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The Modern Gold Rush - Intangible Personal Property and Escheat

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THE MODERN GOLD RUSH – INTANGIBLE PERSONAL PROPERTY AND ESCHEAT

Escheat of unclaimed personal property through comprehensive escheat statutes has today presented the states with an apparent pot-of-gold lying free for the taking.[1] Those states without a statutory scheme of escheating such property or with statutes which were not competitive in this area have rushed in legislation to fill the gap. Between 1946 and 1960, twenty states passed legislation either bringing unclaimed personal property within their statutory scheme of escheat or broadening their existing statutes,[2] and in the eight-year period from 1954 to 1962, nine states adopted the Uniform Disposition of Property Act to accomplish the same purpose.[3]

I

Escheat at common law was the process by which tenurial land returned to the lord of the fee upon the occurrence of an event obstructing the normal course of descent.[4] Although a common law escheat was applicable only to land, the concept was broadened within the common law to include escheat of personal property located within the state[5] and further broadened by legislation to include every kind of property, real and personal, tangible and intangible, which is without an owner or whose owner has become unknown. Today the majority of states have legislation which purports to reach all property.[6]

The procedure by which escheat will be accomplished will vary from state to state depending upon the statutory requirements set up by the individual state. The Wyoming statutes provide three ways in which the property may be reached. First is where the property has been unclaimed for a period of five years and where the owner of such property has become unknown. In this case the county attorney or the attorney general of the state may proceed by filing an information against the person, state bank, or national bank, or corporation in possession of such property, alleging the grounds on which the recovery is claimed and like proceedings in judgment shall be had as in a civil action for the recovery of property. Proof that the property has been unclaimed for a period of five years prior to the filing of the information and that the name and where-

1. Pennsylvania for example collected nearly $5 million from 1948-1950. Garrison, Escheats, Abandoned Property Acts, and Their Revenue Aspects, 35 Ky. L.J. 302 (1947); In 1953 State amended its act to make it more comprehensive so that the "Golden Goose" could be more finely plucked. Act of 1953, July 29, P.L. 986; For a brief statement of the various State's statutory schemes, see Ely, Escheat: Perils and Precautions, 15 Bus. Law 791 (1960).
2. Western Union Tel. Co. v. Commonwealth of Pennsylvania, 368 U.S. 71, 78 (1961). 7 L.Ed. 139, 82 S.Ct. 199 (1961).
3. Arizona, California, Idaho, Illinois, New Mexico, Oregon, Utah, Virginia, and Washington, Book of the States, p. 105, (1962-63).
4. Origins and Developments of Modern Escheat, 61 Colum. L. Rev. 1319 (1961); Morton and Henderson, Survival of Certain Feudal Law Concepts in Wyoming, 2 Wyo. L.J. 91 (1947).
5. State v. Kearns, 79 Mont. 299, 257 Pac. 1002 (1923).
6. 19 Am. Jur. 383.

abouts of the owner is unknown is prima facie evidence of failure of title to the property for want of legal heirs.[7]

Second, in cases where probate proceedings have commenced upon the estate of any person without known heirs, it is the duty of the court having jurisdiction to distribute the unclaimed property to the state by its decree.[8] And, third, in those cases where probate has been started but has never been completed, the county attorney or the attorney general may proceed to recover the property as in the first situation above.[9]

Where the state has power of control over the "res" it has the power, unrestricted by constitutional inhibitions, to destroy the rights, powers and immunities of the former owner as respects that "res", even though the state may not have jurisdiction over the person of the owner. Furthermore, such power, when exercised in accordance with principles of "in rem" jurisdiction, will be given full faith and credit by all sister jurisdictions, and does not violate any constiutional rights of the owner.[10]

Tangible personal property with its physical presence within the jurisdiction would clearly fall within the theory of "in rem" jurisdiction, and escheat by the state of such property would also be given full faith and credit by all other states so long as notice to the owner met the constitutional requirement of due process of law required by *Pennoyer v. Neff*.[11]

Intangible personal property, however, is not capable of physical presence and, therefore, its "situs" within the state, from which the state acquires jurisdiction over the property, must depend upon "control over" the property and not upon the property's location.[12] Control has been successfully based upon domicile of property holder[13] i.e., the person or business entity which has acquired possession of the property with the right of ownership being in some third person; last known domicile of property owner[14] and upon the substantial business contact theory,[15] that is, where the transaction involving the property was carried out either in whole or in part in the escheating state and the owner has become unknown and was not known to be domiciled in that state, and in addition the holder of the property is not domiciled or located within the escheating state.

7. Wyoming Stat. § 9-688 (a) (1957), as amended by the session laws of 1959, ch. 168.
8. Wyoming Stat. § 9-688 (b) (1957).
9. Wyoming Stat. § 9-688 (b) (1957).
10. Pennoyer v. Neff, 95 U.S. 714 (1877); Arndt v. Griggs, 134 U.S. 316 (1890).
11. Id.; Frick v. Commonwealth of Pennsylvania, 268 U.S. 473 (1925).
12. This theory of control grew from the difficulty encountered by the various states in attempting to force intangible property into the rule of location as applied to tangible property, see Carpenter, Jurisdiction Over Debts for the Purpose of Administration, Garnishment, and Taxation, 31 Harv. L. Rev. 905, 907 (1918);
Cardozo, C.J. stated that "at the root of the selection is generally a common sense appraisal of the requirements of justice and convenience in particular conditions," the situs being a mere fiction for convenience. (Severnoe Securities Corp. v. London and Lanchashire Ins. Co., 255 N.Y. 120, 174, N.E. 299 (1931).
13. Security Sav. Bank v. California, 263 U.S. 282 (1923); Anderson Nat'l Bank v. Luckett, 321 U.S. 233 (1944).
14. Connecticut Mut. Life Ins. Co. v. Moore, 333 U.S. 541 (1948).
15. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

It is this theory of "control giving jurisdiction" which has led to the claims of several states to the right to escheat the same property, each state basing its "control" upon theories of the substantial business contact theory without reliance on the domicile of either the property holder or the property owner.[16]

As the state asserted the above basis of jurisdiction resting upon control over the property, property holders claimed "foul," basing their claim upon two provisions of the federal constitution: impairment of contract in violation of Article 1, Section 10, Clause 1[17] and violation of the due process of law of the 14th Amendment.[18] The impairment of contract argument was rejected by the U.S. Supreme Court in several cases[19] for the reason that where there was no contractual agreement between the property holder and the unknown property owner as to what should be done with the property in case the owner should become unknown; thus, there was no contract which could be impaired, and the state was merely exercising its regulatory power over abandoned property. Ordinarily, of course, there would be no such contractual agreement.

The due process argument was that the property holder would not be protected from claims to the property by the property owner should he become known, or from the claims of rival states, and therefore that escheat would result in a taking without due process of law. The Supreme Court rejected this contention.[20] In addition to a valid claim of jurisdiction on the part of the state, either under the theory of control or under the substantial contact theory, the Supreme Court has required that there be personal notice to the property holder of the claim of the state, and notice by publication containing the name and last known residence of the owner, where possible, or, where the owner was unknown, a description of the property being sought to escheat. The Court has stated in each of the cases before it that notice by publication in these cases satisfied the requirement of reasonable notice and opportunity to be heard set forth in *Pennoyer v. Neff*[21]

In 1951 the Supreme Court had before it *Standard Oil Company v. State of New Jersey*.[22] In that case, the State of New Jersey, as the state of incorporation of the Standard Oil Company, escheated the stock and dividends declared and unpaid thereon of owners whose whereabouts had been unknown for fourteen consecutive years.[23] The Company claimed that the action by New Jersey violated the U.S. Constitution in both the impairment of contracts clause and in the violation of due process clause.

16. 368 U.S. 71.
17. Hamilton v. Brown, 161 U.S. 256 (1896); Connecticut Mut. Life Ins. Co. v. Moore, supra note 12; Standard Oil Co. v. New Jersey, 341 U.S. 428 (1951); Western Union Tel. Co. v. Commonwealth of Pennsylvania, supra note 2.
18. Id.
19. Id.
20. Id.
21. Supra note 11.
22. 341 U.S. 428.
23. N.J. Rev. Stat. 2:53 (1945-47).

The Supreme Court reiterated its earlier holding on the impairment argument and then went on to reject the due process argument in a holding that gave rise to what has become known as the doctrine of the "race of diligence."[24] This came about as the result of the court's statement in that case that once one state had acquired jurisdiction over the property and had declared it escheated, the Constitution barred any "double escheat" and such judgment in the first court would have to be given full faith and credit by every other interested state thereafter.[25]

Relying on the above opinion of the Supreme Court, the State of Pennsylvania, in 1953, began proceedings to escheat money deposited with the Western Union Telegraph Company for money orders purchased in Pennsylvania and unclaimed by either the sender or the recipient for a period of seven years. On July 6, 1959, the state court found for the Commonwealth in the sum of $39,857.74.[26]

This case had a distinguishing factor. In none of the earlier cases had another state made any claim to the money involved at the time of the action or previous thereto. But here, the State of New York, basing its jurisdiction on the fact that the company was incorporated in New York, had, prior to the Pennsylvania judgment, escheated a part of the funds held in Pennsylvania. Upon appeal to the Pennsylvania Supreme Court the company argued that New York would not be bound by the Pennsylvania judgment and could escheat these same funds, thereby causing a double escheat which would violate the due process clause. The New Jersey Court rejected this argument, relying upon the *Standard Oil* case, and stated "nor would Western Union need fear that the moneys here involved would be subject to double escheat in New York. . . . The decree of escheat here affirmed is naturally subject to the full faith and credit clause of the United States Constitution. . . ."[27]

The U.S. Supreme Court reversed the New Jersey Supreme Court. It stated that the escheat by Pennsylvania need not be given full faith and credit by the other states with claims against the property, because such states had not been and could not be made a party in state action . Thus the Pennsylvania judgment would result in deprivation of due process of law, because Western Union would be compelled to relinquish its property without assurance that it would not be held liable again in another

24. 341 U.S. 443, 444, Mr. Justice Frankfurter in his dissent created this label. The dissenting Justices, Frankfuter, Jackson, Douglas and Black, felt that because other interested states had not been made party to the action that such states would not be bound by New Jersey's escheat judgment and would not need to give it full faith and credit, as the mapority held.

25. Id.

26. Commonwealth of Pennsylvania v. Western Union Tel. Co., 400 Pa. 337, 162 A.2d 617 (1960).

27. Id. at 622; Id. at 621. The Court stated "the core of the debtor obligations of the plaintiff companies was created through acts done in this state . . . and the ties thereby established between the companies and the State were without more sufficient to validate the jurisdiction here asserted. . . ." thus basing its jurisdiction upon the substantial contact theory.

jurisdiction, or in a suit brought about by a claimant who was not bound by the first judgment.[28]

The Court distinguished the previous holding in the Standard Oil Case, quoting the previous case:

> The claim of no other state to this property is before us and, of course, determination of any right of a claimant state against New Jersey for property escheated by New Jersey must await presentation here.[29]

In the *Standard Oil* Case, the State of New York had claimed the property but not prior to New Jersey's escheat of the same property.

The race of diligence then is not dead; but did it ever evist? The statements of the Supreme Court in the *Standard Oil* case cause doubt as to whether it did: ". . . determination of any right of a claimant state against New Jersey for property escheated by New Jersey must await presentation here."[30] And in the Western Union Case, ". . . for a state court judgment need not be given full faith and credit by other states as to parties or property not subject to the jurisdiction of the court that rendered it."[31]

It appears that the dissent in the *Standard Oil* case, suggesting that only a custodial statute whereby the state acquired custory and possession of the property in perpetuity with a reserved right in the property owner to claim the property at any future date upon proof of his right of ownership would be constitutional, takes the soundest practical position as a matter of reality in this area.[32] The state may race to acquire the property from the holder, but if the action is not brought in the U.S. Supreme Court, any state with a prior claim against the property is not bound by it and, therefore, may proceed to escheat the same property from the holder in violation of the due process of law. If, on the other hand, the state escheated property to which some other state subsequently raised a claim, such subsequent claimant could proceed in the U.S. Supreme Court and, upon proof of a superior claim, acquire the property regardless of the action in the first state. Thus, no state's claim to escheat intangible personal property will be final until there has been a determination by the Supreme Court.

If the race of diligence does continue to have force, it will do so not as a matter of law but as a mere matter of impossibility; the impossibility of requiring the Supreme Court to exercise its original jurisdiction in this area,[33] and the impossibility of the Supreme Court hearing all of the claims

28. 368 U.S. at 75.
29. 368 U.S. at 76.
30. 341 U.S. at 443.
31. 368 U.S. at 444.
32. Supra note 22.
33. In the Western Union case, 368 U.S. at 79, the Court stated that two avenues were open to the states: 1. Through an original action before the Supreme Court where all interested states could be joined as in Texas v. Florida, 306 U.S. 398, 405 (1939); or 2. By referral of the action to a United States District Court as in Massachusetts v. Missouri, 308 U.S. 1 (1939).

which are likely to be presented to it for determination because of the burden which it is presently under.[34]

Realizing the possibility that it could not hear all of these cases, the Supreme Court in the *Western Union* case presented an alternative—of referral of the cases to the District Courts as in *Massachusetts v. Missouri*. However, this may be of no value because of the Eleventh Amendment which would prevent the possibility of any interested state from being interpleaded as a party to the action in the District Court under Rule 22 of the Federal Rules of Civil Procedure.[35] Where it was not possible to join all of the interested states in the District Court, the same shortcoming of not being able to give the property holder the assurance that a state would not make a claim for the property in another proceeding would be raised and would, as in the *Western Union* case, amount to the first escheat action being a violation of due process of law.

II

What then of Wyoming? In 1959, this state broadened the statute in this area so it would be fully effective under existing doctrines,[36] but after this legislation, the U.S. Supreme Court had before it the *Western Union* case and as the result of the holding in that case all the legislation which relied on the earlier decisions of the U.S. Supreme Court has been placed in doubt.

Wyoming's scheme of escheat is found in three statutes, two of which have remained unchanged since their first enactment into law in 1899.[37] The fact that these two have remained unchanged for so long a period of time, during which the law of escheat of intangibles was being developed, is because the statutes were and are so broad as to apply to any kind of property.[38] But these two statutes, by themselves, would be constitutionally insufficient to allow Wyoming to escheat unclaimed intangible personal property in that they make no provision for notice to either the property holder or the property owner. The third statute,[39] from the time of the original passage, has always dealt specifically with all unclaimed property of unknown owners. The legislature, following the growth in the area

34. "The Court has something better to do than survey all the wanderings of migratory millionaires," Chafee, Federal Interpleader Since the Act of 1936, 49 Yale L.J. 377 (1940).

35. Fed. R. Civ. P. 22(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim.

36. Wyo. Stat. § 9-688 (1957), as amended by the Session Laws of 1959, ch. 168.

37. Wyo. Stat. §§ 9-686 and 9-687 (1957).

38. In 1923 the State of Montana interpreted a nearly indentical statute to be broad enough to escheat unclaimed bank deposits. State v. Kearns, supra note 5.

39. Wyo. Stat. supra note 4.

of intangibles and the decisions of the U.S. Supreme Court, has kept the operation of the statute constitutional and broad so as to remain competitive. Prior to the *Western Union* case, Wyoming was in a favorable position from which to compete in the "race of diligence",[40] but the *Western Union* case, as stated previously, has now placed the theory upon which the statutory growth was based in serious doubt. As a result of this doubt, the solution to the problem must come from a joint effort on the part of all the states of self help in the form of reasonable rules as to which claimant state shall have the superior right to the property, in the many and varied areas from which the claims may arise. This could well be the subject of an interstate compact, or other form of interstate agreement.

Another solution is presented by the Commissioners on Uniform State Laws in the form of the Uniform Dsiposition of Unclaimed Property Act.[41]

This act is built upon three premises which have allowed it to become more attractive as a result of the *Western Union* case than it had been prior to that case, at least so far as Wyoming is concerned. The first premise is that it is not an escheat statute but is custodial; the second is that it was drawn up with the idea in mind that the "race of diligence" was to be avoided; and third is the general desirability of symmetry in the law for the benefit of persons doing business in more than one state which is found in all the Uniform Acts.

The prefatory note to the Act best states the purpose of the Act:[42]

> The Uniform Act is custodial in nature,—that is to say, it does not result in the loss of the owner's property rights. The state takes custody and remains the custodian in perpetuity. Although the actual possibility of his presenting a claim in the distant future is not great, the owner retains the right of presenting his claim at any time no matter how remote. State records will have to be kept on a permanent basis. In this respect the measure differs from the escheat type of statute, pursuant to which the right of the owner is foreclosed and the title to the property passes to the state. Not only does the custodial type statute more adequately preserve the owner's interests, but, in addition, it makes possible a substantial simplification of procedure.
>
> The Act, which consists of thirty-two sections, commences with the usual section of definitions. This is followed by Sections 2 through 9 devoted to defining and describing the circumstances under which various classes of property are to be presumed abandoned under the Act. Separate sections deal with property held or owing by banks or other financial organizations, insurance cor-

40. Id., The important provisions of Wyo. Stat. § 9-688 (1957) are that:
(1) it applies to property of "whatsoever character";
(2) which has been unclaimed for a period of five years;
(3) notice is provided for by the Wyoming Rules of Civil Procedure 4(d) upon the holder, and by 4(e) (3) by publication upon the unknown claimant; and
(4) the property may be recovered by the owner at any time for a further period of five years after the state acquires custody of it.

41. Handbook of the National Conference of Commissioners on Uniform State Laws, pp. 136-153 (Hereafter cited Act) (1954).

42. Act. Supra pp. 136-137.

porations, public utilities, other business associations, trustees in corporate dissolution proceedings, fiduciaries, and state courts and other public agencies. Section 9 is an omnibus section covering all other items held on owing "in the ordinary course of the holder's business." Thereafter comes Section 10, which may be regarded as a key section in the Act, for it contains the provisions which preclude the possibility of multiple liability being imposed upon the holder of unclaimed property who happens to be subject to the jurisdiction of two or more states. The remaining sections, 11 through 32, deal principally with procedural matters, including the reporting of unclaimed property, the giving of a notice to owners, payment into the custody of the state and various provisions pursuant to which the owner may subsequently present his claim to the state and recover his property.

Prior to setting out Section 10 of the above Act, it might be well to note that as Wyoming's statute now stands, it is custodial for a period of five years[43] and except for the dissent in the *Standard Oil* case to the effect that only a custodial statute would be constitutional, there appears to be no compelling reason for the custodial period to extend beyond the five-year period, but the Uniform Act has the added advantage of not requiring custody to be based on a judicial escheat action, as would be necessary to vest the state with absolute title to the property after the running of the custodial period.[44]

Section 10 of the Act provides:

> If specific property which is subject to the provisions of Sections 2, 5, 6, 7, and 9, is held for or owed or distributable to an owner whose last known address is in another state by a holder who is subject to the jurisdiction of that state, the specific property is not presumed abandoned in this state and subject to this act if:
>
> (a) it may be claimed as abandoned or escheated under the laws of another state; and
>
> (b) the laws of such other state make reciprocal provision that similar specific property is not presumed abandoned or escheatable by such other state when held for or owed or distributable to an owner whose last known address is within this state by a holder who is subject to the jurisdiction of this state.

In addition to preventing multiple state claims to the property through the reciprocity feature of Section 10, the Uniform Act would have the added advantage of adding to Wyoming's law the necessity for the holders of property assumed abandoned to report such property to the State Treasurer[45] and to pay such sums to the state without the necessity of a judicial escheat or forfeiture determination, the state assuming any liability to the owner thereof. Thus the state would acquire the property absolutely, subject to a continuing liability to the owner. Presumably,

43. Op. Cit. note 35.
44. Act, supra pp. 144-145.
45. Act, supra § 11 at 145.

money could be invested and the income would be the unconditional property of the state. And, as stated previously, the Act overcomes the "race of diligence" concept if it still exists, or if such concept has no vitality, the Act will, through its reciprocity feature, give the states the assurance of not being faced with the uncertainty of an action before the U.S. Supreme Court or a U.S. District Court and not knowing which of several claimant states will be considered to have the superior right to the property.

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