California Law Review

Volume XXVIII NOVEMBER, 1939 Number 1

State Taxation and the Supreme Court, 1938 Term

THERE is no causal connection between the growing revenue needs of government and the theories of taxation underlying the decisions of the Supreme Court, but it is an unmistakable reflection of the times that the tax decisions of the 1938 term have set a new pace in the liberalization of old restrictions upon the taxing power of both the federal and state governments. Such a change as the breakdown of the immunity of government salaries from taxation, because of its timeliness in spreading the costs of government to that growing segment of the population engaged in its work, makes vivid to all taxpayers and most of all to the new ones their financial responsibility to their governments.

The time-honored phrase that the power to tax involves the power to destroy, which had already lost much of its Old Testament sound and fury, ceased to have the power of an incantation against the march of decisions concerned less with undue exercise of the government's power to tax than with undue immunities of many citizens from their obligations to support their governments. There was less emphasis on tax burdens and more on tax avoidance. When the Court reopened the way to multi-state taxation of intangibles, when it refused to pronounce an exclusive blessing on the common-law doctrine of a single domicile, when it danced intricate verbal figures through the maze of restrictions which had long surrounded the taxation of interstate commerce, when it re-examined certain doctrines and abandoned others, it set the conditions for a new emphasis in taxation upon the obligation of citizens to support the governments whose protection they enjoy.

FOURTEENTH AMENDMENT

The extent of permissible multi-state taxation of intangibles has varied with the changing membership of the Supreme Court. Before 1930 it was widely permissible. Several decisions had upheld it in one form or another, but in that year, in *Farmers Loan & Trust Co. v. Minnesota*[1] and *Baldwin v. Missouri*[2] the Court renounced these decisions[3] and in 1932, in *First National Bank of Boston v. Maine*[4] it made emphatically clear its position that multi-state taxation of intangibles was not permissible at all. Thereafter interest centered upon speculation as to which one of two or more competing states with plausible claims to tax would win the Court's approval of its claims. That two or more might tax seemed to be a dead issue but it was only dormant after the way of a sleeping volcano. There remained of the 1930 Court majority only a minority in 1937 and the time grew ripe to renounce the renunciation. In that year there were still only portentous rumblings[5] and it was not until the following year that the second renunciation was undertaken in *Schuylkill Trust Co. v. Pennsylvania*,[6] upholding a state's *ad valorem* taxation of shares of a domestic corporation held by a non-resident while conceding that the same shares might also be taxed in another state where the shareholder resided. The case was concerned with property taxation, but whatever limitations the renunciation might have been susceptible to on that account were forestalled in 1939 by *Curry v. McCanless*[7] and *Graves v. Elliott*,[8] upholding multi-state death taxation of intangibles.

In the *McCanless* case intangibles were transferred in trust by a Tennessee settlor to an Alabama trustee. The trust instrument provided that the income of the trust should be paid to the settlor for life and reserved to her the power, of which she availed herself, to dispose of the trust estate by will. Suit was brought in Tennessee against the tax officials of both states under the Tennessee Declaratory Judgments Act to determine the extent to which the trust estate was tax-

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1 (1930) 280 U. S. 204.

2 (1930) 281 U. S. 586.

3 See Peppin, *The Power of the States to Tax Intangibles or Their Transfer* (1930) 18 CALIF. L. REV. 638, n. 6.

4 (1932) 284 U. S. 312.

5 First Bank Stock Corp. v. Minnesota (1937) 301 U. S. 234. See also Cohn v. Graves (1937) 300 U. S. 308.

6 (1938) 302 U. S. 506.

7 (May 29, 1939) 307 U. S. 357.

8 (May 29, 1939) 307 U. S. 383. This case involved a trust of intangibles held by a Colorado trustee in which the settlor reserved a power of revocation. The settlor died domiciled in New York without having exercised the power. The Court upheld the applicability of the New York estate tax to the intangibles upon the authority of Curry v. McCanless. Mr. Chief Justice Hughes, Mr. Justice McReynolds, Mr. Justice Butler, and Mr. Justice Roberts dissented in both cases.

able by each state, and it thus became possible for the claims of both states to be presented before the United States Supreme Court in the same case.

When the Tennessee courts "considered that the primary question for determination was the situs or location to be attributed to the intangibles of the trust estate at the time of decedent's death"[9] they acted in obedience to the theory that the Fourteenth Amendment prohibited the multiple taxation of intangibles and therefore compelled a determination which would prevent their taxation elsewhere than at the situs determined upon. Since this was precisely the theory upon which the Supreme Court acted in 1930 and 1932, the state courts had no choice but to follow it, under the assumption that Supreme Court decisions are law until overruled. When the Supreme Court in 1939 commented that the Tennessee courts followed this theory "Despite the impossibility in the circumstances of this case of attributing a single location to that which has no physical characteristics and which is associated in numerous intimate ways with both states,"[10] it conveyed the impression that the Tennessee courts were unaware of that impossibility. Actually the quarrel of the Supreme Court majority of 1939 is not with the Tennessee courts, but with the Supreme Court majority of 1930-1932. The later majority wished to overrule the earlier decisions but not outright and so it repudiated the direct descendants of those decisions in the Tennessee courts.

There was no intimation of how complete the break was in the language of the Court:

> "The doctrine, of recent origin, that the Fourteenth Amendment precludes the taxation of any interest in the same intangibles in more than one state has received support to the limited extent that it was applied in Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204; Baldwin v. Missouri, 281 U. S. 586; First National Bank v. Maine, 284 U. S. 312. Still more recently this Court has declined to give it completely logical application.[11] It has never been pressed to the extreme now urged upon us, and we think that neither reason nor authority requires its acceptance in the circumstances of the present case."[12]

[9] Curry v. McCanless, *supra* note 7, at 362.

[10] *Ibid.* at 362-363.

[11] The Court refers in a footnote at this point to Lawrence v. State Tax Comm. (1932) 286 U. S. 276; Cohn v. Graves, *supra* note 5; Guaranty Trust Co. v. Virginia (1938) 305 U. S. 19; Senior v. Braden (1935) 295 U. S. 422; Corry v. Baltimore (1905) 196 U. S. 466; First Bank Stock Corp. v. Minnesota, *supra* note 5; and Schuylkill Trust Co. v. Pennsylvania, *supra* note 6.

[12] Curry v. McCanless, *supra* note 7, at 363.

While the Court limited itself to a stout declaration against inflation of the doctrine it effectively collapsed it.

This is not the first time that the Court has departed from earlier decisions by indirection. The passing reference to the recent origin of the doctrine conveyed the impression that it was less than established and the cautious statement that it has received support to a limited extent serves actually to suggest that in the future even that limited application will be reduced to the vanishing point. The same reason and authority which operate against the doctrine in the present case would operate against the doctrine in the cases cited in the quotation. The Tennessee courts erred not in pressing the doctrine to the extreme but in invoking it at a time when the Supreme Court no longer approved of it, for the opinion of the four dissenting justices makes it evident that the Court majority that laid down the doctrine would certainly have held it applicable to this case.

In reopening the way to multi-state inheritance as well as multi-state *ad valorem* taxation of intangibles the Court faced the necessity of explaining why intangibles enjoyed a less favorable position than tangibles. Multi-state taxation of intangibles is as harsh as multi-state taxation of tangibles; it penalizes interstate as against local investments in the same way as it would in the case of tangibles and it differs only in degree in troubling the waters of interstate relations.[13] The Court finds a distinction, not because the reasons for multi-state taxation of intangibles could not also be applied to tangibles but because the reasons against multi-state taxation of tangibles are inapplicable to intangibles. Long engrained doctrine in the common law and other legal systems localizes the rights in tangibles for the purpose of jurisdiction of courts, conflict of laws, and taxation in the state where the tangible itself is located. That state alone can insure the full benefit and protection of those rights and effectively reach the property in the enforcement of the tax. Here then, the Court declares, is an exclusive dominion offering a basis for an exclusive

[13] See Burnet v. Brooks (1933) 288 U. S. 378, and Estate of McCreery (1934) 220 Cal. 26, 29 P. (2d) 186, distinguishing between the power of Congress and the power of the states to tax intangibles. The Court repudiates this distinction in the McCanless case: "If the 'due process' of the Fifth Amendment does not require us to fix a single exclusive place of taxation of intangibles for the benefit of their foreign owner, who is entitled to its protection, Burnet v. Brooks, 288 U. S. 378; *cf.* Russian Volunteer Fleet v. United States, 282 U. S. 481, 489, the Fourteenth can hardly be thought to make us do so here, for the due process clause of each amendment is directed at the protection of the individual and he is entitled to its immunity as much against the state as against the national government." 307 U. S. at 369-370.

taxing jurisdiction, a situation without parallel in the taxation of intangibles which have no physical location.

The touchstone of the distinction between the taxation of tangibles and intangibles is physical location; its presence effectively prevents multi-state taxation and its absence opens the way to it. But cases arise, as in *Southern Pacific Co. v. Kentucky*,[14] where the touchstone fails to work, for a tangible which has no physical location in any state is as devoid of physical location for purposes of state taxation as any intangible. A new touchstone then comes into play, the same one which operates in the taxation of intangibles, namely, "control over the person at the place of his domicile and his duty there, common to all citizens, to contribute to the support of government. . . ."[15] Physical location then is not the sole criterion for determining the taxation of tangibles and others will be found whenever they are necessary to justify one state in levying a tax when all other states are powerless to do so. The ease with which one was found in *Southern Pacific Co. v. Kentucky* to justify a tax which found no moorings in the hallowed doctrine of physical location indicates that the Court will allow neither tangibles nor intangibles to escape taxation so long as a suitable doctrine can be found to justify a tax. Kentucky afforded no substantial protection to the rights taxed and could not effectively lay hold of any interest in the property in order to compel payment of the tax. The sum and substance of her power was relative and depended not upon physical location but upon what the other states could do.

The rule that tangibles are taxable in the state of their physical location or at the owner's domicile in the absence of physical location in any state prevents not only multi-state taxation on the one hand but complete avoidance of taxation on the other. Beneath its overgrowth of custom the rule is rooted not in inexorable logic but in expediency. For the most part this expediency has produced equitable results equivalent to those the states probably would have arrived at independently and it was natural enough that the Court in 1930 should seek comparable protection against multi-state taxation for intangibles. It began with the rule that taxation should be at the state of the owner's domicile in the absence of better claims but did not specify what the alternative claims might be or when they were to take precedence. Conflicts inevitably arose, presaging more

14 (1911) 222 U. S. 63.

15 Curry v. McCanless, *supra* note 7, at 366.

in their wake, which threw upon the Court the difficult task of recognizing only one claim when more than one was plausibly entitled to recognition. *Curry v. McCanless* and *Graves v. Elliott* made it dramatically clear that when the Court was faced with two convincing claims it could not select one without inventing reasons against the other, and thus embarking upon limitations of state power which would either arbitrarily constrict a normally flexible legislative function within the iron lady of constitutional doctrine or breed confusion calling for constant restatement of those limitations. The Court pulled up short and abandoned its position against multiple taxation of intangibles on the ground that it constituted an unwarranted curtailment of the power of states to tax persons whom they control and protect in those relationships in which lie the origin of the rights constituting intangibles. Had the Court followed this reasoning to the end it would not have concerned itself with the defense of its position against multi-state taxation of tangibles for the "control over the person at the place of his domicile and his duty there . . . to contribute to the support of government"[16] is not diminished by the nature of the property owned.

Physical location, upon which the Court pegged its position against multi-state taxation of tangibles, could not be invoked against multi-state taxation of intangibles having no physical location, and the Court refused to conjure up a fictitious physical location to force intangibles within the rule governing tangibles. Intangibles, said the Court, are not related to physical things but represent relationships between persons, and jurisdiction to tax them arises from that dominion over and protection afforded the persons which alone can make the relationships effective. When relationships which are sources of actual or potential wealth are created between persons under the dominion and protection of more than one state, more than one state will have power to tax.

This was the situation in *Curry v. McCanless*. When the Tennessee decedent transferred the intangibles to an Alabama trustee while reserving a general power of appointment equivalent to ownership of the property, she created,

> "two sets of legal relationships resulting in distinct intangible rights, the one embodied in the legal ownership by the Alabama trustee of the intangibles, the other embodied in the equitable right of the decedent to control

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[16] *Ibid.*

the action of the trustee with respect to the trust property and to compel it to pay over to her the income during her life, and in her power to dispose of the property at death."[17]

The power which she retained was a potential source of wealth which was property in her hands and the Court regarded her as under the highest obligation to contribute from such wealth to the support of the government of Tennessee whose protection she enjoyed. When Tennessee imposed a tax upon the exercise of that power which she alone controlled in that state, she came directly within the rule of *Bullen v. Wisconsin*[18] which had been temporarily eclipsed by the series of cases from 1930 to 1932. At the same time the legal ownership of the intangibles by the Alabama trustee, which under *Safe Deposit & Trust Co. v. Virginia*[19] afforded a basis for subjecting them to a property tax in Alabama, served likewise as a basis for a tax upon their transfer even when effected by the decedent's testamentary act in another state. The Court could not have chosen between the equally good claims of Tennessee and Alabama without discriminating against one state or the other, and in the final analysis it was the decedent herself who opened up the way to multi-state taxation by creating a different set of legal interests in each state.

The whole problem of multi-state taxation of intangibles takes on added significance when intangibles are held in trust and the settlor retains sufficient control or interest in them to render them subject to death taxation. When, as in *Curry v. McCanless*, the testatrix reserved the power to dispose of the trust estate by will, or as in *Graves v. Elliott*, the testatrix reserved a power of revocation, the intangibles which they placed in trust became somewhere subject to death taxes even though the location of the power to levy such taxes had to be determined by the Court. The characteristic elusiveness of trust property in the field of taxation[20] compels a certain latitude in locating the power to tax it and when the Court in these cases allowed that latitude it shut the door to escape from taxation even though it opened the door to multi-state taxation. Had the dissenting justices prevailed and limited the power to tax to the state of the trustee's domicile the way would have been open for intangibles held in trust

[17] *Ibid.* at 369.

[18] (1916) 240 U. S. 625.

[19] (1929) 280 U. S. 83.

[20] See Traynor, *State Taxation of Trust Income* (1937) 22 IOWA L. REV. 268.

to avoid some measure of taxation whenever the tax by the state of the settlor's domicile exceeded 80 per cent of the federal estate tax imposed under the Revenue Act of 1926[21] for the settlor could then transfer the intangibles to trustees in states which either impose no taxes thereon or taxes at low rates. Whenever the tax by the state of the settlor's domicile did not exceed that 80 per cent no tax saving would have resulted from such a device for the tax would have been paid to the federal government instead of to the state. So long as only a few states imposed death taxes higher than that 80 per cent and so long as the federal government allowed the 80 per cent credit no widespread avoidance would have occurred but it would have been a menacing prospect in view of the growing pressure upon both the federal government and the states to find additional revenue.

When the Court abandoned its struggle against multi-state taxation of intangibles it returned that problem to the states, where it appropriately belongs. It might in time have won on every front its battle against multi-state taxation but only by choking with restrictions the vital taxing power of the states and paving new ways for tax avoidance. It yielded to the lesser evil, which can be eliminated by the states themselves, to prevent greater ones which might not easily be undone in the wayward course of judicial recantations. The states themselves have already gone far to solve the problem. Twenty-two of them now provide for reciprocal exemption and ten for outright exemption from death taxes on intangible property of non-residents,[22] and both expediency and self-interest will undoubtedly lead others to similar action. In the case of trusts, *Curry v. McCanless* and *Graves v. Elliott*, by removing obstacles to multi-state taxation, will paradoxically drive the states into preventing it themselves. When settlors taxable upon their intangibles at their domiciles wish to select trustees in other states they will naturally be magnetized to those states which offer exemption. The eventual result will be that other states will likewise forego their power to tax the intangibles of non-residents in the realization that such a power would be a futile one if there were no trust property to tax.

Given the practical considerations which deter states from imposing taxes upon intangibles transferred to domestic trustees by non-resident settlors, the chances of tax avoidance are multiplied in cases where the property becomes a proper subject of death taxation

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[21] INTERNAL REVENUE CODE (1939) § 813; U. S. Treas. Reg. 80 (1937) art. 9.

[22] 3 TAX ADMINISTRATORS NEWS (1939) 3.

by reason of the settlor's reservation of the income for life.[23] Here there is no reservation of a general power of appointment as in *Curry v. McCanless* or of a power of revocation as in *Graves v. Elliott* upon which might be posited the right of the state of the settlor's domicile to tax. The virtual ownership of trust property represented by such powers is very different from a life interest therein. In the first two instances the settlor retained control over the disposition of the whole property until the day he died. In the last instance he renounced control over all of the property except his life interest and one must determine whether the retention of that interest alone can serve as a basis for a death tax on the entire trust corpus by the state of the settlor's domicile. Unless it can serve as a basis there, the way is open to tax avoidance, given the impracticability of a tax by the state of the trustee's domicile.[24] It is therefore pertinent to turn to the general reasons which justify a death tax to determine whether they govern the imposition of such a tax by the state of the settlor's domicile.

There are two justifications in *Helvering v. Bullard*[25] for the application of the federal estate tax to transfers of the kind in question. One is that the tax in this instance is tantamount to a gift tax and the application of a higher rate bracket resulting from the inclusion of the gift in the decedent's gross estate falls within the power of Congress to classify gifts for the purposes of taxation and to apply different rates to gifts with and without reservations of life interests. The other justification is "the authority of Congress to treat as testamentary, transfers with reservation of a power or an interest in the donor"[26] for the purposes of preventing tax avoidance. The reasons which make the federal tax consistent with the due process clause of the Fifth Amendment likewise make a tax by the state consistent with the due process clause of the Fourteenth Amendment when the

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[23] In such cases the property has been generally held to be part of the decedent's estate for purposes of death taxation because its transfer in trust so closely approximates a testamentary disposition by virtue of taking effect in possession or enjoyment at or after the settlor's death. Helvering v. Bullard (1938) 303 U. S. 297; *cf.* Guaranty Trust Co. v. Blodgett (1933) 287 U. S. 509; Hassett v. Welch (1938) 303 U. S. 303; *In re* Estate of Rising (1932) 186 Minn. 56, 242 N. W. 459; Matter of Green (1897) 153 N. Y. 223, 47 N. E. 292; Matter of Brandreth (1902) 169 N. Y. 437, 62 N. E. 563; Notes (1927) 49 A. L. R. 864, 874, 878; (1930) 67 *ibid.* 1247; (1926) 75 U. of Pa. L. Rev. 168; (1929) 38 Yale L. J. 657.

[24] The only restraint on tax avoidance here, as in the situation discussed above, would be the 80 per cent credit allowed on the federal estate tax.

[25] (1938) 303 U. S. 397.

[26] *Ibid.* at 301-302.

settlor and the trustee are both domiciled in the same state and the transfer takes place entirely within its borders. The question arises whether the same certainty attaches to a tax by the state of the settlor's domicile when settlor and trustee are domiciled in different states and the negotiations surrounding the transfer of the intangibles are all carried on in the state of the trustee's domicile.[27] It is established in *Curry v. McCanless* that such a state can tax a testamentary transfer by reason of its control over the settlor from whom the trustee's title is derived, and of the settlor's obligation to contribute to the support of his state. A state's control over a person and a person's obligation to contribute to the support of his state are not reduced when he shifts his economic interests in ways other than through testamentary transfers. The tax on testamentary transfers is occasioned by the event of death and it is applicable even though that event occurs outside the state's borders. The tax on *inter vivos* transfers is occasioned by the event of a gift and it would seem equally applicable when that event occurs outside the state's borders.[28] In any event, since it is established that a transfer of property in trust with a reservation of a life interest can be treated as testamentary it would seem to come as properly within the jurisdiction of the state of the settlor's domicile as testamentary transfers.

When the settlor moves to another state where he is domiciled at his death, a new question arises as to whether this state becomes empowered to impose a death tax with respect to the intangibles. There would seem to be no substantial basis for such a power for the new state is not even distantly related to the trust corpus and its thread of connection therewith lies entirely in the settlor's life interest. That thread would hardly bridge the distance between its taxing jurisdiction and property which was never owned within its borders and never transferred there. If the intangibles are to be subjected to state death taxation the choice of the taxing jurisdiction would seem to settle upon the state of the settlor's domicile at the time of their transfer. Even that state, however, must take measures to make its tax effec-

[27] See Compañia de Tabacos v. Collector (1927) 275 U. S. 87; Standard Oil Co. v. California (1934) 291 U. S. 242; Connecticut Gen. Life Ins. Co. v. Johnson (1938) 303 U. S. 77. See also Cahn, *State Gift Tax Jurisdiction* (1939) 87 U. of Pa. L. Rev. 390. Essentially the same problem arises with respect to gifts in contemplation of death made outside the state of the owner's domicile.

[28] "So far as the constitutional power to tax is concerned, it would be difficult to state any intelligible distinction, founded either in reason or upon practical considerations of weight, between a tax upon the exercise of the power to give property *inter vivos* and the disposition of it by legacy. . . ." Bromley v. McCaughn (1929) 280 U. S. 124, 137.

tive in the event the settlor moves to another state without leaving any property out of which the tax could be collected. It could anticipate that situation by imposing a gift tax at the time of the transfer in trust, to be duly credited against a subsequent death tax[29] the state might levy with respect to the property.

Mr. Justice Reed reserved his conclusion with regard to the Court's statement in *Curry v. McCanless*[30] that,

> "taxation of a corporation by a state where it does business, measured by the value of the intangibles used in its business there, does not preclude the state of incorporation from imposing a tax measured by all its intangibles."

It was not surprising, therefore, that only four members of the Court in *Newark Fire Insurance Co. v. State Board of Tax Appeals*[31] voted to uphold, upon the authority of *Cream of Wheat Co. v. County of Grand Forks*,[32] a New Jersey personal property tax upon the intangibles of a domestic corporation with executive offices in New York City, regardless of the taxing jurisdiction of other states. The other four left open the question whether the intangibles could be taxed in two states, and upheld the tax on the ground that the presumption of taxability in the state of domicile was not overcome by "the mere fact that the general affairs of a foreign corporation are conducted by general officers in New York without further evidence of the source and character of the intangibles. . . ."[33]

In *Guaranty Trust Company v. Virginia*[34] the Court held for the first time that the Fourteenth Amendment did not prohibit the state of residence of the beneficiary of a discretionary trust from taxing the net income received from a trust, even though the state where the trust was administered and the trustee domiciled had taxed the entire net income from the trust to the trustee. While the opinion places the question of multi-state taxation of income on the threshhold of settlement[35] it is cautious enough to enable the Court to distingnish the case on the ground that the income was taxed to successive own-

[29] See INTERNAL REVENUE CODE (1939) § 936; U. S. Treas. Reg. 80 (1937) art. 9, for federal provision for gift tax credit against federal estate tax.

[30] *Supra* note 7, at 374.

[31] (May 29, 1939) 307 U. S. 313.

[32] (1920) 253 U. S. 325.

[33] *Supra* note 31, at 322.

[34] *Supra* note 11.

[35] It thus brings within sight of realization the implications of Sbaffer v. Carter (1920) 252 U. S. 37; Lawrence v. State Tax Comm., *supra* note 11; Whitney v. Graves (1937) 299 U. S. 366; and Cohn v. Graves, *supra* note 5.

ers and not to the same owner and is therefore analogous to a case where one state taxes a corporation's income and another taxes a resident's dividend declared therefrom. There is little likelihood, however, that the Court will make such a distinction[36] and every indication from its present receptivity to multi-state taxation that it would uphold such taxation of income even to the same owner.

Prior to 1935, Wisconsin exempted dividends from the income tax, either in whole or in part, but in 1935 it placed a tax on dividends received in 1933 and 1934 which had not been subject to the income tax in those years. The tax was a special one in which the regular deductions were not applicable. A taxpayer contested the application of the tax to his 1933 dividends on the ground that it denied him equal protection of the laws by taxing his dividends more heavily than the income tax taxed other income,[37] and by taxing his dividends retroactively, which it was argued was also a violation of due process. The Court in *Welch v. Henry*[38] denied the validity of each of these contentions.

The Court reasoned that not only were dividends manifestly different from other forms of income but classification was additionally justified by the state's having previously either exempted them or taxed them at a lower rate than that applicable to other income. This former advantage may distinguish *Welch v. Henry* from other instances of special treatment of dividends, and prevent its being conclusive authority on the validity of the numerous special state taxes on dividends.[39]

The majority disposed of the argument that the retroactivity of the tax constituted a denial of equal protection of the laws by reference to federal retroactive tax laws. While the Court failed to state that the equal protection clause is not a limitation upon Congress but only upon the states, it went on to point out that the clause did not deny the power of state legislatures to equalize previous inequities. The retroactive nature of the tax was also held unobjectionable with

[36] See Senior v. Braden, *supra* note 11; Stone v. White (1937) 301 U. S. 532, 537.

[37] Because the ordinary deductions allowed in computing net income were not allowed in computing the special dividend tax, the burden on dividends was greater.

[38] (1938) 305 U. S. 134. Mr. Justice Roberts, Mr. Justice McReynolds, and Mr. Justice Butler dissented.

[39] In general the state courts have upheld these taxes. See Shields v. Williams (1929) 159 Tenn. 349, 19 S.W. (2d) 261; see also Knights v. Treasurer (1921) 237 Mass. 493, 130 N. E. 60, *aff'd* (on another point), in Knights v. Jackson (1922) 260 U. S. 12. Colgate v. Harvey (1935) 296 U. S. 404, is not conclusive for there the taxpayer was not subjected to a greater tax burden because he received dividends.

regard to the due process clause. The majority opinion called attention to the numerous cases upholding the retroactive application of the federal income tax, including *Cooper v. United States*[40] which probably presented a more doubtful issue than that involved here. It pointed out that previous notice of the tax, required in the gift tax cases,[41] is not a prerequisite to validity where the tax is not one on a voluntary act. The majority makes it clear that their decision approves retroactivity only to the preceding legislative session.[42]

THE GREEN CASE

When *Curry v. McCanless*[43] and *Graves v. Elliott*[44] removed the constitutional bar against multi-state death taxation of intangibles they ended the problem of reconciling a rule against multi-state taxation with the patent absence of any effective remedy against such taxation in the multiple domicile cases. At the same time they dampened whatever faint hope of alleviating such taxation might have been kindled by the decision in the *Green* case[45] that a suit brought by one state against several others to determine the domicile of a decedent was within the Supreme Court's original jurisdiction.

The suit brought by Texas was in the nature of a bill of interpleader against Florida, New York, and Massachusetts, as well as against decedent's wife and sister. The bill alleged that Texas was the decedent's domicile at the time of his death and therefore Texas had the right to tax the succession to his intangibles; that the other states made parallel claims; that the total claims exceeded the net value of the estate; and that because there was insufficient property in Texas to pay its proposed tax it would be deprived of that tax in the event that other states obtained adjudications supporting their claims. The bill prayed for a determination of the question of domi-

40 (1930) 280 U. S. 409. The Revenue Act of 1921, which became effective November 23, 1921, was held validly to ascribe the donor's basis to gift property acquired and sold by the donee before that date. Mr. Justice McReynolds, who with Mr. Justice Roberts dissented in the instant case, wrote the opinion for a unanimous Court and held that a retroactive income tax could be imposed on the value of gifts to prevent future tax avoidance.

41 Nichols v. Coolidge (1927) 274 U. S. 531; Untermyer v. Anderson (1928) 276 U. S. 440; Coolidge v. Long (1931) 282 U. S. 582.

42 The New York Court of Appeals held that the principal case did not mean that a tax on rentals passed in 1935 and retroactive to 1919 was valid. Such retroactivity was held invalid in New York v. Graves (N. Y. May 23, 1939) 21 N. E. (2d) 371.

43 *Supra* note 7.

44 *Supra* note 8.

45 Texas v. Florida (March 13, 1939) 306 U. S. 398.

cile and particularly for an adjudication that the domicile was in Texas which accordingly would alone have jurisdiction to tax the intangibles. A Special Master appointed by the Court found instead that Massachusetts was the domicile of the decedent at the time of his death, and his report was confirmed by the Court once it had determined that it had original jurisdiction.

The significance of the case lies not in the reasons for selecting Massachusetts as the state of domicile but in the fact that a way was found for steering the issue of multiple domicile into an independent federal tribunal for determination. Where a strict bill of interpleader ran afoul of the Eleventh Amendment in *Worcester County Trust Co. v. Riley*,[46] a bill in the nature of interpleader found an unobstructed path to the federal court. In the first case the state could not be sued by the executor without its consent, but in the second three states were successfully sued by another, when it appeared that the issue framed by the pleadings constituted a justiciable controversy under the Judiciary Article of the Constitution and that the facts afforded an adequate basis for relief according to accepted principles of equity. The plaintiff state here claimed a direct interest in the estate which was subject to risk of loss by the possibility of multiple adjudications in favor of the other states, despite the fact that only one state was theoretically entitled to tax. A state could obtain equitable relief under such circumstances even though its suit were brought against other states, just as individuals have long been able to sue each other under comparable circumstances.

The prospect of multiple adjudications in other states would not of itself have empowered Texas to bring its suit. The magic which opened the doors of the Court resided in two circumstances. A risk of loss threatened Texas because the aggregate claims of the states and of the federal government exceeded the value of the net estate and the claims of the respective states were mutually exclusive.

The majority of the Court found compelling evidence that the risk of loss was real enough to justify the exercise of equity jurisdiction. The decedent had relationships with each state affording a substantial basis for a claim to tax. None of the states would consent to proceedings in any other and since each was preparing in good faith to enforce its claim there was a fair probability of multiple adjudications in favor of them all, which loomed larger in the obscurity thrown around whatever might be the real domicile by the self-serving decla-

[46] (1937) 302 U. S. 292.

rations of the decedent to avoid income and personal property taxes levied on a domiciliary basis. The *Dorrance* litigation[47] was an impressive reminder that such a probability could come to pass.

Mr. Justice Frankfurter in a dissenting opinion, in which Mr. Justice Black concurred, maintained that the risk of loss was not so substantial as it seemed and did not warrant the invocation of a remedy whose special appropriateness for the settlement of private controversies did not extend to controversies between states. He took issue with the assumption that the claims of the three states in themselves jeopardized the payment of any tax Texas might levy, and observed that none of the tax officials had translated their assertions into effective legal action, let alone embarked upon the actual collection of the tax. Nor could it be assumed that if these claims ultimately found their way into the state courts they would automatically be upheld. Whatever memories were conjured up of the *Dorrance* litigation immediately stirred up recollections of the *Trowbridge* case,[48] so that one could not rely upon the assumption that the judgments of state courts would be dictated only by fiscal advantages to their states. Thus, multiple adjudications did not necessarily mean multiple taxes, and if the Supreme Court stepped in to avoid conflicts that might never arise it could easily find itself burdened with new cases centering around similar hypothetical conflicts. It would soon develop that when the Court took jurisdiction in such cases it would serve less to dispel for a state the uncertainties attending the collection of its tax than to establish for executors the certainty that only one state tax based on domicile would be levied upon the succession to an estate. The single factor which brought the controversy before the Supreme Court was the allegation that if the claims of all four states were allowed to prevail the estate would be insufficient to pay the aggregate taxes and Texas would be deprived of her tax. That factor could be artificially incorporated into any controversy by the device of having enough states assert claims to tax to threaten absorption of the whole estate. In the instant case itself it was decided that the claim of Texas was without basis but the Court retained the bill regardless and its finding as to domicile thereafter amounts "to a decla-

[47] Dorrance's Estate (1932) 309 Pa. 151, 163 Atl. 303, *cert. den.*, Dorrance v. Pennsylvania (1932) 287 U. S. 660; *In re* Dorrance (1934) 115 N. J. Eq. 268, 170 Atl. 601, *cert. den.*, Dorrance v. Martin (1936) 298 U. S. 678; New Jersey v. Pennsylvania (1933) 287 U. S. 580; Hill v. Martin (1935) 296 U. S. 393.

[48] Matter of Trowbridge (1935) 266 N. Y. 283, 194 N. E. 756.

ration of rights on behalf of the estate which could not be adjudicated otherwise than through the screen of a controversy between states."[49]

The fears expressed in the dissenting opinion would seem to be largely allayed by a growing awareness of the difficulties which would attend the initiation of such a controversy between states. If it were a transparent screen it would be rejected for consideration by the Court and if it were less than transparent it would still have to fulfill such onerous conditions as to defeat its wide-spread use. The *Green* case offers no broad avenues out of the darkness of multiple domiciles; the interest which it aroused bears witness to the novelty of offering even a slender trail under circumstances so extraordinary that they could not easily be duplicated. If an executor actually set about to follow the trail of the *Green* case, he would first be under the necessity of finding a state willing to undertake the suit. Unless it were made clear that there were enough states with which the decedent had relationships affording such a substantial basis to tax as to give rise to a fair probability of multiple adjudications which, together with the federal estate tax, would more than consume the entire estate, the suit would be dismissed at the outset. If the net estate were sufficient to enable each of the states to enforce its claims, there would be no controversy to come within the jurisdiction of the Court. It is also likely that the suit would be dismissed if it were brought by a state which could enforce its tax out of property within its borders, for it would not then risk any loss of its tax even though that risk confronted one or more of the other states. In this connection it would seem that intangibles subject to garnishment or execution by the petitioning state could with propriety be taken into account in determining whether there is a risk of loss to the petitioning state.[50] Its own tax lien would seem to take precedence over any judgments in favor of other states to which it must give full faith and

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[49] Texas v. Florida, *supra* note 45, at 433.

[50] A footnote to the opinion calls attention to the findings of the Special Master that the aggregate values of the real estate and tangible property *and the intangibles subject to the jurisdiction of the courts* of Texas, Florida, and Massachusetts respectively, was less than the amount of the taxes claimed by each state. For general discussion of the liability of shares of stock to attachment, see 4 AM. JUR. (1936) § 351, and cases cited thereunder. As to jurisdiction for garnishment of a debt from a foreign corporation doing business within the state to a non-resident arising from business outside the state, see Note (1923) 27 A. L. R. 1396. As to jurisdiction for garnishment of shares of stock in a foreign corporation held outside the state by a non-resident defendant, see (1923) 37 HARV. L. REV. 387. As to jurisdiction for garnishment of certificates of stock of a foreign corporation, see (1928) 41 HARV. L. REV. 924.

credit[51] just as it would take priority over any other judgments.[52] In the *Green* case none of the paper evidences of the intangibles was in Texas and the tangible property therein valued at $2,220 fell far short of the asserted tax claim of $4,685,057. This discrepancy, while not discussed by the Court, undoubtedly influenced its opinion that a serious risk of loss confronted the state.

It was only because the risk of loss appeared in conjunction with claims that were mutually exclusive, however, that the Court took jurisdiction.[53] The sole legal basis for the claim of each state was that the decedent was domiciled at death within its borders. The Special Master concluded that the rule defining domicile in each of the states was substantially that of the common law and that there was no local law peculiar to any of the states with respect to the essential fact elements which go to establish domicile. By the law of each state a decedent can have only a single domicile for purposes of death taxes. A variation in any one of these circumstances would have prevented Texas from meeting an essential condition of a bill in the nature of interpleader. Had one or more of the states made a claim on any other basis than domicile, as they will henceforth be much freer to do in view of *Curry v. McCanless*, or defined domicile differently from the others, or had a rule that admitted of more than one domicile, there would have been lacking the requisite mutual exclusiveness of the claims.

The dissenting opinion raises some doubts that this requisite was satisfied even in the instant case. Whatever general agreement might exist as to the elements which in combination constitute domicile it does not always follow that only one state can find the key to that combination. That may be true in relatively simple situations but in proportion to the relations which a decedent has set up in different states, the likelihood increases of multiple claims having such valid foundations as to make their recognition as reasonable in one case as in another. Such claims are mutually exclusive only in theory for while they are all based on the same rules of domicile the validity of one in no way detracts from the validity of the others. In this respect

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[51] Milwaukee County v. White Co. (1935) 296 U. S. 268.

[52] "They [foreign judgments] can no more demand priority over domestic claims for taxes than a judgment upon a simple contract debt, which is equally a binding obligation of the judgment debtor where rendered, and to which full faith and credit must be accorded." *Ibid.* at 276.

[53] See MACLENNAN ON INTERPLEADER (1901) 122-144; POMEROY, EQUITY JURISPRUDENCE (4th ed. 1919) § 1324; *cf.* (1910) 23 HARV. L. REV. 405; (1939) 23 MINN. L. REV. 231.

they differ from those conflicting claims which, precisely because only one of them can reasonably have validity, are appropriately subject to settlement by the procedural device of interpleader.

There was a tacit acceptance in the *Green* case of the doctrine common to the four states of a single domiciliary status, which led the Court not merely to deny the claim of Texas but to recognize only the claim of Massachusetts. The dissenting opinion expressed concern over the inadequacy of this doctrine to respond to the increasing mobility of men and their wealth and to secure a just measurement of their obligations to the government whose benefits they enjoy.

Whatever its shortcomings, however, the acceptance of the doctrine by each of the four states helped to make possible a plausible case for the exercise of equity jurisdiction even though the Court could in its discretion equally well have refused to exercise that jurisdiction. In any event the role of the Court with regard to the doctrine was a passive one and the real quarrel of the dissent was with the states which followed it. It came to the Court within the limits of an ordinary equity case and it left the court in the same way. The Court made it clear that "no determination made here as to domicile can hereafter foreclose the determination of such questions by any court of competent jurisdiction in which they may arise."[54] This warning that its determination as to domicile would not have the force of *stare decisis* went hand in hand with its reminder,

> "that two or more states may each constitutionally assess death taxes on a decedent's intangibles upon a judicial determination that the decedent was domiciled within it in proceedings binding upon the representative of the estate, but to which the other states are not parties, is an established principle of our federal jurisprudence."[55]

The inevitable conclusion would seem to be, not that the Court has taken a slight step toward the solution of the problem of multiple domicile, but that the problem will more than ever defy solution by litigation as it increases in complexity. When *Curry v. McCanless* removed the ban against multi-state taxation of intangibles it destroyed the hope that a way would some day be found to make that ban operate effectively against multi-state taxation on the basis of domicile, and both the majority and dissenting opinions of the *Green* case contain ample warning that such taxation is likely to continue.

The dissenting opinion is an omen that if multiple domicile taxa-

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[54] Texas v. Florida, *supra* note 45, at 408.

[55] *Ibid.* at 410.

tion continues to belie the common law doctrine of a single domiciliary status inquiry will be directed not at possible ways of reconciling the two but at the concept of domicile itself as a basis of taxation. The possibility of reconciliation becomes increasingly remote as human beings are transplanted to new scenes more frequently than they are left rooted in familiar ones and mobility rather than stability becomes the distinguishing characteristic of many homes. Domicile becomes more and more a capricious abstraction in whose shifting sands no tax can take root which will justly measure the wealth of mobile men according to the benefits of government which they have received. A man domiciled in one state may leave never to enter it again and enjoy the warm sun of government protection in another state throughout a long procession of years until his death. Yet if he carries with him throughout those years an intention to return to the first state and never harbors an intention to establish himself permanently in the second he will be regarded as domiciled at his death in the first. Conversely he may be domiciled in the first state for many years only to leave it for another state in which he establishes a new domicile which is shortly thereafter terminated by death. In either case the state which bestowed upon the decedent only a modicum of the benefits of government which he received throughout his lifetime receives all of the tax upon his death, while the state which bestowed upon him the lion's share of those benefits receives nothing in return. If it is unwilling to be turned away empty handed there arises such litigation as in the *Dorrance, Hunt,*[56] and *Green* cases.

Even graver injustices may result when a person is assigned a domicile by law as in the case of married women and children who not infrequently may have never set foot in the state which the law calls their domicile. The fiction of a legal domicile totally extinguishes all the rights of the state which normally would have been recognized as the domicile had not the fiction intervened to set up a new set of rights in a state from whom the decedent may have never received any benefits.

It is natural that death tax litigation invariably centers around the estates of men of substance. No death tax problem arises from the multiple domiciles of those who leave no estates and whatever problems arise from the multiple domiciles of those who leave small estates are not apt to come to a head in litigation. In the past no problems arose even from large estates, for substance meant substantial

[56] Worcester County Trust Co. v. Riley, *supra* note 46.

things—land and livestock and a house that was built to endure. Men customarily spent their lives in the state in which they accumulated their property and made their investments, and a realistic foundation existed for the common law doctrine of a single domiciliary status. Today substance is represented less by substantial things than by their paper evidences, and men of substance are more and more characteristically mobile than static. The doctrine that a man has but one home can no longer be realistically applied to such men, and it is of little import that it is still applicable to most other men for the whole problem of domicile begins and ends with those situations where the factual evidence of multiple domiciles is at war with the fiction that only one of them can exist. The problem is complicated by the fact that the intention of the person who has identified himself with more than one home still very largely determines the location of his domicile. As the gap widens between subjective intent and its objective evidence, it becomes increasingly difficult to ferret out the real intent. It is not always unequivocally declared; it may not be declared at all; and it may easily be concealed by self-serving declarations for the purpose of tax avoidance. If intention takes precedence over any other considerations in all of the states with a claim to tax, then all of them except one must forego their claims. But as estates become more disperse and complex, situations arise where the decedent himself may never have clearly identified his intention with a single domicile. Even more likelihood exists of situations where he has feigned an intention to be domiciled in whichever of several states best serves the purposes of tax avoidance. When declarations of intention appear at odds with the objective evidence, the likelihood increases of their being refused credence by interested states which can press their claims in their own courts on the grounds of substantial objective evidence of domicile.

Under such circumstances the doctrine of a single domiciliary status breaks down, the inquiry inevitably follows whether the concept of domicile should be abandoned as a basis for death taxation and replaced by a concept which would admit the existence of several permanent homes. The domicile concept has not deterred states from simultaneously pressing their claims even as they were giving lip-service to the fiction that there is only one domicile and hence only one valid claim, and they have not withdrawn their claims when others with the same basis were recognized in other states. Since there is no uniformity in the role played by the intention of a decedent in the location of his domicile, it becomes impossible to predict in which state or states that domicile will be located and taxpayers as well as states stand to suffer from the uncertainties of an outworn concept.

It should not be impossible to find an entirely new concept as a basis for death taxation which will be productive at once of greater certainty and greater justice for the taxpayer and the taxing states by making death taxation correspond more realistically with the benefits of government enjoyed by the decedent during his lifetime.

The lesson of the multiple domicile cases is not that there is any inherent evil in multi-state death taxation but that the proper basis for such taxation has not yet been found. That way will hardly be found in Supreme Court decisions which set only the outer limits of a state's jurisdiction to tax. It may sometime be found through a concept adopted by the states themselves which will enable a state with a valid claim to receive a fair allocation of the total taxes without prejudice to the claims of other states and without undue burden to the taxpayer.*

Roger John Traynor.

School of Jurisprudence,
University of California.

*[This is the first of two articles on this subject. They are based upon papers read at the National Tax Conference, San Francisco, October 16 and 18, 1939.—Ed.]