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Art. X, §6, providing that the wife's real and personal property "shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations, or engagements of her husband, and may be devised and bequeathed and, with the written assent of her husband, conveyed by her as if she were unmarried?"

WALTER HOYLE.

Taxation—Situs of Contract for Purchase of Federal Property

In *Port Angeles Western Ry. Co. v. Clallam County*,¹ the defendant assessed for taxation the interest of the plaintiff, a Delaware corporation, in a contract for the purchase of an unfinished railroad and certain lands lying in the State of Washington, from the United States. Title was to be retained by the vendor until the full purchase price had been paid and certain improvements made. In a previous case between the same parties it was held that the property itself, the subject matter of the contract, could not be taxed.² The present action was brought under a section of a Washington statute providing that the interest of purchasers under such contracts shall be personal property.³ The court held the assessment valid and refused to enjoin its collection.

While the title to property remains in the United States either for the purpose of securing the purchase price or the performance of precedent conditions, it may not be taxed by the states.⁴ When, however, all that is required of the purchaser under the terms of the contract has been done by him, a tax may be levied by the state even though there has been no formal transfer of legal title.⁵ It is at

¹ 36 F. (2d) 956 (W. D. Wash. 1930).

² *Port Angeles Western Ry. v. Clallam County*, 20 F. (2d) 202 (W. D. Wash. 1927).

³ Laws of Wash. Ex. Sess., c. 130, s. 33.

⁴ *Union Pac. Ry. v. McShane*, 22 Wall. 444, 22 L. ed. 747 (1874); *Kansas Pac. Ry. v. Prescott*, 16 Wall. 603, 21 L. ed. 373 (1872); *Irwin v. Wright*, 258 U. S. 219, 42 Sup. Ct. 293, 66 L. ed. 573 (1921), although as between private parties the vendee may be taxed under such executory contract; *Bowls v. City of Oklahoma City*, 24 Okla. 579, 104 Pac. 902, 24 L. R. A. (N. S.) 1299 (1909), as may a non-resident mortgagee's interest be taxed; *Savings & Loan Soc. v. Multnomah County*, 169 U. S. 421, 18 Sup. Ct. 392, 42 L. ed. 803 (1898).

⁵ *State v. Itasca Lumber Co.*, 100 Minn. 355, 111 N. W. 276 (1907). "When the government has no longer any right or interest in the property which would justify it in withholding the patent, and the purchaser is in possession, the latter will be treated as the beneficial owner."

that time and not before that equitable title is considered as having passed.⁶

Whether or not the vendee has such an interest arising from the existence of such contract as the state may subject to taxation depends upon the nature of the interest and its situs. The purchaser being a non-resident, the property taxed must of necessity be an interest in the land and railroad as such in order that it have a domestic situs.⁷ Should it be an intangible, whose value is the difference between the purchase price of the property sold under the contract and the market value of the contract, its situs would be the domicile of the purchaser. It has been held that a lease upon property owned by the United States may be taxed to the lessee.⁸ And possessory rights in a mining location and in lands granted but not yet patented for the purpose of building a railroad have been taxed.⁹ In such cases where the interest of the person taxed may be forfeited and sold under execution without beclouding the title of the United States to the land itself it would seem that the tax is not open to the objection that the property of the United States may not be taxed. But where as in the instant case, the contract may not be alienated

⁶ For the purposes of taxation such view seems correct. The equitable title of a purchaser under an executory contract between private parties arises only from the fact that a court of equity will grant him specific performance. This type of remedy has now so long been available that it partakes of the nature of a right *in rem*. However, it is doubtful whether specific performance may be had against the United States upon refusal to convey, and it would seem that the purchaser has neither legal nor equitable title until an actual conveyance has been effected.

⁷ No state may tax that which is not within her jurisdiction. Since the decision in *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 21 L. ed. 179 (1872) it has uniformly been held that a property tax on intangible interests may be levied only by the domiciliary state of the debtor except in the case where the credits have acquired a "business situs." Otherwise, where there is no jurisdiction over the person, the tax must be upon physical property within the territorial limits of the taxing sovereign. *Farmer's Loan & Trust Co. v. Minnesota*, 280 U. S. 204, 50 Sup. Ct. 98 (1930). And see, *Covington v. Covington Nat. Bank*, 198 U. S. 10, 25 Sup. Ct. 562, 49 L. ed. 963 (1904); *Hawley v. Madden*, 232 U. S. 1, 34 Sup. Ct. 201, 58 L. ed. 477, Ann. Cas. 1918C 842 (1916); *Welch v. City of Boston*, 221 Mass. 155, 109 N. E. 174, Ann. Cas. 1917D 946, that there is no process by which the collection of a tax upon a non-resident's intangibles may be enforced.

⁸ *Garland County v. Gaines*, 56 Ark. 227, 19 S. W. 602 (1892), even though the lease provided that there be no assignment without the assent of the Secretary of the Interior.

⁹ *Elder v. Wood*, 208 U. S. 226, 28 Sup. Ct. 263, 52 L. ed. 464 (1908); *Forbes v. Gracey*, 94 U. S. 762, 24 L. ed. 313 (1876); cf. *Irwin v. Wright*, *supra* note 4. But in this type of case the possession of the lands is tacitly left open by the United States to anyone who desires to occupy them to develop their latent resources, and the government has no such interest in them as under valuable contracts of sale.

except with the consent of the government and then only upon the assumption of certain conditions, the right in the state to tax might easily interfere with the discretion of the United States in the disposition of its property.¹⁰

Attempts to tax the interest of a purchaser in United States land under statutes specifically providing that the interest of the United States is not assessed and with other safeguards to the end that no cloud be cast upon the sovereign's title have not met with success.¹¹ No cases have been found permitting the levy of a tax under a statute which gives to the state an *in rem* action for its enforcement. Since the purchaser in the instant case is a non-resident, the State of Washington may levy no tax against him enforceable *in personam*.¹²

Though it may be highly undesirable that private corporations should receive the benefit of exemptions from taxation upon highly valuable properties tied up under long term installment contracts, yet under the present state of the law the instant case appears to be incorrectly decided.

HARRY ROCKWELL.

¹⁰ *Jaybird Mining Co. v. Weir*, 271 U. S. 609, 46 Sup. Ct. 592, 70 L. ed. 1112 (1925); *Weston v. City of Charleston*, 2 Pet. 467, 7 L. ed. 481 (1864).

¹¹ In *Pacific Spruce Corp. v. Lincoln County*, 21 F. (2d) 586 (D. C. Ore. 1927) the statute under which the tax was levied provided that the terms real property and land shall be construed to include beside the land itself, any estate, right, title or interest whatever in the land less than the fee simple. Assessment was made against the "right, title and interest of the plaintiff, subject to the paramount title therein of the United States." The court denied the right to tax, saying, "This section has reference to the res. Consequently to real property, title to which is vested in the United States. All outstanding interests or estates therein less than the fee simple are exempt from taxation."

What the interest of the purchaser is, and the construction of the act under which the tax is levied is not a federal question, and the decisions of the highest state court are controlling. *Central Pac. Ry. v. Nevada*, 162 U. S. 512, 16 Sup. Ct. 885, 40 L. ed. 1057 (1895). But see *Page v. Peirce County*, 25 Wash. 7, 64 Pac. 802 (1901); *Wildy v. Henry*, 86 Wash. 387, 150 Pac. 620 (1915) holding that the purchaser has no equitable interest in the land subject to taxation.

In distinguishing the *Pacific Spruce Corp.* case, the court in the instant case makes it clear that the tax is levied not upon an *equitable or possessory right of the plaintiff in the land*, but upon an intangible interest arising from the assignable value of the contract. The fatal defect in such construction is apparent. Cf. *People v. Burke*, 128 Misc. 195, 217 N. Y. Supp. 803 (1926) where the right to tax under a statute similar to the one in the instant case was denied.

¹² *Supra* note 7.