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# Transfer of Property in Trust as a Method of Escaping Taxes

Henry K. Higginbotham
*West Virginia University College of Law*

there is a mis-joinder or non-joinder. The emphasis is still upon the old rules of joinder, and not placed where it is believed that it should be, that is upon the basis of conveniency of the court and prejudice to the parties.

—HARRIET L. FRENCH.

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TRANSFER OF PROPERTY IN TRUST AS A METHOD OF ESCAPING TAXES.—Is it possible to transfer property to a non-resident in trust for a resident and thus escape taxes altogether? No. But might it thus be possible to substitute the taxation law of a foreign state for that of our own? In a case recently decided by the United States Supreme Court the facts and holding were as follows: One K, a resident of Virginia, transferred and delivered to a trust company of Baltimore, Maryland, stocks and bonds of various corporations to the amount of $50,000 with power to change the investments, collect and accumulate the income, and pay the same together with the principal in this manner: One-half to each of K's sons (residents of Virginia) when they should respectively become of the age of twenty-five years. Virginia assessed taxes for the years 1921, 1922, 1923, 1924 and 1925 upon the whole corpus of the estate against the trust company. The United States Supreme Court, citing authorities, *stated* that the property as such was only taxable at the residence of the owner, and that the trust company, having the legal title and control, was the owner, and, therefore, that these intangibles were taxable in Maryland. The court *held* that the cestuis, not having present control of the property, were not the owners, and, therefore, the property was not taxable in Virginia. The court did state, however, that the question of whether Virginia could tax the equitable interest of the cestuis, was not presented for adjudication, but intimated that "Virginia, following its own view of vested and contingent interests, might tax the interests of these beneficiaries as though they were the whole, but it is sufficient for present purposes that it has not assumed to do so."

Thus it seems certain that one may not dodge taxes altogether by transferring the property, title, and control to a foreign trustee, for by so doing the property is made subject to taxation at the trustee's residence. There is a possibility, however, that the application of the tax laws of a foreign state may be substituted for that of one's own state, provided the latter state would not assume to tax the equitable interest remaining, in which case the

only result would be to subject the property to double taxation. Let us see how the attempt would work out in West Virginia.

There are no cases in this jurisdiction on this point, but if there were any such cases they would be controlled by the recent federal decision. Therefore we will simply try to guess what would be the result of the application of our statutes. It is clear that if the control of the property did not remain in a person in West Virginia that West Virginia could not tax the property as such. For the Supreme Court held in that a Virginia law, Virginia Code, 1919, §2307, as amended, which stated that the property of an infant should be taxed to his trustee was unconstitutional if applied to a non-resident trustee having control and possession of the property. Our statute, W. Va. Code, 1923, ch. 29, §14, which provides that the person holding, possessing or controling the property as trustee or in any representative of fiduciary capacity shall return the full value thereof for taxing purposes, would hardly be construed in a different manner from the Virginia statute.

Similarly, another West Virginia statute, Code 1923, ch. 29, §54 says: "Personal property mortgaged or pledged shall, for the purpose of taxation be deemed the property of the party who has possession" would be held unconstitutional if applied to a non-resident mortgagee or pledgee in possession. Moreover, the law of our state seems to prohibit such taxation, for Barnes' Code, 1923, ch. 29, §63 says: ". . . . personal property belonging to residents of this state, which is actually and permanently in another state and by the laws of such other state is subject to taxation and is actually taxed in such other state, shall not be * * * taxed in this state."

Since such a superficial examination of the code and later statutes has revealed no provision for the laying of taxes generally on equitable interests, it would seem possible to substitute the tax law of another state for that of our own.

But there are one or two difficulties: In the first place there are two West Virginia statutes, West Virginia Code, 1923, ch. 29, §§57 and 63, which provide among other things that a transfer of personalty for the purpose of evading taxes shall be invalid and that the assessor shall assess such property to the one who makes such transfer. Whether West Virginia has the power to declare such trust invalid once the property has passed from its jurisdiction or whether, not having such power, it could tax the transferor on property validly in trust in another state is beyond the scope of this note. The second difficulty is that even though it may have no statute providing therefor, West Virginia as the United States Supreme Court intimated that Virginia might do, might "assume" to tax the equitable interest of the resident

even up to the full value of the property thus subjecting it to double taxation. West Virginia has a statute, Code 1923, ch. 33, §2 (see also §1 which might be construed as meaning to lay a tax on equitable interests) in effect providing that an inheritance tax may be levied on equitable interests. And there is nothing specifically against such a levy in the general tax laws.

—HENRY K. HIGGINBOTHAM.

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DEEDS—RESTRICTIONS AS TO TRANSFER OF PROPERTY TO ETHIOPIANS.—A recent case presents a question which has not arisen before in West Virginia, but upon which there is a sharp conflict of authority in other jurisdictions. There was a provision contained in a deed whereby the grantee covenanted that the property granted could not be conveyed, demised, devised, leased or rented, to any person of Ethiopian race or descent for a period of fifty years from the date of the deed. The same provision was contained in each of the several deeds executed by A and others for eleven lots constituting a particular block in the City of Huntington. Of these Lot Number 4 was conveyed to B, who thereafter conveyed to C, who later made a conveyance of the lot to the defendants, who are colored persons. Plaintiff, as owner of Lot Number 6, filed a bill seeking to have the deed from C to the defendants be declared void and the defendants enjoined from renting or leasing the property. Plaintiff prevailed in the Circuit Court, but upon appeal, the decision was reversed upon the ground that the restriction contained in the deed was void because incompatible with the estate granted. Since the suit was by the owner of an adjoining lot the attempt was to enforce the covenant as an equitable servitude. Had it been a condition against alienation the grantor or his heirs only could enforce the condition. *White* v. *White et al.*, 150 S. E. 531 (W. Va. 1929).

An absolute restraint on the alienation of a fee simple estate in land, even for a short period, is contrary to public policy and void, the policy of the law being that property should not be taken out of commerce. GRAY, PERPETUITIES, 3rd. ed. §60 3d. However, provisions restraining the alienation of property to specified individuals have been sustained in some cases on the ground that this does not substantially restrict free alienation. Gray, RESTRAINTS ON THE ALIENATION OF PROPERTY, 2nd. ed. §40. But may there be a provision restraining alienation to all members of a race even though there be few persons of that race in the com-