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at the current term, in *Massachusetts v. Missouri*,²⁵ that jurisdiction will be taken only when it appears that the estate is insufficient to satisfy all conflicting tax claims.

It is well to note that the prohibition of multiple taxation has never been extended to the case of international conflicts. Consequently, although there are due process clauses in both the Fifth and Fourteenth Amendments, it is held that the Federal Estate Tax may reach foreign bonds kept here but owned by a citizen of Great Britain domiciled in Cuba at his death²⁶ and also that the Federal Income Tax may reach income of a United States citizen domiciled in Mexico even though the income is exclusively from Mexican land.²⁷

Largey MacDonald.

TAXABILITY OF PROPERTY OF MUTUAL IRRIGATION COMPANY

The method of taxing the irrigation system of a mutual irrigation corporation was worked out by an interesting application of the principle allowing disregard of the corporate entity in *Brady Irrigation Company v. Teton County, et al.*,¹ decided by the Montana Supreme Court in 1938. Plaintiffs, stockholders in the irrigation company, sought to restrain the commissioners and treasurer of Teton County from securing a tax deed to lands, reservoir, dams, ditches, canals, and other like property of the irrigation company. The Court held that the injunction should be granted, saying that the total value of the property owned by the irrigation company represents the aggregate value of the water rights of its shareholders; that these rights when used by the shareholders become appurtenant to their lands, adding to the taxable value of those lands; and that in a case of a mutual irrigation company the Court would look behind the corporate veil and avoid taxing these interests twice.

That water rights are appurtenant to the land on which they are used is well-settled.² Being appurtenant, such rights

²⁵307 U. S., 60 S. Ct. 39, 84 L. Ed. 38 (1939). Cf. 26 VA. L. REV. 231 (1939).

²⁶*Burnet v. Brooks*, 288 U. S. 378, 53 S. Ct. 457, 77 L. Ed. 844 (1935).

²⁷*Cook v. Tait*, 265 U. S. 47, 44 S. Ct. 444, 68 L. Ed. 895 (1923).

¹107 Mont. 330, 85 P. (2d) 350 (1938).

²*Tucker v. Jones*, 8 Mont. 225, 19 Pac. 571 (1888); *Hale v. Jefferson Co.*, 39 Mont. 137, 101 Pac. 973 (1919); *Osness Livestock Co. v. Warren*, 103 Mont. 284, 62 P. (2d) 215 (1936); *Pendola v. Ramm*, 138 Cal. 517, 71 Pac. 624 (1903); *Whittlesley v. Porter*, 82 Conn. 95, 72 Atl. 593 (1909). And see WIEL, WATER RIGHTS IN WESTERN STATES (3d ed., 1911), Sec. 551. This rule is aided in Montana by Sec. 6671, R. C. M., 1935: "A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit."

are not taxable separately from the land.* The recent case of *Northwestern Improvement Co. v. Lowry*⁴ is suggestive, holding that a negative easement, by which the use of certain property was restricted, bore its proportionate burden of taxation by the added value which it gave to the property in favor of which it ran, and was not cut off by a tax deed of the servient tenement.⁵

Montana also has held⁶ that water rights represented by landowners' shares of stock in a mutual ditch company are appurtenant to land, though stock certificates are personal property, so that a purchaser at foreclosure sale took title to both land and stock, even though the stock was not mentioned in the deed. California has upheld this view,⁷ and Utah has followed it also.⁸ The result of this view is that the certificate of stock represents the water right; that is, it represents an interest in the property of the water company. This conflicts with the general rule of the law of corporations to the effect that ownership of a share of stock is not ownership of the corporate property.

The decision in the principal case follows logically from the rules established by the above cases. If the share of stock represents the water right itself and becomes appurtenant to the land, it is reasonable to say that when the landowner is taxed on his land he pays also on the corporate property of the irrigation company.

Conceivably, the result of the principal case could be bolstered by the theory that a mutual irrigation company is but a trustee for those it serves, who own the equitable title.⁹ Since under that theory it could be said that the equitable title holders had already paid the tax, it would be impossible to sustain another tax on the trustee of the same property. However, Montana had already rejected the theory that a mutual irrigation company is but a trustee and had declared that the rela-

* *Hale v. Jefferson Co.*, *supra*; *Essex Co. v. City of Lawrence*, 214 Mass. 79, 100 N. E. 1016 (1913); COOLEY ON TAXATION (4th ed., 1924), Sec. 568.

⁴ 104 Mont. 289, 66 P. (2d) 792 (1937).

⁵ The case is commented upon in 51 HARV. L. REV. 361 (1937) and in 12 WASH. L. REV. 300 (1937).

⁶ *Yellowstone Valley Co. v. Assoc. Mortgage Investors, Inc.*, 88 Mont. 73, 290 Pac. 255 (1930), noted in 44 HARV. L. REV. 476 (1931).

⁷ *In re Thomas' Estate*, 147 Cal. 236, 81 Pac. 539 (1905) and *Woodstone Marble and Tile Co. v. Dunsmore Canyon Water Co.*, 47 Cal. App. 72, 190 Pac. 213 (1920).

⁸ *In re Johnson's Estate*, 64 Utah 114, 228 Pac. 748 (1924). And see WIEL, *op. cit.*, Sec. 1269. But see KINNEY, IRRIGATION AND WATER RIGHTS (2d ed., 1912), Sec. 1484.

⁹ This theory is followed in *Riverside Water Co. v. Sargent*, 112 Cal. 230, 44 Pac. 560 (1896), *Tenem Ditch Co. v. Thorpe*, 1 Wash. 566, 20 Pac. 538 (1889), and *Monte Vista Canal Co. v. Centennial Irrigating Ditch Co.*, 24 Colo. App. 496, 135 Pac. 981 (1913). And see KINNEY *op. cit.*, Sec. 1481, 1482.

tion between the company and its stockholders is one of contract only.¹⁰

Even under the trust theory, to avoid taxing the company it would be necessary to pierce the corporate veil, and it is on this latter ground that the Montana court based its decision. The Court cited the U. S. Supreme Court cases of *Southern Pacific Co. v. Lowe*¹¹ and *Gulf Oil Corp. v. Lewellyn*¹² in support of the view that when the facts warrant it, there should be no hesitation in looking behind the corporate veil in tax cases. The *Southern Pacific* case held that where a corporation received dividends from a second corporation all of whose capital stock it owned, and the dividend was effectuated by a bookkeeping process which simply reduced the apparent surplus of the controlled company and reduced the apparent indebtedness of the controlling company, no income tax should be levied on such dividends. The same result on similar facts was reached in the *Gulf Oil Corp.* case.

As these cases indicate, it is sometimes desirable that the corporate entity be disregarded when it comes to determining what and who should be taxed. Where the interest of the stockholder in the corporate property is so intimately associated with other property owned as in the case of a mutual, non-profit irrigation company, there is presented a proper case for application of the principle. Even so, the result of the principal case is startling in its refusal to hold any of the corporate property taxable to the corporation, in view of Art. XII, Sec. 7, of the Montana Constitution and Sec. 2013, R.C.M., 1935. Art. XII, Sec. 7, provides that " * * * all corporations in this state or doing business therein, shall be subject to taxation * * * on real and personal property owned or used by them and not by this constitution exempted from taxation." The only provision of the Constitution under which property of this corporation could be held exempt is the clause of Art. XII, Sec. 2, which permits exemption of "such other property as may be used exclusively for the agricultural and horticultural societies" and there would seem to be no construction of this provision on which it is possible to base the idea that it includes the property of a mutual irrigation company. And, in any event, the legislature has not provided for the exemption. On the other hand, it is difficult to exclude such property from the provisions of Sec. 2013, which states that "the property of every firm and corporation must be assessed in the county where the property is situate, and must be assessed in the name of the firm or corporation." Of course, this section does not state that the property must be taxed in the name of the corporation, but that would

¹⁰Dyk v. Buell Land Co., 70 Mont. 557, 227 Pac. 71 (1924).

¹¹247 U. S. 330, 62 L. Ed. 1142, 37 S. Ct. 540 (1917).

¹²248 U. S. 71, 63 L. Ed. 133, 39 S. Ct. 35 (1918).

seem to be the evident intention. The Court neither cited nor discussed these constitutional and statutory provisions.

Bernard Thomas

PROPRIETY OF INSTRUCTION ON COMPARATIVE NEGLIGENCE

The decision in *McCulloch v. Horton*¹ has given rise to the question whether the doctrine of comparative negligence now prevails in Montana. The Court approved denial of a requested instruction on contributory negligence to the effect that plaintiff could not recover if he were guilty of "any negligence, however slight, that proximately contributed" to his injury.²

In 114 A. L. R. 823, where the case is reprinted and annotated, the author of the comment states at page 832 that the requested instruction correctly expounds the law of contributory negligence as limited by the doctrine of proximate cause, inasmuch as the expression "however slight" is qualified by the phrase "that proximately contributed," but that the Court, in rejecting that instruction, necessarily took the position that slight negligence on the part of plaintiff, even though actually contributing to his injury, would not bar recovery. This latter position, said the writer, represents the doctrine of comparative negligence, viz., the doctrine that plaintiff may recover if his negligence is slight as compared with defendant's negligence.³

It is true that this instruction has been approved in a number of cases on the ground that a contrary ruling would amount to adoption of the comparative negligence principle.⁴ Thus, in

¹105 Mont. 531, 74 P. (2d) 1, 114 A. L. R. 823 (1937).

²The offered instruction read in full as follows: "Should you believe from the evidence that the plaintiff was negligent, and that the defendant was also negligent, you must not compare their negligence and thereby make up your verdict against the party that may appear to you from the evidence to have been the more negligent and in favor of the party that may appear to have been guilty of the lesser degree of negligence, because under the law of this State if a plaintiff was guilty of any negligence, however slight, that proximately contributed to the injuries he receives, he cannot recover by this action."

³"The two doctrines may be defined as follows: (1) Doctrine of comparative negligence.—Even though the plaintiff was negligent, and even though his negligence concurrently with the defendant's negligence proximately caused his injury, he may recover, if the degree of his negligence was slight as compared with that of the defendant. (2) Doctrine of contributory negligence as limited by or in its relation to the doctrine of proximate cause.—While the contributory negligence of the plaintiff, however slight, will defeat his right to recover, if it was the proximate or the concurrent cause of his injury, it will not defeat that recovery if it merely remotely caused or contributed to the injury." 114 A. L. R. at 831.

⁴*Birmingham Ry. Light & P. Co. v. Bynum*, 139 Ala. 389, 36 So. 736 (1903); *Botti v. Savill*, 97 Cal. App. 524, 275 Pac. 1029 (1929); *Cream-*