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Taxation - Mistake of Fact - Recovery of Excess Payment

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disturb any of the four unities. The legal title is in the vendors, though it be merely a security interest, so that it could not be said that the unity of title has been disturbed. If the unity of title remains unchanged then necessarily, so does the unity of time. Mere legal title although in the nature of a security interest is an interest capable of being held in joint tenancy.[7] Although the interests of each joint tenant have been reduced they remain equal – therefore unity of interest is maintained. Since physical possession is not required in a property interest to be capable of being held in joint tenancy,[8] unity of possession would not appear to be changed. Some jurisdictions hold that equitable conversion does not apply so as to sever the joint tenancy, where all the joint tenants execute a contract for deed.[9]

The rule in the instant case may give rise to a problem where the vendee of a land contract defaults. Since joint tenancies are disfavored,[10] the rescinding of the contract by the vendors in case of default would probably not restore the joint tenancy, but a tenancy in common would result.[11] It is submitted that the better rule would be that severance does not occur when joint tenants execute a contract for deed. Under such rule, default by the vendee and repudiation by the vendors would leave the joint tenancy intact.

Although the question here involved has never been decided in North Dakota, it should be noted that the North Dakota Bar Association has taken cognizance of the problem.[12] Their recommendation anticipates the holding of the instant case, by requiring the executor of the deceased joint tenant to join with the survivor in a conveyance of the entire fee.

RALPH E. KOENIG.

TAXATION – MISTAKE OF FACT – RECOVERY OF EXCESS PAYMENT. – Plaintiff, public utility corporation, received 1200 tax statements from various governmental sub-divisions in one year. Statement of the defendant county contained erroneous computation due to the misplacing of a decimal point in the assessment by the defendant township. As a result plaintiff paid $30,659.36 personal property taxes in excess of the amount owed. Plaintiff sued the defendants to recover the excess amount of taxes paid without benefit of a statute authorizing refunds. The Supreme Court of Michigan, two justices dissenting, reversed the decision of the lower court and *held* that the amount of excess taxes paid without protest was a voluntary payment and could not be recovered in the absence of statutory provision therefore. *Consumer Power Co. v. County of Muskegon,* 78 N.W.2d 223 (Mich. 1956).

In the absence of statute, courts have not favored suits for the refund of taxes,[1] but have allowed recovery for overpayment due to mistake in ex-

7. *In re* Abdullah's Estate, 214 Wis. 336, 252 N.W. 158 (1934) (interests of joint mortgagees); Williams v. Jones, 175 Wis. 380, 185 N.W. 231, 233 (1921) (dictum) (existence of joint tenancy based on parties intent).

8. See Thornbug v. Wiggins, 135 Ind. 178, 34 N.E. 999 (1893).

9. Watson v. Watson, 5 Ill.2d 526, 126 N.E.2d 220 (1955) (alternative holding); *In re* Estate of Jogminas, 246 Ill. App. 518 (1927); Detroit Security Trust Co. v. Kramer, 247 Mich. 468, 226 N.W. 234 (1929).

10. Cases cited note 1 *supra.*

11. See Swenson and Degnan, *Severance of Joint Tenancies;* 38 Minn. L. Rev. 466, 482 (1954).

12. See N. D. Bar Ass'n. Title Examination Standards § 1.12.

1. See State *ex rel.* Kresge v. Howard, 357 Mo. 302, 208 S.W.2d 247 (1948); 9 Miami L. Q. 237 (1955).

treme cases.[2] Where there is no refund statute, courts have distinguished between voluntary and involuntary payments: permitting recovery when involuntary[3] and denying it when voluntary.[4] Recent decisions find courts more indulgent in construing a payment to be involuntary,[5] because of the harsh penalties for non-payment which effectively operate as technical duress upon the taxpayer.[6] Apparently the present trend is to allow recovery of illegal taxes when it is justifiable from the facts.[7]

Although tax payments are considered to be voluntary until proved otherwise,[8] it is generally recognized that payment under a mistake of fact – as distinguished from a mistake of law – is not voluntary and may be recovered.[9] A mistake of fact has been distinguished as "a mistake where a person understands the facts to be other than they are, whereas a mistake of law is where the person knows facts as they really are, but has a mistaken belief as to the consequences of those facts".[10] Under this definition it would seem that a clerical error on the part of the assessor would be a mistake of fact such as would permit a recovery of the taxes paid.[11] It has been held that the taxpayer would be permited to recover if there was a mistake of fact regardless of his own negligence in investigating or ascertaining the facts.[12] If there was a mistake of fact, failure to protest should not be determinative of whether payment was voluntary or involuntary.[13]

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2. See, *e. g.*, Bridgeport Hydraulic Co. v. City of Bridgeport, 103 Conn. 249, 130 Atl. 164 (1925) (Taxpayer owned property in two tax districts using different rates of taxation. The assessor entered the value of all the property in the district levying the highest rate. The taxpayer relying on the rates so assessed paid the tax. The court permitted recovery because of the mistake).

3. State *ex rel.* Kresge v. Howard, 357 Mo. 302, 308 S.W.2d 247 (1948). *Contra,* Weil-McClain Co. v. Collins, 395 Ill. 503, 71 N.E.2d 91 (1947).

4. Peterson v. Sundt, 67 Ariz. 312, 195 P.2d 158 (1948). *But see* N. D. Rev. Code § 57-2304 (1943) (Which would appear to eliminate the controversy in the principal case should it arise in North Dakota, since the statute makes no distinction between voluntary or involuntary payments and would seem to allow recovery in either case if payment is due to a mistake).

5. See, *e. g.*, State *ex rel.* Kresge v. Howard, 357 Mo. 302, 208 S.W.2d 247 (1948); Brink v. Kansas City, 355 Mo. 860, 198 S.W.2d 710 (1946).

6. See, *e. g.*, State *ex rel.* American Mfg. Co. v. Reynolds, 270 Mo. 589, 194 S.W. 878 (1917) (Where the license collector refused to issue a license until the taxes assessed had been paid, and the taxpayer needed the license to continue in business, the court held there was sufficient technical duress to constitute an involuntary payment and permit recovery); Austin Nat'l Bank v. Sheppard, 123 Tex. 272, 71 S.W.2d 242 (1934) (Statute provided that taxpayer who failed to pay tax would forfeit his right to do business in the state, and would have the courts closed to him. The court held that the duress may be either express or implied and the duty to refund the involuntarily paid tax is the same).

7. 11 Va. L. Rev. 134 (1924).

8. North Miami v. Seaway Corp., 151 Fla. 301, 9 So.2d 705, 707 (1942) (dictum).

9. Pettibone v. Cook County, 31 F. Supp. 881 (1940), *aff'd.* 120 F.2d 850 (8th Cir. 1941); Wendell Foundation v. Moredall Realty Corp., 176 Misc. 1006, 29 N. Y. S.2d 451 (Sup. Ct. 1941); *In re* Wampler's Estate, 103 N.E.2d 303 (Ohio 1950); McArdle v. Robertson, 70 S. D. 545, 19 N.W.2d 576 (1945); Stephen v. Board of Equalization, 105 Colo. 556, 92 P.2d 732, 733 (1939) (dictum). 3 Cooley, Taxation § 1295 (1924).

10. Wendell Foundation v. Moredall Realty Corp., 176 Misc. 1006, 29 N. Y. S.2d 451, 454 (Sup. Ct. 1941); Jordan v. Brady Transfer and Storage Co., 226 Iowa 13, 284 N.W. 73, 76 (1939) (A mistake of fact was defined as "that which means any mistake except a mistake of law and a mistake of law means a mistake as to the legal consequences of an assumed state of facts.")

11. See Pabst Brewing Co. v. Kostecki, 163 Wis. 101, 157 N.W. 559 (1916) (Assessor had entered two items of property on assessment rolls, one as personal property and the other as real property. He later decided the items should be reversed and entered the property on the rolls in their proper classification. He neglected to strike the original entry however, which resulted in each item being listed twice. Court held this was a clerical error and a mistake of fact which would permit recovery of the excess amount of tax paid).

12. *In re* Wing, 162 Misc. 551, 295 N. Y. Supp. 336 (Surr. Ct. 1937). *Contra,* Bridgeport Screw Co. v. City of Bridgeport, 125 Conn. 593, 7 A.2d 649 (1939).

13. State *ex rel.* Kresge v. Howard, 357 Mo. 302, 208 S.W.2d 247 (1948).

The clerical error involved in the instant case would seem to be a mistake of fact which caused involuntary payment. Under those circumstances the plaintiff would be permitted to recover in most jurisdictions unless refunds were expressly forbidden by statute. The cases cited by the majority in support of their decision do not stand for the proposition that a mistake of fact is a voluntary payment. Those decisions turned upon the negligence of the taxpayer[14] and a mistake of law.[15] Obviously the county was not entitled to the full amount of money paid. Even in Michigan the plaintiff would have been entitled to recover the excess if the court had construed the payment to be involuntary.[16]

GERALD W. VANDEWALLE.

TORTS — CHARTIABLE IMMUNITY — LIABILITY FOR NEGLIGENCE OF EMPLOYEES. — Plaintiff, a paying patient instituted a suit against defendant nonprofit hospital for injuries sustained due to the negligence of defendant's employee in permitting the patient to fall from a hospital bed furnished by the defendant. The Ohio Supreme Court affirmed the lower court's overruling of defendant's demurrer and *held* that a nonprofit corporation which had for its purpose the maintenance and operation of a hospital may be liable for the torts of its servants under the doctrine of respondeat superior. *Avellone v. St. John's Hospital,* 135 N.E.2d 140 (Ohio 1956).

It is generally held that a charitable institution is liable for its torts,[1] but immunity is usually granted to such institutions for the torts of their employees.[2] Where third parties are involved an exception is sometimes made and the institution is then held liable for their employees' torts.[3] In certain jurisdictions liability of the institution is based on whether or not the patient is paying for the services;[4] other jurisdictions use the corporate negligence of the institution in the selection of their employees as the basis for liability.[5]

The rationale advanced in favor of immunity varies: (1) Some courts adopt the trust fund theory, which is that the object of the trust fund of the charity would become frustrated and ultimately destroyed if subjected to such liability;[6] (2) others argue that it would be against public policy not to allow immunity,[7] because gifts to a charitable institution should be encouraged, but to subject them to tort liability is to discourage potential donors,[8] furthermore,

14. See Bateson v. City of Detroit, 143 Mich. 582, 106 N.W. 1104 (1906).
15. See General Discount Corp. v. City of Detroit, 306 Mich. 458, 11 N.W.2d 203 (1943).
16. See Blanchard v. City of Detroit, 253 Mich. 491, 235 N.W. 230 (1931) ("If payment of a tax is involuntary, in absence of statutory provisions to the contrary, it may be recovered although there is no express statutory provision therefore.").

1. See 3 Scott, Trusts, § 402 (1939).
2. *Ibid.*
3. See, *e. g.*, Alabama Baptist Hospital Board v. Carter, 226 Ala. 109, 145 So. 443 (1933) (Wife of patient recovered for injuries sustained from falling on hospital stairs).
4. See, *e. g.*, Tucker v. Moblie Infirmary Ass'n., 196 Ala. 572, 68 So. 4 (1914).
5. See Fisher v. Ohio Valley Gen. Hospital Ass'n., 137 W. Va. 723, 73 S.E.2d 667 (1952) (Corporate negligence may also include the purchase of any faulty equipment or supplies by the institution).
6. See, *e. g.*, Morton v. Savannah Hospital, 148 Ga. 438, 96 S.E. 887 (1918); Greatrex v. Evangelical Deaconess Hospital, 261 Mich. 327, 246 N.W. 137 (1918).
7. See, *e .g.*, Southern Methodist University v. Clayton, 142 Tex. 179, 176 S.W.2d 749 (1943); Weston v. Hospital of St. Vincent, 131 Va. 587, 107 S.E. 785 (1921).
8. Jensen v. Maine Eye & Ear Infirmary, 107 Me. 408, 78 Atl. 898 (1910).