Taxation - Privilege Dividends Tax

Joseph E. Tierney Jr.

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
Available at: http://scholarship.law.marquette.edu/mulr/vol24/iss3/10

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.
mining this original intention that it becomes necessary to show actual physical annexation or the lack of it.

Where the mortgagee of a building elects to consider rollaway beds as personality, as evidenced by the fact that he requested a chattel mortgage on them in addition to his mortgage on the realty, the court will consider his expressed intention and hold that the beds are chattels even though they are peculiarly adapted to the use of the realty. *Thuma v. Granada Hotel Corp.*, 269 Ill. App. 484 (1933). Thus, the question of adaptability is now also being regarded only as evidence as to the intention of the parties.

Rollaway beds are held to be part of the realty when it is the intention of the vendor of the realty that the beds are to be "dedicated to the realty." Thus, when the realty was an apartment building and the beds were adapted to the use of the premises, and the vendor waited for over a year after the sale of the building to assert his claim and then only after being vexed by a law-suit brought by the vendee against him, it was held that the obvious intention of the vendor was shown, and that the beds were part of the realty. *Doll v. Guthrie*, 233 Ky. 77, 24 S.W. (2d) 947 (1929). Also when a clause in the mortgage expressly states that rollaway beds, which are unattached to the realty, are to be covered by the mortgage, the beds will be deemed part of the realty because the mortgage shows that that is the actual intent of the parties. *First Mortgage Bond Co. v. London*, 259 Mich. 688, 244 N.W. 203 (1932).

But mere secret intention of one of the parties is not sufficient. The defendant in a foreclosure action, who had the secret intention that corn cribs on his property were to be considered as personal property, found the court ruling against him even though the cribs were not attached to the realty because the court decided that in this case the adaptability of the chattel to the use of the premises would be the major factor to consider in the absence of proof of expressed intention. *Cornell College v. Crain*, 211 Iowa 1343, 235 N.W. 731 (1931).

However, there may be situations in which factors other than the intention of the original parties become important, such as the natural equities of third parties, for example, where a mortgagee lends money on realty to which a conditional vendee has attached chattels not yet paid for. This problem is discussed in a note by Carl Luther, *The Law of Fixtures as Affected by the Relationship of the Litigants* (1939) 23 Marq. L. Rev. 136.

Robert P. Hamm.

---

**Taxation—Privilege Dividend Tax.**—Wisconsin imposed upon all corporations doing business in the state a "Privilege Dividend Tax" which taxed the privilege of declaring and receiving dividends out of income derived from property located and business transacted in the state. Wis. Stats. (1939) § 71.60(3). This section requires the corporation to deduct the amount of the tax from the dividend declared and pay it to the state.

The plaintiff is a Delaware corporation with its principal office in New York. It maintains no executive offices in Wisconsin. In 1937 the Wisconsin Tax Commission assessed a privileged dividend tax on that part of the dividend declared by the plaintiff in New York derived from income earned in Wisconsin during the years of 1934, 1935 and 1936. The plaintiff contended that the tax violated the Fourteenth Amendment in that it deprived the plaintiff corporation of its property without due process of law. The Supreme Court of the
State of Wisconsin held that the privilege dividend tax could not be imposed upon dividends declared by a foreign corporation because they were not declared in Wisconsin nor was the privilege of declaring dividends one granted by this state. Since the privilege of declaring dividends was not granted by Wisconsin nor the dividends declared in Wisconsin, there was no jurisdiction to tax it.

J. C. Penny Co. v. Wis. Tax Comm. (Wis. 1940) 289 N.W. 677.

In State Ex Rel. Froedert Grain & Malt Co. v. Wisconsin Tax Commission, 221 Wis. 225, 265 N.W. 677, 104 A.L.R. 1478 (1936) the Wisconsin Supreme Court had held that the Privilege Dividend Tax was valid as to a foreign corporation because the dividend involved the distribution of earnings made within the state and such earnings had a constructive situs in the state. This decision was overruled by the Penny case which has for its authority the decision of the United States Supreme Court in Connecticut General Life Insurance Co. v. Johnson, 303 U.S. 77, 58 Sup. Ct. 436, 82 L.Ed. 673 (1938).

In that case the California legislature imposed a tax on gross premiums of all insurance contracts written in California as a means of taxing the privilege of doing insurance business in California. The defendant, a Connecticut corporation, reinsured in Connecticut contracts written in California. Although the transaction dealt entirely with California business, although both parties, the reinsurer and original insurer, were authorized to do business in California and the entire amount of the reinsurance premium was earned in California, the State of California was held not to have jurisdiction to tax this premium. The power of the state to control the object of the tax marks the boundary of the jurisdiction to levy it.

Taxation without jurisdiction is a violation of the Fourteenth Amendment. This principle embraces an assertion of authority by the State to exact a license tax for the privilege of doing acts which lie beyond the sphere of local control. A privilege tax rests upon the assumption that what is done depends upon the consent of the state. Provident Savings Life Assurance Society v. Kentucky, 239 U.S. 103, 36 Sup. Ct. 34, 60 L.Ed. 167 (1915).

The act of declaring a dividend is a strictly corporate act involving the internal management of the corporation and authorized and controlled exclusively by the law of the corporate domicile. Union and New Haven Trust Co. v. Watrous, 109 Conn. 268, 146 Atl. 727 (1929).

A dissenting opinion in the principal case attempts to distinguish the Connecticut General Life Insurance case which forms the basis of the majority opinion. It was contended that the contract of reinsurance was in no way incidental to any earnings of the company from business conducted in California, whereas the dividend declared in the present case was incidental to and related back to the business conducted in Wisconsin. Therefore, since the reason for the ruling in the Connecticut General Life Insurance case does not apply to the principal case, the ruling does not apply either and the tax is still valid. This position does not appear to be well taken. The above distinction does exist as pointed out in the dissenting opinion, but the conclusion does not follow. The dissenting argument is based on the business situs of the subject of the tax as if it were a property tax. The Privilege Dividend Tax is not a property tax but a privilege tax, so designated by the legislature and so held by the Wisconsin Supreme Court in the Froedert case.

In the Connecticut General Life Insurance case the court did not base its opinion on the situs of the earnings but upon the fact that California did not grant the privilege of doing business in another state and therefore could not
tax the earnings of that business. In the *Penny* case, the Privilege Dividend Tax was held invalid because it was an attempt to tax a privilege granted by Delaware and exercised in New York.

*Joseph E. Tierney, Jr.*

---

**Torts—Duty of Possessor of Land to Business Invitees—To Licensees—Scope of the Invitation.**—The plaintiff entered the defendant's drugstore to make a purchase and to use the telephone. She did not make the purchase, but was invited to use the telephone, which was in the prescription room. There was evidence that customers generally were permitted to use this telephone, access to which usually could be had by reaching over the top of a swinging door at the entrance to the prescription room. This door extended to a height of about three feet from the floor. The plaintiff, because of her short stature, could not reach the telephone without pressing against the swinging door, and in doing so she pushed the door open and fell through an open trap door inside the prescription room down a stairway into the basement. This stairway was three inches from the swinging door.

The trial court directed a verdict for the defendant. On appeal, judgment affirmed, three justices dissenting. The majority regarded the plaintiff at the time of her injury as a mere licensee who took the premises as she found them and as to whom there had been no willful and wanton misconduct. *McMullen v. M. & M. Hotel Co.*, (Iowa 1940) 290 N.W. 3.

The majority opinion is based largely on two earlier Iowa cases. In the first the plaintiff's decedent lost his way and thinking that he was on a road which crossed a bridge over the Mississippi River he drove off the defendant's ferry slip and was drowned. *Printy v. Reimbold*, 200 Iowa 541, 202 N.W. 122, 41 A.L.R. 1423 (1925). In that case the deceased was at best a licensee since he was not on the premises for any purpose in which the defendant had an interest. In the second case plaintiff left his coat in defendant's store. When he returned for it, he was told by defendant's clerk to go and get it. When plaintiff entered a dark closet to get it, he fell down a stairway and was injured. *Keeran v. Spurgeon Merc. Co.*, 194 Iowa 1240, 191 N.W. 99, 27 A.L.R. 579 (1923). There was no evidence in that case to show that it was the custom of the store to permit persons to leave their coats in this closet or that this service was a convenience offered to its customers so as to bring the closet within the scope of the invitation extended to the public.

Where plaintiff who was a regular customer of defendant's store, entered for the sole purpose of using a telephone and was told by a clerk "Help yourself, Mrs. Ward," the court held that she was an invitee when she slipped and fell on a negligently waxed floor. Just before the injury the manager of the store had made a fruitless effort to sell her a pair of shoes. In that case the court said that even if she were regarded as merely a licensee there was a duty to warn her of the danger from the slippery floor, the condition of which the defendant must be presumed to have known. *Ward v. Avery*, 113 Conn. 394, 155 Atl. 502 (1931).

Where plaintiff came upon the premises to look for a dress, she was held to be an invitee. *Osborne v. Klaber Bros.*, (Iowa 1939) 287 N.W. 252. The Tennessee court held the plaintiff to be an invitee where he entered the defendant's store to sell vegetables. *East Tennessee Power & Light Co. v. Gose* (Tenn. 1939) 130 S.W. (2d) 984.