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Inheritance Tax—Tax on Specific Bequests—"Tax on a Tax Ad Infinitum" Held Improper

Testator made specific bequests to various individuals, providing that her executor should pay all inheritance and estate taxes out of the residue. The executor paid the taxes due on each bequest, but the tax commissioner treated the tax due on each bequest as an additional bequest, thus imposing a "tax on a tax ad infinitum." The lower court ruled against the commissioner. Held, affirmed. The inheritance tax statute does not authorize a "tax on a tax ad infinitum." W. VA. CODE ch. 11, art. 11 (Michie 1955). Glessner v. Carman, State Tax Comm'r, 118 S.E.2d 873 (W. Va. 1961).

When a decedent's will provides that all taxes should be paid out of the residue of the estate, is the tax saving to the legatees an additional bequest which should be included as part of the taxable estate? The instant case provided the West Virginia Supreme Court with its first opportunity to rule on that question. Prior to the West Virginia decision only six states had ruled on the question, five holding that an additional tax should be imposed. The two most recent decisions, of which one is the West Virginia case, have not followed the earlier decisions. First, the Pennsylvania court in 1960, and now the West Virginia court in 1961, have decided the question contrary to the prevailing view.

The West Virginia court based its decision on the wording of the statute which provides that, "The market value of property is its actual market after deducting debts and encumbrances for which the same is liable. . . ." W. VA. CODE ch. 11, art. 11, § 5 (Michie 1955). Also, W. VA. CODE ch. 11, art. 11, § 12 (Michie 1955), provides that the tax is to be determined by the market value of all the property subject to the tax, and that the payment shall be made out of the estate in the same manner as other debts may be paid. From this wording the West Virginia court said, in order to find that a tax was due on the money paid out of the estate to cover the inheritance tax, the tax would have to be considered as both a debt and a devise. The West Virginia court held that this construction was not possible from the wording of the statute. What the legislative intent may have been is unclear, but because of the ambiguity in the statute, the court held that the doubt should be resolved in favor of the taxpayer.

It would seem that the Pennsylvania court had more justification for its opinion in the case of In re Loeb's Estate, 400 Pa. 368,
162 A.2d 207 (1960). The statute in Pennsylvania is worded differently than the comparable West Virginia section, and it seems to better justify the interpretation of the Pennsylvania court. The applicable Pennsylvania statute, PA. STAT. ANN. tit. 72, § 2301 (1949), provides that the inheritance tax is payable on the clear value of the property passing to the legatee. Prior rulings by the Pennsylvania court lend support to such an interpretation of the tax. The tax is on the right of inheritance, not on the property itself. *In re Schmuckli's Estate*, 341 Pa. 36, 17 A.2d 876 (1941). The tax is on the transfer of property and not on the estate itself, thus the only property to be taxed is that portion of the net clear estate which passes to the distributees. *In re Mellon's Estate*, 347 Pa. 520, 32 A.2d 749 (1943). The Pennsylvania court said in the *Loeb* case, *supra*, that in order to impose this additional tax on the taxes paid out of the estate, it would be necessary to consider this as two legacies. The court held that this could not be done, either from the interpretation of the statute or from the will of the decedent. During the last thirty-nine years the Pennsylvania tax commissioner has interpreted the inheritance tax act as not imposing a tax on the taxes paid out of an estate. The commissioner in the *Loeb* case, *supra*, was attempting to change this interpretation to bring Pennsylvania in line with the other jurisdictions which had decided this question. But the court concluded that the interpretation, having endured for so long, was a part of the law of Pennsylvania, and that it was the interpretation the Pennsylvania legislature had intended since no amendment had been made to change it.

Other cases which have decided the question of whether a tax on a tax should be imposed when the inheritance taxes are paid out of the estate are: *In re Irwin's Estate*, 196 Cal. 366, 237 Pac. 1074 (1925); *Bouse v. Hutzler*, 180 Md. 682, 23 A.2d 767 (1942); *In re Bowlin's Estate*, 189 Minn. 196, 248 N.W. 741 (1933); *In re Henry's Estate*, 189 Wash. 510, 66 P.2d 350 (1937); and *In re Levalley's Estate*, 191 Wis. 356, 210 N.W. 941 (1926). All of these cases have followed the California decision which was first in point of time. The rationale of the decisions is that when a legatee receives a bequest on which the taxes have been paid, he has been saved some expense, thus this saving should be considered as an additional bequest to him. As an additional bequest it would have to be taxed, and thus the "tax on a tax ad infinitum." These cases have said that such an interpretation must be given the tax statute. Any other interpretation would enable the testator to defeat
the inheritance tax by directing the tax to be paid out of the residue of his estate. The West Virginia court did not seem concerned about this method of escaping the inheritance tax, and said that there were other examples of tax saving which had been written into the act itself.

If the West Virginia Legislature does not amend the inheritance tax, the available savings could be substantial. If the tax rate were, for example, ten per cent, and testator I wished to leave 60,000 dollars to A, a tax of 6,000 dollars would result. If T were to provide that A get 54,000 dollars and the inheritance tax be paid out of the estate, the tax would amount to only 5,400 dollars and a tax saving of 600 dollars could be realized. Until such change occurs, the payment of such taxes from the residuary clause offers an attractive technique for tax saving.

Robert Glenn Steele

Torts—Statutes of Limitations—Malpractice Actions Involving Objects Left in Surgical Patients

P underwent an operation on April 26, 1955, and after receiving post-operative attention, was discharged from the hospital on May 5, 1955. Her last visit to D, a physician, was on November 14, 1955. After the operation P constantly suffered from back trouble and was X-rayed to determine the cause in August, 1958. The X-rays disclosed a wing nut in her abdomen. P instituted an action against D on August 13, 1959, for his negligence during the operation. The lower court held that P's action was barred by the two-year statute of limitations. Held, reversed. The statute of limitations on a cause of action for malpractice based on negligent failure to remove a foreign object from patient's body during the course of an operation began to run when the patient knew or had reason to know about the foreign object and existence of a cause of action based upon its presence. Fernandi v. Strully, 173 A.2d 277 (N.J. 1961).

The issue presented to the court in the principal case is one that has arisen many times and one that has been ruled on by many courts throughout the land. By its present decision, the New Jersey