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Taxation--Jurisdiction of Domiciliary State to Tax Transfer of Property Located in Another State

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TAXATION—JURISDICTION OF DOMICILIARY STATE TO TAX TRANSFER OF PROPERTY LOCATED IN ANOTHER STATE.

Settlor, resident and domiciled in Oregon, owned various stocks and securities which were managed for him by a trust company in Illinois. At his direction, these securities were liquidated, and with the proceeds the company purchased federal reserve notes which it held as agent for the settlor. Settlor executed in Oregon a trust agreement transferring to the company as trustee the federal reserve notes. The trust was irrevocable, in favor of definite beneficiaries, and by its terms the trustee was to purchase with the notes property, real or personal at its discretion, for the trust account.

Pursuant to a statute, Oregon attempted to tax the transfer of the notes under the trust agreement, but the Supreme Court of that state held that the notes were tangibles, and therefore, under the Fourteenth Amendment, not taxable by Oregon because not within its jurisdiction. The Supreme Court of the United States reversed the judgment of the Oregon court, stating that since Oregon had jurisdiction to tax by virtue of the statute, the Fourteenth Amendment does not take away that jurisdiction. The court treated the transfer under the trust agreement as one indivisible transaction—a transfer of intangibles in contemplation of death.

In a separate opinion, Justice Stone answered what he considered to be the only federal question raised by saying that “nothing in the Constitution prevents taxation by Oregon of a gift by its citizen of federal reserve notes located elsewhere.” Justice McReynolds dissented without opinion. Pearson v. McGraw, 60 S. Ct. 211 (1939).

Tangible personal property is subject to taxation by the state in which it is permanently located. If such property has acquired a situs in a state other than that in which the owner is domiciled, the latter state may not tax it. The situs concept, as regards jurisdiction to

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3. Cooley discusses situs as follows: "In order to acquire a situs in a state or taxing district so as to be taxable in the state or district regardless of the domicile of the owner and not taxable in another state or district at the domicile of the owner, tangible personal property must be more or less permanently located in the state or district. In other words, the situs of tangible personal property is
tax tangible property, is closely related to the benefit theory, and makes the power to tax dependent upon some element of control. Taxation of tangible personal property, by a state which does not have jurisdiction according to these criteria, amounts to a taking of private property in violation of the Fourteenth Amendment.

Applying the benefit theory, the Supreme Court held in *Frick v. Pennsylvania* that under the Fourteenth Amendment the privilege of taxing the right of succession to the ownership of tangible personal property can be exercised only by the state in which the property has acquired a situs. In denying the right of the domiciliary state to enforce an inheritance tax on tangible personalty located in another state, the court said that the transfer of such property occurred under the jurisdiction of the state of its situs, not under the jurisdiction and laws of the state of decedent's domicil. It then reiterated the familiar "principle" that a tax by the latter on such transfer would contravene the due process clause.

With regard to succession taxes on the transfer of intangibles, the ancient maxim *mobilia sequuntur personam* furnished a con-
venient device upon which to base the right of the state of domicil to tax. That right has been consistently upheld. With the decision of Blackstone v. Miller, the Supreme Court committed itself to the view that any state which contributes in effecting the transfer of an intangible property right also may tax that transfer.

However, in Farmers Loan Co. v. Minnesota, Blackstone v. Miller was expressly repudiated. The court stated that there existed no sufficient reason for saying that intangibles are not entitled to the same immunity against double taxation as is accorded to tangible property. This view was reiterated two years later in First National Bank v. Maine, in which case the court refused to permit the state of incorporation to tax the transfer by succession of corporation stock owned by a nonresident decedent. By emphasizing the question of jurisdiction as based on situs, the majority of the court found that such a transfer “is an event single in character and is effectuated under the laws, and occurs within the limits, of a particular state . . . .”, thus precluding the possibility of a transfer tax by more than one state. In a dissenting opinion, Mr. Justice Stone again voiced approval of the benefit theory, and stated:

“Situs of an intangible, for taxing purposes, as the decisions of this Court, including the present one, abundantly demonstrate, is not a dominating reality, but a convenient fiction which may be judicially employed or discarded, according to the result desired.”

The view expressed in the dissent in First National Bank v. Maine seems to prevail today. Situs as previously defined, does not ipso facto determine that one state may and others may not tax the transfer of intangibles; nor is it now held that the Fourteenth Amendment prohibits double taxation on death transfers thereof. Under the decisions of Curry v. McCanless and Graves v. Elliott, both the domicil of the creator of a revocable trust of intangibles and the state in which the trust is set up and the evidences of the intangibles kept may tax than where the owner is domiciled, or (3), in case of intangible property, it has acquired a business situs in a state other than the one where the owner is domiciled.”

22 Merrill, supra note 5, at 539.
23 188 U. S. 189, 23 S. Ct. 277 (1903) (upheld New York tax on the transfer of local bank deposits by non-resident testator).
24 280 U. S. 204, 50 S. Ct. 98 (1930).
25 Id. at 212.
26 284 U. S. 312, 52 S. Ct. 174 (1932).
27 Id. at 327.
28 “... control and benefit are together the ultimate and indubitable justification of all taxation.” Id. at 334.
29 Id. at 332.
30 Though concurring in the result of the Farmers Loan Co. case, Mr. Justice Stone expressed in a separate opinion his disapproval of invoking the due process clause to prohibit multiple taxation in every case.
the transaction arising at his death. It matters not that the power of revocation is never exercised.

A seemingly perfect foundation for the holding of the Oregon court was laid by the Supreme Court in *Blodgett v. Silberman*. In that case Connecticut was denied the right to impose a succession and transfer tax on property in New York left by a resident testator. With regard to certain money and bank notes kept by the testator in a safe deposit box in a New York bank the court said:

"But we think that the money, so definitely fixed and separated in its actual situs from the person of the owner as this was, is tangible property and can not be distinguished from the paintings and furniture held in the Frick case to be taxable only in the jurisdiction where they were."

Relying on *Blodgett v. Silberman*, the Oregon court regarded the Hayes trust agreement as transferring tangible property which had never acquired a situs at the domicile of the settlor.

The majority of the court in the instant case was able to see a transfer of intangibles in the trust instrument prepared by the Oregon resident, and as a consequence it decided the controversy on the authority of *Curry v. McCanless*. By refusing "to make a fetish of form" it saw "but one integrated and indivisible transaction—a transfer by decedent of intangibles in contemplation of death."

In view of the fact that the trust agreement transferred federal reserve notes and directed the trustee to invest them "in whatever form of property real or personal . . . (it) . . . shall deem proper and for the best interests of the trust estate", it is difficult to understand just wherein the court saw a transfer of intangibles. The majority opinion does not refute the finding by the Oregon court that federal reserve notes are tangible property. If the notes are considered tangibles, the conclusion of the latter court seems inescapable under the rule of *Frick v. Pennsylvania*. The trust agreement transferred bank notes, not property which had been exchanged for the notes. And, as stated by the Oregon court, the fact that the transaction may have been planned for the purpose of evading the tax cannot affect the result if it was lawful.

It is interesting to speculate on the effect of the opinion of Mr. Justice Stone, had it been adopted by the majority. Despite the fact that, as he stated, the question is whether a state may constitutionally tax a gift of banknotes permanently located without the state, there appear to be only three alternatives in deciding that question as he decides it. Either 1) federal reserve notes are intangibles and the quasi-obiter in *Blodgett v. Silberman* is not applicable, or 2) federal

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277 U. S. 1, 48 S. Ct. 410 (1928).
22Id. at 18.
22Instant case at 213.
22In re Hayes's Estate—Ore.—86 P. (2d) 424, 426 (1939).
22Id. at 432-33.
reserve notes are tangibles and Frick v. Pennsylvania is overruled, or 3) the transfer of property by gift in contemplation of death is governed by rules which differ from those governing transfer by succession, even though that succession takes place under a will. The choice of any of these alternatives might give rise to embarrassing questions.

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CRIMINAL LAW—THE FELONY MURDER DOCTRINE IN KENTUCKY*

The appellant willfully set fire to a dwelling at night, and as a result an occupant was burned to death. Appellant was convicted of murder on the ground that the death was the natural consequence of the arson. He sought a new trial, alleging that the lower court erred in refusing to submit to the jury the question of whether the death of the occupant was a necessary or natural consequence of the burning of the dwelling. In affirming the conviction the court said, “There can be no doubt that the death of this child was the natural consequence of burning the house; therefore, it was not necessary . . . to submit this question for the determination of the jury.” Whi
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In the case at bar the court seems to be in accord with its prior holding in Reddick v. Commonwealth, but the case clarifies and explains the Kentucky Court's attitude toward the felony murder doctrine. Prior to the instant case, the Kentucky Court had held that where a death ensues during the commission of a felony dangerous to life, the felon was guilty of murder. The rule was not qualified in any manner, and the popular conception has been that the felony did not have to be the proximate cause of the death. But in the case under discussion, the court did consider proximate cause and

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28 Mr. Justice Stone cleverly avoids committing himself on this point when he says (at 214), “there is nothing in the Constitution to compel a state to treat federal reserve notes for tax purposes as chattels were treated in Frick v. Pennsylvania . . .” It is unlikely, however, that he would say that there is nothing in the Constitution to compel a state to treat chattels as chattels were treated in Frick v. Pennsylvania. He did not dissent in that case.


* This comment is written in conjunction with the one immediately following. The same case is considered in both. The writers reach different conclusions.

1 17 Ky. Law Rep. 1020, 33 S. W. 416 (1895). The defendant set fire to a hotel under cover of night and an occupant was burned to death. The question of proximate cause was not presented on appeal, but the court held that when one commits a dangerous felony and a death ensues the felon is guilty of murder.