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Leonard H. Langen

ment in the form of a conveyance *inter vivos*, as distinguished from a will, is presumed to have been delivered, even though still in the grantor's possession, since the very form of the instrument indicates an intention that it shall operate before the grantor's death.[85] This criticism is perhaps not fully justified, for a deed with an express reservation of a life estate would seem to be a better indication of the grantor's intent to convey a present estate than is a deed, absolute on its face, found in the grantor's possession after his death. The decision in *Martin v. Flaharty*, in which the grantee executed a life lease to the grantor, perhaps may be supported on this ground, although the express power to revoke would still seem fatal.

By way of summary, then, it may be said that, while the principal case is supported by the weight of authority,[86] it seems doubtful on principle, and is difficult to reconcile with *Martin v. Flaharty*. The decision must be supported, if at all, on the ground that an objective standard is properly required in order to prevent fraud and perjury against a deceased grantor, rather than upon the effect of retention of the instrument as amounting to control over its legal operation, or upon the view that an instrument so retained is necessarily testamentary in character.

Justice Angstman in a concurring opinion in the principal case criticized the result reached as defeating the wishes of the deceased with respect to the disposition of the property at his death, and expressed the view that while there was little reason for the rule followed, any change desired should emanate from the legislature.

Ben Holt.

DO PROPERTY TAXES CONSTITUTE PERSONAL LIABILITY IN MONTANA?

The Montana Supreme Court not long ago held that, inasmuch as taxes cannot be collected by civil action, one who by mistake pays taxes upon land of another cannot, by means of a personal judgment, obtain restitution from the latter unless ratification of the payment is shown. The decision suggests interesting questions as to the nature of tax liability, the remedies

[85] 4 TIFFANY, REAL PROP. (3d Ed.), Sec. 1039.

[86] 8 R. C. L., "Deeds", Sec. 60, p. 995; Note to Jackson v. Jackson, Ann. Cas. 1915C, pp. 378, 380; note to Munro v. Bowles, 54 L. R. A. 882, 883; Moore v. Trott, 156 Cal. 353, 104 Pac. 578 (1909); Noble v. Tipton, 219 Ill. 182, 76 N. E. 151 (1905). *Contra*: Belden v. Carter, 4 Day 66, 4 Am. Dec. 185 (Conn., 1810); but Grilly v. Atkins, 78 Conn. 380, 62 Atl. 337 (1905) stated that rule would probably not be followed today; Davis v. John E. Brown College, 208 Ia. 480, 222 N.W. 858 (1929); but see Orris v. Whipple, 224 Ia. 1157, 280 N. W. 617 (1938), where the Iowa court announced its intention "to return to the long and well established rule and be in step with our sister states."

available for collection, and the relief to which one who pays another's taxes is entitled.

In the case referred to, *Calkins v. Smith*,[1] the mistake was traceable to the fact that, notwithstanding the sale of the west half of a tract of land to plaintiff's predecessor in 1930, the entire tract continued to be assessed to defendant, its prior owner and the remaining owner of the east half. Taxes on the entire tract, delinquent since 1926, were paid by plaintiff's predecessor in 1935 under the mistaken belief that they had been levied against the west half only. Plaintiff paid the 1936 taxes on the entire tract under a like mistake. The decision was complicated by the fact that plaintiff, who had taken an assignment from her predecessor, apparently sought reimbursement for all taxes paid on the entire tract, and also by the further fact that the Court had to assume that, pursuant to the statutory requirement, the property had been sold to the county for the 1926 taxes and later taxes had merely been added to the amount required to be paid in order to redeem. However, the rationale of the opinion rendered rather clearly is that, absent proof of ratification, civil action fails because civil action could not have been maintained by the county. But, in view of the presumed sale to the county and the statutory implication that sale cuts off personal liability, the Court was able to put the decision on the broader ground that not only did defendant enjoy immunity from civil action but also had been relieved of personal liability or obligation to pay and so had an "option" to lose his land by failure to redeem. This position is obviously predicated on the view that prior to sale there is personal liability. Since, however, such personal liability is held not enforceable by civil action, the "option" would seem to exist even prior to sale, hence it would appear that the result would have been the same had there been no sale and that the true rationale is as above stated. This was tacitly admitted in the opinion. The Court, conceding that a contrary result would have followed from proof that defendant ratified the payment, refused to find that the allegations of the complaint to the effect that defendant knew of the payment and "was thus receiving the benefits of such payments" amounted to an allegation of ratification. But plaintiff was allowed to amend her complaint.

The evident confusion of the Court as to the nature of tax liability in Montana, shown by the statement in one sentence that tax sale extinguished defendant's "personal obligation to the county" and by the statement in the immediately following sentence that "real estate is liable for the taxes upon it, and the owner thereof is not personally liable therefor," is perhaps an unavoidable consequence of the peculiar Montana statutes. It is provided by Sec. 2152, R. C. M., 1935, that "every tax has the

[1]106 Mont. 453, 78 P. (2d) 74 (1938).

effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all personal property of the delinquent," and further that "the judgment is not satisfied nor the lien removed until the taxes are paid or the property sold for the payment thereof." But Sec. 2153 enacts that personal property taxes constitute prior liens on the particular property assessed, "but shall not extend to any other personal property of the owner thereof," and that such tax is also a lien upon the real property of the taxpayer but of only limited priority. And Sec. 2154 declares that "every tax due upon real property is a lien against the property assessed." Surely, under Sec. 2152, all taxes impose personal liability, notwithstanding the statement to the contrary in the principal case as to real estate taxes, even though it may be that no civil action will lie to collect them. As for the extent of liens, there is obvious conflict in the language of these sections, but the resolving of that conflict is beyond the scope of this note.

Chapter 199, R. C. M., 1935 (Secs. 2169, *et. seq.*), contains the provisions for enforcement of tax liability. No other procedure is expressly authorized therein than sale of the property subject to tax liens. One apparent exception is the requirement of Sec. 2173 that the District Courts insist upon payment by decedents' estates of "all taxes due from such estates" before any order of distribution is made. A second and important exception, but one which apparently has received almost no attention, is contained in Chapter 200, Secs. 2253 and 2254, which provide for the bringing of civil action to collect taxes amounting to $300 or more where, on special order from the State Auditor, the property subject to the lien has been put up for sale once and has found no purchaser. But is it not odd that provision is thus made for civil action which can eventuate in nothing more than a personal judgment, in view of the broad declaration of Sec. 2152 that "every tax has the effect of a judgment against the person?" What advantage would be gained by such action and judgment? In any event, this provision for civil action is deemed exceptional and subject to the condition precedent of order by the State Auditor, hence does not seriously embarrass the position of the Court that, even if there is personal liability, no means of enforcing it against the person ordinarily exist.

The cases in Montana, as generally elsewhere, support the proposition that, while for some purposes a tax may constitute a "debt," "liability," or "obligation,"[2] "statutory remedies for

[2]Under Sec. 3716, Cal. Pol. Code, which statute is the same as Sec. 2152, R. C. M., 1935, the California Court has held that a tax is in the nature of a personal debt due from the property holder, hence that a statute providing for civil action to collect taxes which had already become delinquent prior to enactment of the statute is valid, People

the collection of delinquent taxes are exclusive and preclude the maintenance of an action at law.'"[3] This principle was put to a severe test in *State ex rel. Tillman v. District Court*,[4] where the Court, under the guise of restraining waste and requiring an accounting for waste already committed, ordered a taxpayer to pay to the taxing polity the value of buildings removed, less the remaining value of the premises, but in no event more than the total tax with penalties and interest. This, the Court held, was not equivalent to maintenance of a civil action to collect a tax, a decision which seems emminently sound and just. It was recognized, however, that there are not only statutory but other exceptions to the rule against civil action, and that the case might possibly have been brought within one such exception. "The rule that, where the Legislature has provided the method for collecting taxes, the remedy is exclusive, has been held subject to the exceptions that, where it is found inadequate in a particular instance, or cannot be enforced, or has been exhausted without satisfaction of the taxes, some other appropriate remedy may be resorted to, and it has further been held that this rule applies only to the collecting officers and not to the state."

Where, however, the statute imposing the tax creates a duty and obligation to pay the tax, or makes the amount due a debt, the right to maintain an action at law has been implied.[5] In *United States v. Chamberlin*,[6] for example, the United States Supreme Court based such implication upon the mere provision of the statute that the tax should be "levied, collected and paid." It has also been held that, where no particular remedy is given, the action of assumpsit will lie, on the principle that where the law creates an obligation it raises an implied assump-

v. Seymour, 16 Cal. 332 (1860); and likewise, that it is a debt in the sense that it may be a set-off in favor of the city in a suit by the taxpayer against the city for gas furnished the latter, San Francisco Gas Co. v. Brickwedel, 62 Cal. 641 (1882); but that it is not a debt in the sense of money obligations existing by contract, hence that greenbacks need not be received in payment of the tax under the United States Legal Tender Act of 1862, Perry v. Washburn, 20 Cal. 318 (1862).

[3]3 COOLEY ON TAXATION (4th Ed.), Sec. 1330; State v. Nicholson, 74 Mont. 346, 240 Pac. 837 (1925); State ex rel. Tillman v. District Court, 101 Mont. 176, 53 P. (2d) 107 (1936); Marion County v. Woodburn Mercantile Company, 60 Ore. 367, 119 Pac. 487, 41 L. R. A. (N. S.) 730 (1911); Lemhi County v. Boise Live Stock Loan Co. 47 Idaho 712, 278 Pac. 214 (1929); Mosher v. Conway, 45 Ariz. 463, 46 P. (2d) 110 (1935).

[4]Note 3, *supra*.

[5]Cincinnati College v. Yeatman, 30 Ohio St. 276 (1876); Walsh-McGuire Co. v. Commissioner of Internal Revenue, 97 F. (2d) 983 (C. C. A., 6th, 1938); Fuller v. Payne, 96 S. C. 471, 81 S. E. 176 (1914); Town of Cheraw v. Turnage, 184 S. C. 76, 191 S. E. 831 (1937); Vallentine v. Robinson, 188 S. C. 194, 198 S. E. 197 (1938); 61 C. J. 1052.

[6]219 U. S. 250, 31 S. Ct. 155, 55 L. Ed. 204 (1911).

sit on the legal obligation to pay.[7] But, in general, it may be said that these doctrines yield to the proposition that statutory remedies, if adequate, are exclusive, notwithstanding existence of personal liability or obligation in the more abstract sense.[8]

The existence of this personal liability, although perhaps of little present practical consequence, nevertheless is significant. It might, for instance, sustain a statute providing for civil action to collect taxes which had already become delinquent prior to enactment of the statute.[9] It has been held that the nature of a tax cannot be changed after assessment so as to convert a mere charge on land into a personal liability.[10] But such a statute would, in Montana, merely add a remedy and not alter the nature of the tax. Possibly the Legislature might enact a similar statute even after sale of the property for taxes, authorizing civil action to collect the taxes or any deficiency thereof. The Court, however, in *Calkins v. Smith*,[11] accepted the argument that Sec. 2152 provides that sale for taxes cuts off personal liability. Whether that provision, so interpreted, can be supported as constitutional, is a matter of grave doubt.[12] It will be recalled that the Constitution, Art. V, Sec. 39, declares that "No obligation or liability of any person, * * * held or owned by the state, * * * shall ever be * * * remitted, released or postponed, or in any way diminished by the legislative assembly; nor shall such liability or obligation be extinguished, except by the payment thereof into the proper treasury." It was held in *Sanderson v. Bateman*[13] that a statute authorizing payment of delinquent taxes without interest or penalties which had already attached was a violation of this prohibition. And, although the precise holding was overruled in *State v. Hitsman*,[14] the doctrine was reaffirmed insofar as it applies to the taxes proper.

The question next arises whether plaintiff, who was in *Calkins v. Smith* denied restitution by way of a personal judgment, was wholly without remedy. The Court, while pointing

[7]Richards v. Commissioners of Clay County, 40 Neb. 45, 58 N. W. 594 (1894); City of South Fulton v. Parker, 160 Tenn. 634, 28 S. W. (2d) 639 (1930); 3 COOLEY ON TAXATION (4th Ed.), Sec. 1331.

[8]See cases cited in note 3, *supra*. Existence of an adequate remedy does not, of course, preclude the legislature from providing an additional remedy. City of Oakland v. Whipple, 39 Cal. 112 (1870).

[9]People v. Seymour, *supra*, note 2; 3 COOLEY ON TAXATION (4th Ed.), Sec. 1332.

[10]City of Grand Rapids v. Lake Shore & M. S. Ry. Co., 130 Mich. 238, 89 N. W. 932, 97 Am. St. Rp. 473 (1902). *Contra*, Delta & Pine Land Co. v. Adams, 93 Miss. 340, 48 So. 190 (1908).

[11]Note 1, *supra*.

[12]In State v Montoya, 32 N. M. 314, 255 Pac. 634 (1927), the Court, distinguishing statutes of limitation, held unconstitutional a statute raising a conclusive presumption that long overdue taxes had been paid, insofar as concerned personal liability. But it was held that the tax lien might be thus discharged.

[13]78 Mont. 235, 253 Pac. 1100 (1927).

[14]99 Mont. 521, 44 P. (2d) 747 (1935).

out that in the absence of mistake plaintiff could have had the tax apportioned or could have redeemed and taken an assignment of the tax certificate, and while allowing plaintiff to amend her complaint, apparently left open only the possibility that she could, by proof that defendant had accepted the benefit of the payments, show a ratification or adoption of them by defendant. But should not plaintiff also have been entitled, irrespective of defendant's adoption or repudiation of the payments, to be subrogated to the lien of the county? Without here attempting a conclusive answer, it may be pointed out that there are two lines of authorities on the matter. The older, and perhaps the majorty, view is that such a payor is a volunteer who pays officiously and can neither recover nor claim subrogation.[15] This view prevails in California.[16] The more modern, and surely the better, rule is that the mistake prevents the payment from being officious and entitles the payor to subrogation if not to a money judgment.[17] This is the position of the Restatement of Restitution[18] and is well exemplified in a recent Wisconsin case.[19] The Montana Supreme Court has recognized the right of a lien holder to be subrogated to a tax lien which he has discharged to protect his interest.[20] Statute provides for assignment of tax certificates to any person who shall pay the re-

[15]Bryant v. Nelson-Frey Co., 94 Minn. 305, 102 N. W. 859 (1905); Pennybaker v. Atwood, 50 S. W. (2d) 377 (Tex. Civ. App., 1932); Jacobs & Feller v. Webster, 199 Mo. App. 604, 205 S. W. 530 (1918). Cf. Maxwell v. Hatherly, 170 Minn. 27, 211 N. W. 963 (1927); 3 COOLEY ON TAXATION, Secs. 1270 and 1271; 61 A. L. R. 592; 91 A. L. R. 398; 106 A. L. R. 1212.

[16]McMillan v. O'Brien, 219 Cal. 775, 29 P. (2d) 183, 91 A. L. R. 383 (1934).

[17]Rothchild Bros. v. Rollinger, 32 Wash. 307, 73 Pac. 367 (1903); Govern v. Russ, 125 Iowa 188, 100 N. W. 325 (1904). See also the secondary authorities cited in note 15, *supra.*

[18]"A person who, by payment to a third person, has discharged the duty of another or has released another's property from an adverse interest, doing so unintentionally or acting because of an erroneous belief induced by a mistake of fact that he was thereby discharging a duty of his own or releasing property of his own from a lien, is entitled to restitution from such other for the value of the benefit conferred up to the value of what was given, unless the other disclaims the transaction." AMERICAN LAW INSTITUTE, RESTATEMENT OF RESTITUTION, Sec. 43 (1). In the Reporter's note to this Section it is said, "The earlier cases allowing recovery were mostly those where there was coercion rather than mistake, as where an unpaid seller of land, in order to protect his security interest, paid taxes which a buyer should have paid. Some courts apparently have not yet recognized that there is not an officious payment if payment is made by mistake and without coercion. It is believed, however, that the rule stated in this section is not only in accord with the underlying principles of restitution but also with the present trend of decisions." See also 3 COOLEY ON TAXATION (4th Ed.), Secs. 1270 and 1271.

[19]Central Wisconsin Trust Co. v. Mary Smith Swenson, 222 Wis. 331, 267 N. W. 307, 106 A. L. R. 1207 (1936).

[20]McKenzie v. Evans, 96 Mont. 1, 29 P. (2d) 657 (1934).

quired amount to the county.[21] It would seem then that there is no good reason why subrogation should not be permitted in this State.

Leonard H. Langen.

MULTIPLE TAXATION: THE SUPREME COURT LETS DOWN THE BARS

The decade which has just come to an end has witnessed one of the most remarkable cycles in the constitutional law of taxation in the history of the United States Supreme Court. When the Court convened for its October Term, 1929, multiple taxation, in the sense of taxation of the same economic interest by more than one State, was not *per se* unconstitutional. But, with the decision in *Farmers' Loan & Trust Co. v. Minnesota,*[1] January 6, 1930, the Court squarely held to the contrary and thereupon took up the battle against multiple taxation with all of the zeal of a crusader. When, in 1932, the Court decided *First National Bank of Boston v. Maine,*[2] victory appeared complete. But, alas, man is mortal and judicial personnel changes. In a series of cases culminating in *Curry v. McCanless,*[3] decided in May, 1939, the Court repudiated the doctrine that due process of law necessarily precludes taxation by two or more States and, while not expressly overruling the earlier cases, in effect left them little more than lifeless monuments to the past.

The traditional point of departure has been the maxim, *mobilia sequuntur personam,* it being a principle of general application in the Conflict of Laws that, for purposes of determining jurisdiction over property, movables follow the person, i. e., the domicil of the owner. But, at least in the case of tangible property, the maxim states such an obvious fiction that, since the decision in *Union Refrigerator Transit Co. v. Kentucky,*[4] decided in 1905, it has been settled that, once a chattel has acquired a more or less permanent physical situs elsewhere,[5] the

[21]Sec. 2207, R. C. M., 1935.

[1]280 U. S. 204, 50 S. Ct. 98, 74 L. Ed. 371 (1930).
[2]284 U. S. 312, 52 S. Ct. 174, 76 L. Ed. 313 (1932).
[3]307 U. S. 357, 59 S. Ct. 900, 83 L. Ed. 1339 (1939).
[4]199 U. S. 194, 26 S. Ct. 36, 50 L. Ed. 150 (1905).
[5]The situs need not be permanent. It is probably sufficient that the chattel is being held or used for some local purpose on tax day. Gromer v. Standard Dredging Co., 224 U. S. 362, 32 S. Ct. 499, 56 L. Ed. 801 (1912); Coe v. Errol, 116 U. S. 517, 6 S. Ct. 475, 29 L. Ed. 715 (1885). *Cf.*, upholding a poll tax on transient laborers, Haavik v. Alaska Packers' Association, 263 U. S. 510, 44 S. Ct. 177, 68 L. Ed. 414 (1923). But it is not enough that the chattel, such as a railway car, is frequently within the State, if its employment is interstate. Johnson Oil Co. v. Okla., 290 U. S. 158, 54 S. Ct. 152, 78 L. Ed. 238 (1933). The proper procedure is to strike an average of the cars customarily within the State. American Refrig. Transit Co. v. Hall, 174 U. S. 70, 19 S. Ct. 599, 43 L. Ed. 899 (1898). Where, however, no foreign situs