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In a recent decision the Attorney General of Colorado has ruled that the interest of a deceased vendor in a contract for the sale of real estate is subject to Colorado inheritance tax, provided the vendor was a resident of Colorado, even though the real estate is located outside of Colorado, and, conversely, that where the deceased vendor was a non-resident and the real estate located in Colorado, the interest of the deceased vendor in such contract is not taxable under Colorado law.

The opinion of the Attorney General states in part:

> "In view of the position that the Colorado courts have taken with reference to such contracts, I am of the opinion that, as regards the doctrine of equitable conversion, our courts would follow the majority rule rather than the minority rule and would hold that there is an equitable conversion of real estate into personalty at the date of the execution of the contract.
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> "I am of the opinion that in the case of a non-resident decedent who, during his lifetime, enters into an executory contract for the sale of his real estate situate in Colorado, an equitable conversion occurs at the date of execution of the contract and that for inheritance taxation purposes the interest of such vendor should be considered intangible personal property and not real estate; and that the interest of the vendee in such a contract should be considered real estate. In the case of a resident decedent who, during his lifetime, enters into an executory contract for the sale of his land situate outside the State of Colorado, I am of the opinion that the interest of the vendor should be considered intangible personal property and taxed as such."[1]

Irrespective of inheritance tax laws, it is well established as a fundamental principle of the laws of descent and distribution that the interest of a deceased vendor under a contract of sale of real estate constitutes personal property and passes to his executor or administrator, and that the

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[1]Letter dated July 26, 1941, from Attorney General Gail L. Ireland to Inheritance Tax Commissioner Berton T. Gobble.

interest of a deceased vendee under such a contract is real estate and descends to his heirs at law.

Storey states the rule as follows:

> "Thus if a man has entered into a valid contract for the purchase of land, he is treated in equity as the equitable owner of the land, and the vendor is treated as the owner of the money. The purchaser may devise it as land, even before the conveyance is made, and it passes by descent to his heir as land. * * *
>
> "Under such circumstances the vendee is treated as the owner of the land, and it is devisable and descendible as his real estate. On the other hand the money is treated as the personal estate of the vendor, and is subject to the like modes of disposition by him as other personalty, and is distributable in the same manner on his death."[2]

This rule is based upon the theory of equitable conversion.

In determining the taxability of a decedent vendor's interest under the inheritance tax laws, it would seem that the same rule should apply, and most of the courts have so held. Their decisions are based upon three legal theories.

The state of Washington follows the theory of equitable conversion:

> "We have consistently held that the situs of intangible property is at all times at the domicile of the owner. We have also repeatedly held that a vendor's interest under an executory contract for the sale of land should be treated as personalty for the purpose of administration. We cannot see any good reason for holding that, for the purpose of administration of an estate, a vendor's interest in such a contract should be treated as personalty but not so treated when the question of inheritance taxation is involved. The two situations are not distinguishable on principle."[3]

Some courts have taken the position that the effect of a contract of sale is practically the same as a mortgage. The vendor is said to hold the bare legal title to the land in trust for the vendee and as security for the payment of the debt. This view is touched upon by the Colorado Supreme Court, in *Marvin v. Stimpson*.[4] In that case the court quoted with approval the following statement from Pomeroy's Equity Jurisprudence:

> " 'By the terms of the contract the land ought to be conveyed

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[2]STOREY'S EQUITY JURISPRUDENCE (14th ed. 1918) 486, §1092.

[3]*In re* Eilermann's Estate, 179 Wash. 15, 35 P. (2d) 763 (1934). See also KIDDER, STATE INHERITANCE TAX AND TAXABILITY OF TRUSTS (1934) 250.

[4]23 Colo. 174, 46 Pac. 673 (1896).

to the vendee, and the purchase price ought to be transferred to the vendor; equity, therefore, regards these as done: the vendee as having acquired the property in the land, and the vendor as having acquired the property in the price. The vendee is looked upon and treated as the owner of the land; an equitable estate has vested in him commensurate with that provided for by the contract, whether in fee, for life, or for years; although the vendor remains owner of the legal estate, he holds it as a trustee for the vendee to whom all the beneficial interests has passed, having a lien on the land, even if in possession of the vendee, as security for any unpaid portion of the purchase money.' "[5]

Under inheritance tax laws, the general rule has been that mortgage notes, like stocks and bonds, are considered intangible personal property subject to tax by the state of decedent's domicile.

Other courts have not attempted to apply any particular theory to support the taxability, but have taken the broader ground that intangible personal property is taxable at the domicile of the decedent, that any contract right, whether with relation to property or not, is an intangible property right which can be appraised and taxed by the state of the domicile of the decedent.

This holding is adhered to in *In Re Russell's Estate,* the court saying:

"* * * the amount due upon the contract of sale must be regarded as intangible, and not tangible, property, and, as the decedent was a nonresident, the transfer thereof is not subject to a tax."[6]

In *State ex rel. Hilton v. Probate Court,*[7] the Minnesota Supreme Court said:

"The decedent sold his Montana land under an executory contract which obligated the vendee to pay the purchase price and gave him the right to the possession of the land. If the decedent's interest under this contract is to be deemed personal property, it is subject to a succession tax in Minnesota, the state of his domicile; if it is to be deemed real estate, it is not subject to such tax in Minnesota, but only in Montana, where the land is located. We are of opinion that *State v. Rand,* 39 Minn. 502, 40 N. W. 835, is decisive of the question under consideration. In that case the defendants, residents of the city of Minneapolis, sold a tract of land in that city under an executory contract which obligated the

[5] *Supra,* note 4, at 182-183. 46 Pac. at 676.
[6] 119 Misc. 12, 194 N. Y. Supp. 837 (1922).
[7] 145 Minn. 155, 176 N. W. 493 (1920).

vendee, a corporation, to pay the purchase price and entitled it to the possession of the land. It was held in an exhaustive opinion that the interest of the vendors under this executory contract was taxable as a credit under the general tax laws."

In *Dodge County v. Burns,*[8] the Nebraska court held that the interest of a deceased New York vendor could not be reached for inheritance tax purposes in Nebraska.

While the Attorney General seems to have based his opinion upon the theory of equitable conversion, which is of course sufficient to sustain it where that theory is accepted in applying both the laws of descent and distribution and inheritance tax laws, the third or broader ground just referred to may ultimately prove to be the soundest basis in view of the recent trend of the decisions of the Supreme Court of the United States.[9]

The mortgage theory, if solely relied upon in Colorado, might lead to distinctions based upon the different forms of contracts, because of the decisions of our Supreme Court holding some forms of contracts of sale to be like mortgages and others not to be.[10] It is doubtful whether any distinction on such a basis for tax purposes would be sustained by the Supreme Court of the United States, which has recently declined to base taxable status upon "niceties of the art of conveyancing."[11]

Too close an adherence to the doctrine of equitable conversion may also lead the courts into difficulties. This seems to have been the case in a recent Pennsylvania decision, *In re Estate of Henry S. Paul,*[12] which holds that the decedent vendor's interest cannot be taxed by the state of his domicile. That case involved a resident of Pennsylvania, who died seized of real estate in New Jersey and Massachusetts concerning which he had entered into contracts of sale prior to his death. The Pennsylvania taxing officers appraised the contracts at less than their unpaid balances, and assessed an inheritance tax thereon. During the administration of the estate, these balances were paid and deeds issued to the purchasers by the executor of the estate. In reversing the action of the taxing officers and holding the decedent's interests in the contracts nontaxable in Pennsylvania, the court seemed to be influenced by six cases: *Frick v.*

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[8]89 Neb. 534, 131 N. W. 922 (1911).

[9]See Curry v. McCanless, 307 U. S. 357, 59 S. Ct. 900, 83 L. ed. 1339 (1939), and Graves v. Elliott, 307 U. S. 383, 59 S. Ct. 913, 83 L. ed. 1356 (1939), although our subject does not include any consideration of the power of two states to tax the vendor's interest.

[10]See Morris, *Must Colorado Real Property Installment Sales Be Foreclosed as Mortgages?* (1932) 9 DICTA 320.

[11]Helvering v. Hallock, 309 U. S. 106, 60 S. Ct. 444, 84 L. ed. 604 (1940).

[12]303 Pa. 330, 154 Atl. 503, 78 A. L. R. 779 (1931).

Pennsylvania,[13] *In re Robinson's Estate*,[14] *In re Croxton's Estate*,[15] *McCurdy v. McCurdy*,[16] *Heymann v. Viane*,[17] and *Safe Deposit & Trust Company v. Virginia*.[18]

The *Frick* case is well known. It holds that the situs of tangible personal property for inheritance tax purposes is the state in which the property is located, not the state of domicile of the owner.

The facts in the *Robinson* and *Croxton* cases are very meagerly stated in the reports, but they both apparently involve the question as to whether the provisions of the wills under consideration in those cases worked an equitable conversion of the real estate for inheritance tax purposes, and it was held that they did not.

In the *McCurdy* case, an ancillary administrator tried to compel the domiciliary administrator to pay a mortgage owed by the decedent on land in the state of the ancillary administration so as to leave the full value of the real estate in the latter state for taxation. The contention was made that the doctrine of equitable conversion required the court to consider that the debt would be paid by the state of domiciliary administration. The court refused to so hold, saying that the ancillary administration had to be carried on independently of the domiciliary administration, and consequently the only taxable value of the real estate would be the equity of redemption. The court did remark in the course of its opinion:

> "The law of equitable conversion ought not to be invoked merely to subject property to taxation, especially when the question is one of jurisdiction between different states."[19]

In the *Heymann* case the will provided that the executor should sell the real estate, and this was done. Thereupon, the executor contended that the inheritance tax lien had shifted from the real estate to the proceeds, but the court held to the contrary, saying:

> "The doctrine of equitable conversion may not be relied on to subject property to taxation or to shift the lien of the tax from the real property to the fund."[20]

With these cases in mind, the Pennsylvania court argued that the vendor's interest in contracts of sales could not be considered intangible

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[13]268 U. S. 473, 45 S. Ct. 603, 69 L. ed. 1058 (1925).
[14]285 Pa. 308, 132 Atl. 127 (1926).
[15]288 Pa. 184, 135 Atl. 626 (1927).
[16]197 Mass. 248, 83 N. E. 881, 16 L. R. A. (N. S.) 329, 14 Ann. Cas. 859 (1908).
[17]252 N. Y. 159, 169 N. E. 124 (1929).
[18]280 U. S. 83, 50 S. Ct. 59, 74 L. ed. 180 (1929).
[19]*Supra* note 16, at 250, 83 N. E. at 882.
[20]*Supra* note 17, at 166, 169 N. E. at 126.

personal property, subject to the Pennsylvania inheritance tax, because (1) the doctrine of equitable conversion could not be availed of to subject the property to taxation; (2) the existence of the contract of sale was therefore of no effect; (3) the "reality" was the real estate in the contract; (4) under the *Frick* case the "reality" was physically present in the foreign state and therefore outside the jurisdiction of Pennsylvania; and (5) the trend of current decisions was in favor of limiting the power of taxation to the state in which the property was actually located.

The court said, in part:

"There can be no question but that no tax could be collected on the lands as lands. * * * Is this situation altered because of the existence of the writings under which the decedent had agreed to convey the lands when the consideration therefor was paid? Is the thing sought to be taxed any the less the land because of the writing, the vendor being still possessed of the real estate when he died?

* * * *

"We are asked to disregard the fact of the testator still holding title to and possession of the lands, and to indulge in the make-believe that the land had been transmuted into something else. We are not prepared to do so. The agreements of sale are not the vital factor. * * *

"While an agreement for sale of land, which contains a promise to pay the purchase price agreed upon, is in one sense a chose in action, it differs in essential respects from the ordinary chose. Aside from the agreement to sell, no such liability ever did exist. Its basic purpose, as a writing, is to fix the rights of the vendor and the vendee in the land; liability for the purchase price is but secondary and contingent. The fee in the land is still in the vendor, and it is the fee which is to be transferred upon payment of the balance of the purchase price. In case of default, neither the vendor nor those standing in his shoes are compelled to sue for that balance in order to be recompensed; they may elect to retain the land. * * *

"If the conversion had been worked by will, no tax could be levied. * * * It is difficult to see wherein the difference lies between conversion by will and conversion by agreement of sale. In each instance the decedent would die seised of the land, which is the reality. Taxes should be levied upon realities, not upon fictions. * * *

"The whole modern tendency is to limit the levying of in-

heritance taxes to the sovereignty which is the situs of the actual property."[21]

The decisions of the two earlier Pennsylvania cases relied upon[22] related solely to the application of the doctrine of equitable conversion in the interpretation of the provisions of a will. For example, if a will contains a direction to the executor to sell all of his property and distribute the proceeds among the beneficiaries of the will, it is considered, for the purposes of distribution, that there has been an equitable conversion of the real estate into personalty. There may well be a distinction, however, between such an equitable conversion effected by the death of the owner of real estate whose death brings into existence the liability for the inheritance tax. In other words, in such a case, the decedent actually owns complete title to the real estate up to the date of his death, and the tax attaches to what he owned at the date of his death. But in the case of a contract of sale, the vendor has consummated the conversion of his interest from the ownership of real estate to the ownership of a contract relating to real estate, and when he dies, he no longer owns the real estate free and clear, but only subject to the terms of the contract out of which he derives his sole remaining rights with regard to the real estate. In such a case, it cannot be said that the rule of equitable conversion is being applied for the purpose of changing the taxable status of any property; the status has been created by applying that rule before the incidence of the inheritance tax.

Hence, it seems that the reliance of the Pennsylvania court upon the two Pennsylvania cases and the comments in the Massachusetts and New York cases, has very slim support.

The court likewise seems to have been unfortunate when in 1931 it ventured a prophecy that the trend of decisions was to limit the levying of inheritance taxes to the sovereignty which is the situs of the actual property, and relied in part upon the case of *Safe Deposit & Trust Company v. Virginia*.[23] The doctrine of that case has probably been modified by later decisions of the Supreme Court of the United States.[24]

Two judges dissented from the decision in the *Paul* case, and one of them, Judge Maxey, wrote an exhaustive and comprehensive opinion in which the various theories and cases were discussed. Although he pointed out that even under previous Pennsylvania decisions the decision in the *Paul* case was wrong, he took the broader position that the contract right

[21] *Supra* note 12, at 334, 154 Atl. at 504.
[22] *In re* Robinson's Estate, *supra* note 14, and *In re* Croxton's Estate, *supra* note 15.
[23] *Supra* note 18.
[24] *Supra* note 9.

was a matter of property which could be separately valued irrespective of its relation to any property at all.

He disposed of the theory of equitable conversion with a brief reference to the *Robinson* case:

> "The distinction between that case and the case before us is so obvious that it does not require extended discussion. In that case the property in question was the decedent's *real estate at the time of his death,* and *it had its situs in another state.* It had the status of real estate at the moment of its owner's death and all inheritance rights are based on facts as they exist at the moment of a decedent's death. Though the land was directed to be sold, it might not be sold for years, but, regardless of when it was sold, the only property right the decedent had in that land or in relation to that land, at the time of his death, was the land itself. It was not a subject over which the sovereign power of Pennsylvania extended, and therefore was not a legitimate object of Pennsylvania taxation. In the case before us, the vendor's interest in the extra-territorial real estate had in his lifetime been converted into a solvent credit which attached to him in Pennsylvania. The legal creator of that personal property was the contract in the vendor's possession, his interest in which contract Pennsylvania recognized as a property right. The sovereign force behind this property right was not the state where the land described in the contract was located, but the state of the domicile of the man who by that contract was endowed with certain rights of pecuniary value which his own state would enforce. This property right was as clearly taxable in Pennsylvania as it would have been if it had been based on promissory notes given by the solvent vendee for the purchase of land." (Italics the court's.)[25]

Then, enlarging upon the true character of a contract of sale, he said:

> "* * * it contractually creates and evidences certain rights of pecuniary value which the law recognizes and will enforce, to wit, the right of the vendor to demand from the vendee a sum of money stipulated to be paid. If Paul had agreed to sell to his solvent debtor, and the latter to buy, a tract of land, say, in Florida, in 1925 for $100,000, retaining the naked title as security, and a year later that land had become worthless, Paul's property in that contract would still be worth $100,000, and would be listed as such among his assets, even though the land itself had become worthless. * * * When a man sells property, real or personal, on a contract, retaining the title in himself, the retained title is only a

[25] *Supra* note 12, at 341, 154 Atl. at 506.

pawn. The other's debt to him is his credit, and is correctly listed among his assets as property, regardless of the pawn. * * *

"[The vendor] acquires from the legally enforceable contract a right of property distinct from the land to which it relates, this right of property being intangible personalty (sometimes called 'a solvent credit,' sometimes called 'a chose in action') whose situs for taxation and other purposes is its owner's domicile. This property is not any 'make-believe' or legal fiction, but it is an economic and legal fact. 'Wealth in a commercial age is made up largely of promises.' Pound's introduction to the Philosophy of Law, p. 236. Even a government bond or a greenback is only a promise, but it is clearly taxable as property."[26]

In the light of this analysis of the *Paul* decision, it does not seem significant that the application for certiorari made to the United States Supreme Court in that case was denied.

District Attorneys Meet

A meeting of the District Attorneys' Association, a section of the Colorado Bar Association, was held at the Broadmoor Hotel, September 13, 1941, with James M. Noland of Durango, president of the section, presiding.

About thirty-five district attorneys, their assistants and deputies, from virtually every judicial district of the state, were present and participated in the round table discussions which followed remarks of the speakers. Principal speakers were James Henderson, Assistant Attorney General, and Harry Bundy, Superintendent of the Colorado Industrial School, both of whom delivered informative and interesting talks on Colorado juvenile laws and juvenile institutions.

A. L. Betke, compiler and editor of the new Betke criminal digest for Colorado, was present, and spoke briefly on his new book. Attorney General Gail Ireland also attended the meeting and gave a brief address.

This was the first meeting of the section held in conjunction with the annual meeting of the state association, and it is now planned to make it an annual event. The regular annual session of the District Attorneys' Association will be held in Denver next January.

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[26] *Supra* note 12, at 338, 154 Atl. at 506.