1957

Taxation

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No tax legislation of general interest was enacted by the General Assembly at its Extra Session in September 1956. An addition to the property tax exempt organizations,[1] a revenue license exemption for certain alien interns,[2] and some changes in the extension of time allowed counties for completing reassessments[3] comprised the total enactments in the tax field.

Tax cases decided by the courts were few in number during the period covered by this Survey. Although none were startling in the sense of setting forth significant innovations in Virginia tax law, some involved particularly interesting phases of subject matter treated by the courts during the previous two years, and foreshadow a likelihood of much additional future controversy centering around those matters.

ASSESSMENTS IN NAME OF PRIOR OWNER

The Supreme Court of Appeals has held that an inaccuracy in the description of property conveyed by deed does not relieve a commissioner of his duty to transfer the property on the land books to the grantee,[4] and thereafter assess in the name of the grantee, where such inaccuracy would readily become apparent upon the required check of the list of deeds[5] furnished him by the clerk of the court against the records in the clerk's office. In *Jennings v. Norfolk*[6] taxes on the property had been assessed in the grantor's name for three years before and extending through eighteen years after the execution and recordation of the deed to the grantee. The land was eventually sold to the city pursuant to a decree in a suit to enforce its tax lien. Plaintiffs, claiming title through the grantee, sought to have the deed to the city declared null and void as a cloud on their title. Despite its inaccuracy in part, the Court found that the description in the deed was adequate to identify the property, and that its proper description was determinable upon examination of the records in the clerk's office. Finding that the subsequent assessments in the grantor's name were therefore erroneous, the Court decided that the taxes for the eighteen years constituted

* Professor of Law, William and Mary. Member, Virginia and New York bars. B.S., 1934, LL.B., 1937, LL.M. 1948, New York University.

1. VA. CODE ANN. § 58-12 (Add. Supp. 1956).
2. *Id.* § 58-387.1.
3. *Id.* § 58-792.1.
4. VA. CODE ANN. § 58-803 (1950).
5. *Id.* § 58-797.
6. 198 Va. 277, 93 S.E.2d 302 (1956).

no enforceable lien against the land. With respect to the city's lien for taxes assessed in open years prior to the conveyance, the Court said that the proceeding for the enforcement of that lien was void as to the grantee and her assigns, as they were necessary parties to that suit and not properly brought in through service by publication under the designation of "Parties Unknown."

The decision does not state how much further a commissioner must go than merely compare the list of deeds furnished him by the clerk against the deed recorded in the clerk's office in order to "carefully check the same" as required by the statute. The city maintained that he is required only to check the list against the deed, and the Court agreed to the extent that his duty is certainly no less than that. While not forthrightly stating that it is any greater, the Court's finding that the deed was sufficient to apprise the commissioner of the identification of the property rested on what the commissioner would have learned had he resorted to the map book referred to in the deed. This is, of course, no indication that the commissioner will be obliged to conduct something akin to a title search in order properly to assess a real property tax and give validity to a tax lien for its nonpayment, but the required "check" would seem to call for more than a cursory comparison.

Tax Situs of Tangible Chattels

The decreasing weight of the *mobilia sequuntur personam* doctrine in the determination of the situs of tangible property has long been acknowledged by the courts, both federal and state. Mr. Chief Justice Hughes, speaking for the United States Supreme Court in *Wheeling Steel Corp. v. Fox*,[7] stated,

> In the case of tangible property, the ancient maxim, which had its origin when personal property consisted in the main of articles appertaining to the person of the owner, yielded in modern times to the law of the place where the property is kept and used.[8]

In *Hogan v. County of Norfolk*[9] the doctrine yields in the construction of that section of the Virginia Code which provides that the situs for the taxation of tangible personal property shall be the county "in which such property may be physically located on the first day of the tax year." [10] That county was the County of Norfolk, whose assessments on defendant's

7. 298 U.S. 193 (1936).
8. *Id.* at 209-10.
9. 198 Va. 733, 96 S.E.2d 744 (1957).
10. Va. Code Ann. § 58-834 (1950).

taxicabs were contested on the ground that the defendant was a resident of Portsmouth. In line with numerous decisions of the federal courts and other jurisdictions, the Court of Appeals distinguished transitory or temporary presence from presence of a more durable nature coupled with habitual use of the property in the taxing locale. Having no evidence before it that the County of Norfolk was not where the taxicabs "really belonged" in the ordinary course of defendant's business, the Court found that the presumptive validity of the assessments, arising by reason of the taxicabs' physical location, was not rebutted. In an earlier case, *Newport News v. Commonwealth*,[11] the *mobilia* doctrine was held to preclude a tax by Newport News upon ferries physically present more in that city than in Norfolk, the home of the company. The Court in *Hogan* distinguished that case on the fact that the ferries were also "present" in Norfolk and that their tax situs therefore remained in the home locale.[12]

The decision makes it clear that the taxpayer may well have to file more than one tangible property tax form if there is diversity between the county or city of his residence and that of the seat of his business activities, or if his activities in regard to the use of his tangible business assets extend beyond the confines of one county or city. The decision, however, infers no threat that more than one county or city will be permitted to tax the same property.

Dairyman's License Tax Exemption

Thompson's Dairy, a District of Columbia corporation with no plant or place of business in Virginia, sold its products not only to Virginia customers whose orders had been previously taken, but also directly by its truck drivers in Virginia to any who wished to purchase them. In an earlier case an Arlington County license tax imposed upon it was held not to violate the commerce clause, as the direct sales were intrastate, nor to discriminate in favor of resident dairies, which, although free of the license tax, were taxed upon their capital employed in Virginia.[13] In *Thompson's Dairy, Inc. v. Commonwealth*[14] the same contentions are again made, and briefly dis-

11. 165 Va. 635, 183 S.E. 514 (1936).

12. Obviously the Supreme Court of Appeals is not as prone to allow more than one county tax upon property in construing the Virginia statute as is the United States Supreme Court to allow more than one unapportioned state tax with regard to the commerce and due process clauses of the Federal Constitution. See Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944), particularly Mr. Justice Jackson's concurring opinion.

13. Thompson's Dairy, Inc. v. County Bd. of Arlington, 197 Va. 623, 90 S.E.2d 810 (1956). See Sager, *Taxation*, Ann. Survey Va. Law, 42 Va. L. Rev. 1190, 1196 (1956); Ribble, *Constitutional Law*, *id.* at 1157, 1161.

14. 198 Va. 411, 94 S.E.2d 243 (1956).

posed of by the Court by reference to its former answers to them. In the present case, however, the Dairy also contended that as a dairyman peddler of milk, butter, cream and eggs, it was exempt from license requirements, both state and municipal.[15] Finding that the products sold also included chocolate mix, eggnog mix, fruit juices, cottage cheese and margarine, the Court refused to give "milk, butter, cream and eggs" the broad connotation of dairy products in general and held the exempting clause inapplicable. The literal construction seems particularly justifiable in the view that when the legislature intended to encompass other than specifically named products in clauses of the same code section concerning self-grown products, it did so in the unmistakeable terms of "other family supplies of a perishable nature." [16]

Resident Appointment of Nonresident Intangibles

Virginia Code Section 58-152 renders only such property as is "within the jurisdiction of this commonwealth" subject to inheritance tax. In March, 1955, the Supreme Court of Appeals held that a settlor of an irrevocable nonresident trust, who subsequently became a resident of Virginia, did not bring the intangible corpus of the trust into Virginia's jurisdiction along with his person solely by reason of the life interest that he had reserved while a nonresident.[17] Citing this precedent and with like approach, Judge Hening of the Circuit Court of the City of Richmond has determined that the donee of a power of appointment, who subsequently becomes a Virginia resident, does not thereby bring the appointive property within the jurisdiction of the commonwealth.[18] The appointive property was intangibles of a New York trust established by a New York settlor. The donee of the power subsequently moved to Virginia and thereafter converted the general testamentary power to a special power[19] which she

15. Va. Code Ann. § 58-340 (1950). The action was also against the City of Alexandria, with municipal exemption automatically dependent upon state exemption. *Id.* § 58-344.

16. Judge Doubles, Richmond Hustings Court, Part II, has recently determined that selling self-produced ice cream on sidewalks falls within the "family supplies of a perishable nature" exemption. Hendricks v. Richmond, In the Hustings Court of the City of Richmond, Part II, Chancery Order Book No. 38, p. 380, entered July 10, 1957.

17. Commonwealth v. Morris, 196 Va. 868, 86 S.E.2d 135 (1955).

18. Davis v. Commonwealth, In the Circuit Court of the City of Richmond, Order Book No. 66, p. 297, entered July 17, 1957.

19. There was no creation of a class of potential appointees as the term "special power" might indicate. Here the donee restricted the general power by releasing all rights to appoint the principal of the trust to herself, her estate, her creditors or the creditors of her estate.

exercised by her will in favor of a Virginia appointee. Property law concepts, such as a power to appoint property is not an interest in the property and the appointee takes from the donor and not from the donee of the power, are infused into Judge Hening's opinion to support a finding of Virginia's lack of jurisdiction over the appointive property and not to assert that appointive property is not taxable upon the donee's exercise of the power.[20] It would seem, however, that the "niceties" of property law will continue to pervade Virginia's judicial tax thinking, at least until many of the doubts raised in the wake of the *Carter* case[21] are resolved.[22]

20. In Commonwealth v. Carter, 198 Va. 141, 92 S.E.2d 369 (1956), the donee's exercise of the power was held to be a taxable event, but the appointive property was not to be coupled with the donee's own property, although both passed to the same recipient, in determining the applicable rate bracket. In that case the donor was a Virginia resident, but at the time of his death in 1888, when the power was created, no inheritance tax was assessable against the beneficiaries of his will. The decision does not clearly indicate of what consequence was the fact that no inheritance tax was assessable at the donor's death and therefore whether, in any event, VA. CODE ANN. § 58-173 (Supp. 1956) might operate so as to impose but one tax from donor to appointee.

21. See note 20 *supra.*

22. For a particularly outstanding example of a court's hurdling of staid property law concepts, see Helvering v. Hallock, 309 U.S. 106 (1940), where the "niceties of the art of conveyancing" give way to "eminently practical" tax considerations.