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PERSONAL PROPERTY-UNITED STATES SAVINGS BONDS--EFFECT OF REGISTRATION IN CO-OWNERSHIP OR BENEFICIARY FORM AS A TRANSFER OF A PROPERTY INTEREST THEREIN

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PERSONAL PROPERTY—UNITED STATES SAVINGS BONDS—EFFECT OF REGISTRATION IN CO-OWNERSHIP OR BENEFICIARY FORM AS A TRANSFER OF A PROPERTY INTEREST THEREIN—In two recent cases, decedents purchased United States Savings Bonds[1] registered in the name of the purchaser and another person[2] which were never delivered to the named co-owner but remained in the possession of the purchaser until his death. In the first case, on appeal from an order of the district court refusing to impose an inheritance tax on the bonds after the death of the purchaser, *held,* reversed. Mere purchase of the bonds and their registration in the names of the co-owners without delivery transferred no interest to the

[1] The bonds were authorized by an amendment to the Second Liberty Bond Act providing for their issuance ". . . in such manner and subject to such terms and conditions . . . and including any restrictions on their transfer, as the Secretary of the Treasury may from time to time prescribe." 31 U.S.C.A. §757(c)(a).

[2] The regulations issued by the Secretary declared, inter alia, that the bonds might be issued "in the names of two . . . persons in the alternative as co-owners . . . [or] in the name of one . . . person, payable on death to one . . . other person." 31 Code Fed. Reg. §315.4 (Supp. 1945). It was further provided that "the form of registration used must express the actual ownership of and interest in the bond and . . . will be considered as conclusive of such ownership and interest." §315.2.

co-owners during the life of the purchaser and is taxable as a testamentary transfer. *In re Brown's Estate,* (Mont. 1949) 206 P. (2d) 816.

In the second case the administrator of the purchaser's estate brought an action to recover the remaining bonds and the proceeds of those cashed by the co-owner after the purchaser's death. The judgment of the lower court denied recovery and the administrator appealed. *Held,* affirmed. The bonds are valid federal contracts in which the government has promised to pay a third party on the death of the purchaser; hence, the rights of the parties are fixed by federal law. *Knight v. Wingate,* (Ga. 1949) 52 S.E. (2d) 604.

The court in the *Brown* case devotes almost its entire opinion to a discussion of whether there was a valid transfer of the bonds by way of gift inter vivos. Failing to find an actual delivery to the alleged donee, the court says there was no gift of the bonds and that an inheritance tax was therefore proper.[3] Where the co-ownership form of registration is used, it may be questioned whether a delivery, absolutely divesting the purchaser of control is necessary since the purchaser still has an equal right to the proceeds and his retention of control is not inconsistent with a present gift of a joint interest.[4] If the purchaser intended to make a gift of an undivided interest in a chose in action, delivery to the person who has purchased it for the joint benefit of himself and another will be sufficient to vest title to an undivided interest in that other person.[5] In the case of savings bonds, however, some courts refuse to find an attempted gift of an undivided interest since the registration of the bonds is in the disjunctive form applicable to several ownership rather than the conjunctive form applicable to joint ownership.[6] The dissent in the *Brown* case adopts an intermediate point of view on this matter, declaring that an actual delivery of the bonds will not be necessary in order to have a sufficient delivery to the co-registrants as co-owners provided that the co-owner has some means of access to the bonds so that he may cash them if he wants to do so. In the *Knight* case, the court discusses the fact that there was no gift of the bonds, but concludes that there was an inter vivos transfer of an interest therein on the theory that the bonds were contracts governed by federal law.[7]

[3] "In order to constitute a gift of personal property, one of the things necessary is that there must be a delivery, and that delivery must be such as will divest the donor of the present control and dominion over the property absolutely and irrevocably, and confer upon the donee the dominion and control." Decker v. Fowler, 199 Wash. 549 at 551, 92 P. (2d) 254 (1939). In the Decker case and in Deyo v. Adams, 178 Misc. 859, 36 N.Y.S. (2d) 734 (1942) the courts used this approach to defeat the benficiary's claim to the proceeds. The Deyo case was later overruled in In re Deyo's Estate, 180 Misc. 32, 42 N.Y.S. (2d) 379 (1943).

[4] Collins v. McCanless, 179 Tenn. 656, 169 S.W. (2d) 850 (1943); Rhorbacker v. Citizens Bldg. Assn. Co., 138 Ohio St. 273, 34 N.E. (2d) 751 (1941). Cf. Bulen v. Pendleton Banking Co., (Ind. App. 1948) 78 N.E. (2d) 449.

[5] 24 AM. JUR., p. 58 (Supp. 1949); Abegg v. Hirst, 144 Iowa 196, 122 N.W. 838 (1909).

[6] State Bd. of Equalization v. Cole, (Mont. 1948) 195 P. (2d) 989. The court in the Cole case apparently failed to note that the regulations expressly authorize payment of the bonds to two persons jointly. 31 Code Fed. Reg. §315.32(a) (Cum. Supp. 1943).

[7] It is not too clear on exactly what theory the Georgia court in fact did decide the case. The gift theory and the contract theory are discussed in the same paragraph without a real attempt by the court to distinguish them, but the prevailing considerations seem to have been those of a contract nature. This is not meant as a criticism of the court's analysis. Herb. v.

This theory was completely disregarded by the Montana court. Admitting that the Montana court's argument may be sound as far as it goes, its weakness, it is submitted, lies in the fact that it fails to consider the possibility of effectuating a transfer of a property interest in the bonds by federal contract as an alternative to doing it by gift.[8] Since the borrowing power given the federal government under the Constitution necessarily includes the power to fix the terms of the obligations entered into,[9] and since the regulations adopted have the force and effect of federal law,[10] the court must recognize the provisions under which the bonds were issued whether or not they would be valid if included in a contract made under state law.[11] It has been argued that though the regulations might supersede state laws if so designed, they will not do so in the case of savings bonds because they were promulgated for the sole purpose of preventing the implication of the government in disputes concerning the ownership of the bonds and to guarantee to it immunity from attack for failure properly to perform its obligations thereunder.[12] In the cases in which the United States has intervened as amicus curiae, however, it has expressly denied that the regulations were designed solely for protective purposes and the government view usually has been accepted by the court.[13] But whether the regulations were designed solely to protect the government is unimportant since, even if the contract were one between private parties, the same result could be reached. It would be a clear instance of a contract partially for the benefit of

Pitcairn, 324 U.S. 117, 65 S.Ct. 459 (1945). See notes 1 and 2, supra, for the applicable federal regulations.

[8] For an extended discussion of these alternate theories see Gammon, "War Savings Bonds and State Succession Laws," 17 TENN. L. REV. 928 (1943); "Rights of Registered Co-owners and Beneficiaries of United States War Savings Bonds," 52 YALE L.J. 917 (1943); 32 MINN. L. REV. 158 (1948).

[9] U.S. CONST., art. I, §8, cl. 2; Perry v. United States, 294 U.S. 330, 55 S.Ct. 432 (1935); Legal Tender Cases, 110 U.S. 421, 4 S.Ct. 122 (1883); Davies v. Beach, 74 Cal. App. (2d) 304, 168 P. (2d) 452 (1946); Franklin-Washington Trust Co. v. Beltram, 133 N.J. Eq. 11, 29 A. (2d) 854 (1943).

[10] United States v. Sacks, 257 U.S. 37, 42 S.Ct. 38 (1921); United States v. Dauphin Deposit Trust Co., (D.C. Pa.) 50 F. Supp. 73 (1943); Succession of Tanner, (La. App.) 24 S. (2d) 642 (1946); Stephens v. First Natl. Bank of Nevada, (Nev. 1948) 196 P. (2d) 756.

[11] U.S. CONST., art. VI, cl. 2; United States v: Dauphin Deposit Trust Co., supra, note 10; In re Fliegelman's Will, 184 Misc. 792, 55 N.Y.S. (2d) 139 (1945); Myers v. Hardin, 208 Ark. 505, 186 S.W. (2d) 925 (1945). Supra, notes 1 and 2.

[12] Katz v. Driscoll, 86 Cal. App. (2d) 313, 194 P. (2d) 822 (1948); In re Di Santo's Estate, 142 Ohio St. 223, 51 N.E. (2d) 639 (1943).

[13] Stephens v. First Natl. Bank of Nevada, supra, note 10; In re Murray's Estate, 236 Iowa 807, 20 N.W. (2d) 49 (1945); In re Briley's Estate, 155 Fla. 798, 21 S. (2d) 595 (1945). Cf. Union Natl. Bank v. Jessel, 358 Mo. 467, 215 S.W. (2d) 474 (1948). See also, Waltenberger v. Pearson, 81 Ohio App. 51 at 58, 77 N.E. (2d) 491 (1946) where the court said that the federal regulations "with the force and effect of law, constitute a part of the contracts by which the bonds are sold by the government and determine not only the person to whom the bonds are to be paid but also determine the property rights, as between themselves, of the parties in whose names as co-owners the bonds are registered." Several states, since the question first arose, have passed special declaratory laws affirming the view that the regulations are decisive of the rights of the parties and not merely for the convenience of the government. See Cal. Civ. Code (1949) §704; N.Y. Laws, Personal Property (1949) §24; Wash. Laws (Remington Supp. 1943) c. 14.

a third party on which a right of action has been held to accrue to the third party.[14] The question remains whether we can admit the validity and the practical desirability of the result reached in the *Knight* case on a contract theory and still approve the result, though not the reasoning, of the *Brown* case. Some courts which have had to face the problem of whether the registered co-owner or beneficiary of a United States Savings Bond may be subjected to an inheritance tax have based their holding of taxability on the express provision in the Treasury Regulations that "the bonds shall be subject to estate, inheritance, gift or other excise taxes, whether Federal or state,"[15] but it is questionable whether this has any real relation to the present problem. The effect of such a provision may be no more than an indication that the federal government has consented to the imposition of state taxes on a federal obligation and has in addition sought to prevent the taxpayer from later asserting that the tax is an impairment of his contract. Indeed, the real issue involved is not whether the bonds are taxable at all, but whether the vested, though defeasible, right which the co-owner or beneficiary acquires during the purchaser's lifetime[16] may be subject to an inheritance tax at the purchaser's death. Since the Montana inheritance tax[17] is a tax upon the right and privilege of receiving property by will, by succession, or by an inter vivos transfer operating as a substitute for testamentary dispositions,[18] the answer to the question seems clear. The statute clearly is intended to reach all transfers which are substantially testamentary in nature, and there is no doubt that an interest in savings bonds may be taxed when such interest indefeasibly accrues to the co-owner or beneficiary only by virtue of the purchaser's death as it did in the *Brown* case.[19] It would seem,

[14] 1 CONTRACTS RESTATEMENT, §135 (1932); Rhorbacker v. Citizens Bldg. Assn. Co., supra, note 4; Lawrence v. Fox, 20 N.Y. 268 (1859).

[15] 31 Code Fed. Reg. §§316.2(d), 318.2(g) (Cum. Supp. 1943). See Succession of Raborn, 210 La. 1033, 29 S. (2d) 53 (1946); Mitchell v. Carson, 186 Tenn. 228, 209 S.W. (2d) 20 (1948); Hallet v. Bailey, (Me. 1947) 54 A. (2d) 533.

[16] Although the purchaser may redeem the bond at any time and defeat the rights of the co-owner or beneficiary, he cannot eliminate the name of the latter from the bond without his consent and the rights of the donee will become absolute on the purchaser's death. 31 Code Fed. Reg. §§315.32(a)(b), 315.34, 315.35, 315.36 (Cum. Supp. 1943). It is the nature of the right not its existence which is conditional. In re Deyo's Estate, supra, note 3. The Georgia court seems to have been clearly in error when it said that the beneficiary or co-owner had only an expectancy and not a vested interest. This may be due to its undiscriminating reliance on an analogy to life insurance cases in which the insured had a power to change the beneficiary and whose interest, therefore, never became vested until the insured's death.

[17] Mont. Rev. Code (1935) §10400.1.

[18] "The statute clearly requires the imposition of the tax 'when the transfer is . . . intended to take effect *in possession or enjoyment at or after . . . death.*'" In re Oppenheimer's Estate, 75 Mont. 186 at 199, 243 P. 589 (1926). (Italics the court's). The statute has an express provision to exempt proceeds of life insurance contracts from the effect of the broad language in which it is framed. Mont. Rev. Code (1935) §10400.1, subdiv. 7. ". . . death, although not the 'generating source' of interest, is yet the operative event which causes the 'vesting *in possession*,' and the coming into enjoyment . . . [which perfects the title]. That operation is plainly and in any view a succession of such real and substantial sort, with such vital and enlarging effect on property rights as to make it the proper subject of an excise." In re Estate of Rising, 186 Minn. 56 at 67, 242 N.W. 459 (1932).

[19] "The statute . . . clearly manifests a purpose to tax all transfers . . . which . . . accomplish a transfer of property under circumstances which impress on it the characteristics of a

then, that the court in that case could have held that the co-owners acquired a property interest in the bonds and still have imposed an inheritance tax on the transfer as intended to take effect in enjoyment at death. Such a solution, it is submitted, while preventing the purchaser from retaining the property during his lifetime without its being taxed at his death, would have avoided turning an attractive form of government security into "a snare to those who rely upon it."[20]

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devolution made at the time of the donor's death." State v. Pabst, 139 Wis. 561 at 591, 121 N.W. 351 (1909); State ex rel. Davis v. State Bd. of Equalization, 104 Mont. 52, 64 P. (2d) 1057 (1937). Cf. Succession of Tanner, (La. App.) 24 S. (2d) 642 (1946).

[20] See the dissenting opinion in Decker v. Fowler, 199 Wash. 549 at 558, 92 P. (2d) 254 (1939).