 110 N. E. 499. Contra, but on construction of statute: *Hollis* v. *Treasurer and Receiver General* (1922) 242 Mass. 163, 136 N. E. 162, 23 A. L. R. 849.

6. *Blackstone* v. *Miller* (1903) 188 U. S. 189, 23 Sup. Ct. Rep. 277, 47 L. Ed. 439; *Bullen* v. *Wisconsin* (1916) 240 U. S. 625, 36 Sup. Ct. Rep. 473, 60 L. Ed. 830; *Eidman* v. *Martinez* (1901) 184 U. S. 578.

7. 25 Col. Law Rev. 967; 39 Harv. Law Rev. 250; 20 Illinois Law Review 492; 24 Mich. Law Rev. 50. But see 35 Yale Law Jour. 357.

8. *Union Refrigerator Transit Co.* v. *Kentucky* (1905) 199 U. S. 194, 26 Sup. Ct. Rep. 603, 50 L. Ed. 150, 4 Ann. Cas. 493.

9. *New York Central Railroad* v. *Miller* (1906) 202 U. S. 584; *Southern Pacific R. R. Co.* v. *Kentucky* (1911) 222 U. S. 63. Chattels having no taxable situs elsewhere may still be taxed at the domicile of the owner.

10. *N. Seefurth* "Recent Limitations on the Power to Impose Inheritance and Estate Taxes" 25 Col. Law Rev. 870.

case was decided. Mr. Justice Van Devanter, delivering the opinion of the court, there said:[11]

"The decedent owned many stocks in corporations of states other than Pennsylvania, which subjected their transfer on death to a tax and prescribed means of enforcement which practically gave those states the status of lienors in possession. As those states had created the corporations issuing the stocks, they had power to impose the tax and to enforce it by such means, irrespective of the decedent's domicile, and the actual situs of the stock certificates. Pennsylvania's jurisdiction over the stocks necessarily was subordinate to that power. Therefore to bring them into the administration in that state it was essential that the tax be paid. The executors paid it out of funds forming part of the estate in Pennsylvania and the stocks were thereby brought into the administration there. We think it plain that such value as the stocks had in excess of the tax is all that could be regarded as within the reach of Pennsylvania's taxing power. . . . So much of the value as was required to release the superior claims of the other states was quite beyond Pennsylvania's control. . . . That the stocks, with their full value, were ultimately brought into the administration in that state does not help. They were brought in through the payment of the tax in the other states out of moneys of the estate in Pennsylvania. The moneys paid out just balanced the excess in stock value brought in. Yet in computing the tax in that state both were included."

It is submitted that the situation in the principal case is not materially different. The paramount power of the foreign state over the subject-matter, not the source of that power, seems the determinative factor in the reasoning of the court. Whether it be upon the theory of business situs,[12] or by reason of the practical similarity between money in the bank and coin in the pocket,[13] or upon the broader and more doubtful view that jurisdiction over the person of the debtor creates jurisdiction over the obligation,[14] it is now settled that bank deposits ordinarily do have a situs for purposes of taxation in the state where the bank of deposit is situated. Therefore before the bank deposit herein could be brought into the domiciliary administration in New York, the Virginia tax had to be paid. The value of the deposit as an asset of the estate in New York was diminished by just that much. And it is immaterial whether the tax was paid by the executors from assets in New York, or whether it was deducted from the amount of the deposit in Virginia. The ultimate result is exactly the same. To adopt the language of Mr. Justice Van Devanter, so much of the value as was required to release the superior

11. 268 U. S. 473, at 497.

12. Matter of *Houdayer* (1896) 150 N. Y. 37, 44 N. E. 718.

13. *Blackstone* v. *Miller* supra, note 6.

14. *Blackstone* v. *Miller* supra, note 6; Matter of *Daly's Estate* (1905) 100 App. Div. 373, 91 N. Y. Supp. 858. The cases are quite fully discussed in the opinion of Surrogate Slater in the principal case.

The arguments for and against this broad view are fully set forth in two articles, *Carpenter* "Jurisdiction over Debts for the Purpose of Administration, Garnishment, and Taxation" 31 Harv. Law Rev. 905; and *Beale* "Jurisdiction to Tax" 32 Harv. Law Rev. 587.

claim of Virginia was quite beyond the control of the state of New York.

If this view of the implications of the decision in the second part of the *Frick* case be correct,[15] then we may say that property falls into three distinct classes as regards inheritance taxation: (1) immovables and chattels having a permanent location, whose transfer is taxable exclusively at the situs;[16] (2) intangible personal property, such as ordinary choses in action,[17] and tangibles having no taxable situs elsewhere,[18] which are taxable only at the domicile; (3) intangibles which under any of the several exceptions to the general rule are held to come within the taxing jurisdiction of some state or states other than the state of decedent's domicile.[19] As to such interests, both jurisdictions may tax but the claim of the domicile is regarded as subordinate and the doctrine of the *Frick* case requires that the amount of the transfer tax paid elsewhere be deducted before its own tax is assessed. The Fourteenth Amendment, it is true, was extended in the *Union Transit* and *Frick* cases to prevent double taxation of tangibles, but double taxation of such intangibles has constantly been held not to be offensive to the Constitution.[20]

Suppose, however, that the state of Virginia had not only exercised its power to tax the bank deposit of the deceased resident of

15. In Appeal of *Silverman* (1926) 105 Conn. 192, 134 Atl. 778, the court held that a transfer tax paid in New York upon the interest of a deceased resident of Connecticut in a limited partnership organized in New York was deductible. This case also involved a savings account of the deceased in a New York bank and mortgage bonds due to deceased from corporations and residents of Connecticut and kept in New York. Transfer tax was paid upon these also in New York, but it does not appear whether the question of the deductibility of such tax was raised. At any rate the point is not discussed in the opinion.

16. *Frick* v. *Commonwealth of Pennsylvania* supra, note 3.

17. State Tax on Foreign-Held Bonds (1872) 15 Wall. (U. S.) 300, 21 L. Ed. 179. Despite the strong language of Mr. Justice Holmes in *Blackstone* v. *Miller* supra, regarding this case, it has never been overruled, and still undoubtedly represents the general rule, as to jurisdiction to tax choses in action. Its reasoning seems equally applicable to inheritance taxation.

18. *Southern Pacific R. R. Co.* v. *Kentucky* supra, note 9. This case involved a tax upon a domestic corporation with respect to a number of steamboats having no permanent situs. Its reasoning, however, would seem equally applicable to an inheritance tax upon such property at the owner's domicile.

19. It should be noted here that there are certain property interests which are, strictly speaking, mere choses in action, but which have become so closely identified with the instruments evidencing the rights as to be regarded by business men and to an increasing extent by the law as having a physical situs wherever the instruments are kept. Bank notes and currency, federal, state and municipal bonds, and treasury certificates are the common examples. Appeal of *Silverman* supra, note 15, held that these things fell within the doctrine of the *Frick* case and were taxable only at the situs. This view has much in its favor, but the law on the point is still uncertain. A tendency is observable to extend a similar doctrine to negotiable instruments generally and to corporate stock certificates.

20. *Fidelity & Columbia Trust Co.* v. *Louisville* (1917) 245 U. S. 54, 38 Sup. Ct. Rep. 40, 62 L. Ed. 145; L. R. A. 1918-C, 124; *Bullen* v. *Wisconsin* supra, note 6; *Frick* v. *Commonwealth of Pennsylvania* supra, note 3.

New York, but that its statutes provided that the fund be administered and distributed in Virginia.[21] Could New York still impose a transfer tax? Such a procedure on the part of Virginia would, no doubt, be contrary to the general practice, which is to surrender the balance of the property, after payment of local taxes and claims of local creditors, to the domiciliary executors or administrators. But is not this general practice based solely upon principles of comity and considerations of policy? Surely there is nothing in the Constitution which would compel the state of Virginia so to limit the exercise of its power. Could it be contended that the distributees in the Virginia proceeding would not get a good title to their respective shares in the property? While Virginia, might, it is true, distribute the property according to the law of New York rather than in accordance with her local rules, it could hardly be contended since the *Frick* case that this circumstance alone would validate an otherwise invalid tax. While such a situation presents many difficulties, it would seem that the principles underlying the decision in the *Frick* case might be successfully invoked to defeat a New York tax.[22]

ARTHUR H. KENT.

CRIMINAL SYNDICALISM—RIGHT OF FREE SPEECH AND ASSEMBLY VERSUS RIGHT OF STATE TO SELF-PROTECTION—LABOR LAW—CONSTITUTIONAL LAW.—[United States] Repression by the State of expression of opinions advocating resort to violent and unlawful methods as means of changing industrial and political conditions will receive momentum with the upholding, recently, by the federal Supreme Court, of the California criminal syndicalist act.[1] In *Whitney*

21. In a note on the *Frick* case in 20 ILLINOIS LAW REVIEW 492, Dean James Parker Hall suggests a similar question with reference to shares of corporate stock.

22. Appeal of *Silverman* supra, note 15, is an authority contrary to this view. There the estate in Connecticut was held chargeable with transfer tax upon various intangibles, including corporate shares and a savings bank deposit, after these had been administered, taxed and distributed by a probate court in New York. The court in this case, however, quite clearly evidences its dislike of the decision in the *Frick* case, and a determination to follow it no further than its decision positively requires. Until the United States Supreme Court has passed upon this problem, it may well be doubted whether Appeal of *Silverman* is sound law upon this point. *Estate of Hodges* supra, note 5, is also contra, but it was decided before the *Frick* case, upon the line of reasoning which was there disapproved.

1. Statutes (1919) ch. 188 p. 281. Heretofore, the United States Supreme Court had not passed on the constitutional validity of a state statute prohibiting, under criminal penalties, the mere membership in a society which had such an objective as that condemned by the criminal syndicalist act. Various types of criminal anarchy statutes, where incitement to violence for the overthrow of industry or State was the motive, had been upheld by the federal Supreme Court. See *Gitlow* v. *New York* (1925) 268 U. S. 652, 45 Sup. Ct. Rep. 625, 69 L. Ed. 1138; *Abrams* v. *United States* (1919) 250 U. S. 616, 40 Sup. Ct. Rep. 17, 63 L. Ed. 1173. Various state courts had likewise upheld different features of criminal anarchy statutes, as well as criminal syndicalist statutes. Consult "Validity of Legislation against Political, Social