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Largey MacDonald

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quired amount to the county.<sup>22</sup> It would seem then that there is no good reason why subrogation should not be permitted in this State.

Leonard H. Langen.

### MULTIPLE TAXATION: THE SUPREME COURT LETS DOWN THE BARS

The decade which has just come to an end has witnessed one of the most remarkable cycles in the constitutional law of taxation in the history of the United States Supreme Court. When the Court convened for its October Term, 1929, multiple taxation, in the sense of taxation of the same economic interest by more than one State, was not *per se* unconstitutional. But, with the decision in *Farmers' Loan & Trust Co. v. Minnesota*,<sup>1</sup> January 6, 1930, the Court squarely held to the contrary and thereupon took up the battle against multiple taxation with all of the zeal of a crusader. When, in 1932, the Court decided *First National Bank of Boston v. Maine*,<sup>2</sup> victory appeared complete. But, alas, man is mortal and judicial personnel changes. In a series of cases culminating in *Curry v. McCanless*,<sup>3</sup> decided in May, 1939, the Court repudiated the doctrine that due process of law necessarily precludes taxation by two or more States and, while not expressly overruling the earlier cases, in effect left them little more than lifeless monuments to the past.

The traditional point of departure has been the maxim, *mobilia sequuntur personam*, it being a principle of general application in the Conflict of Laws that, for purposes of determining jurisdiction over property, movables follow the person, i. e., the domicile of the owner. But, at least in the case of tangible property, the maxim states such an obvious fiction that, since the decision in *Union Refrigerator Transit Co. v. Kentucky*,<sup>4</sup> decided in 1905, it has been settled that, once a chattel has acquired a more or less permanent physical situs elsewhere,<sup>5</sup> the

<sup>22</sup>Sec. 2207, R. C. M., 1935.

<sup>1</sup>280 U. S. 204, 50 S. Ct. 98, 74 L. Ed. 371 (1930).

<sup>2</sup>284 U. S. 312, 52 S. Ct. 174, 76 L. Ed. 313 (1932).

<sup>3</sup>307 U. S. 357, 59 S. Ct. 900, 83 L. Ed. 1339 (1939).

<sup>4</sup>199 U. S. 194, 26 S. Ct. 36, 50 L. Ed. 150 (1905).

<sup>5</sup>The situs need not be permanent. It is probably sufficient that the chattel is being held or used for some local purpose on tax day. *Gromer v. Standard Dredging Co.*, 224 U. S. 362, 32 S. Ct. 499, 56 L. Ed. 801 (1912); *Coe v. Errol*, 116 U. S. 517, 6 S. Ct. 475, 29 L. Ed. 715 (1885). *Cf.*, upholding a poll tax on transient laborers, *Haavik v. Alaska Packers' Association*, 263 U. S. 510, 44 S. Ct. 177, 68 L. Ed. 414 (1923). But it is not enough that the chattel, such as a railway car, is frequently within the State, if its employment is interstate. *Johnson Oil Co. v. Okla.*, 290 U. S. 158, 54 S. Ct. 152, 78 L. Ed. 238 (1933). The proper procedure is to strike an average of the cars customarily within the State. *American Refrig. Transit Co. v. Hall*, 174 U. S. 70, 19 S. Ct. 599, 43 L. Ed. 899 (1898). Where, however, no foreign situs

domiciliary State can no longer tax it. The same principle was applied to inheritance taxes in *Frick v. Pennsylvania*,<sup>8</sup> notwithstanding continued application of the rule that the law of the domicil governs succession, it being said that the maxim must yield to actual situs. It is to be noted, however, that these cases, while resulting in single taxation, did not rest upon any assumption that multiple taxation is *per se* unconstitutional.

But taxation of intangibles is a different story. Since they, by hypothesis, have no physical existence, not only does the maxim *mobilia sequuntur personam* state a fiction as to them, but any attempt to assign them a taxable situs must be equally artificial and fictitious. The choice is between two fictions, if a choice is to be made, and must rest upon considerations of economic and fiscal policy.

The earlier cases generally refused to make a choice. Although it is true that in *State Tax on Foreign-Held Bonds*,<sup>9</sup> decided in 1873, Pennsylvania was denied power to tax interest payable by a Pennsylvania corporation to non-resident owners of its bonds, the principle involved was later obscured by diverse interpretations,<sup>10</sup> and in the famous case of *Blackstone v. Miller*<sup>11</sup> it was held that New York might impose an inheritance tax upon an indebtedness owed by a New York resident to an Illinois decedent. The reasoning of the latter case, based upon power of the debtor's State over his person and so over compulsion of payment, was equally applicable to property taxes. On the other hand, in *Blodgett v. Silberman*,<sup>12</sup> the State of the decedent's domicil was allowed to impose an inheritance tax. Furthermore, it had been decided that jurisdiction to tax might follow from mere presence of documents embodying the chose.<sup>13</sup> And there was even a disquieting fourth threat of taxation arising from a line of cases upholding property taxes at the so-called "business situs" where moneys were employed in business or were being recurrently invested and reinvested.<sup>14</sup>

appears to have been acquired, the domicil of the owner may tax the chattel even though it is never within the State. *Southern Pacific Co. v. Kentucky*, 222 U. S. 63, 32 S. Ct. 13, 56 L. Ed. 96 (1911).

<sup>8</sup>268 U. S. 473, 45 S. Ct. 603, 69 L. Ed. 1058 (1925). Cf. *City Bank Farmers Trust Co. v. Schnader*, 293 U. S. 112, 55 S. Ct. 29, 79 L. Ed. 228 (1934).

<sup>9</sup>82 U. S. (15 Wall.) 300, 21 L. Ed. 179 (1873).

<sup>10</sup>In *Blackstone v. Miller* the case was said to depend upon the foreign location of the bonds as specialties, whereas in *Blodgett v. Silberman* it was said to rest upon the impairment of contract clause. Neither seems correct.

<sup>11</sup>188 U. S. 189, 23 S. Ct. 277, 47 L. Ed. 439 (1903).

<sup>12</sup>277 U. S. 1, 48 S. Ct. 410, 72 L. Ed. 749 (1928).

<sup>13</sup>*Wheeler v. Sohmer*, 233 U. S. 434, 34 S. Ct. 607, 58 L. Ed. 1030 (1913). Cf. *Buck v. Beach*, 206 U. S. 392, 27 S. Ct. 712, 51 L. Ed. 1106 (1906).

<sup>14</sup>*New Orleans v. Stempel*, 175 U. S. 309, 20 S. Ct. 110, 44 L. Ed. 174 (1899); *Bristol v. Washington County*, 177 U. S. 133, 20 S. Ct. 535, 44 L. Ed. 701 (1899); *Liverpool & L. & G. Ins. Co. v. New Orleans*, 221 U. S. 346, 31 S. Ct. 550, 55 L. Ed. 762 (1910).

But, in a series of cases decided at its October Term, 1929, the Supreme Court executed a complete about-face, expressly overruled *Blackstone v. Miller*, impliedly overruled *Wheeler v. Sohmer*,<sup>14</sup> and eagerly embraced its Latin maxim which attributes, as the Court applied it, exclusive jurisdiction to the State of the domicile of the creditor-owner of the chose. In *Farmers' Loan & Trust Co. v. Minnesota*<sup>15</sup> it was held that Minnesota could not levy an inheritance tax upon succession to bonds of Minnesota municipalities owned by a New York decedent and physically kept in New York. *Baldwin v. Missouri*<sup>16</sup> made it plain that physical location of documents is not decisive. Each case, however, carefully left open the possibility of taxation at the "business situs."

Corporate stock has received a similarly varied treatment. *Corry v. Baltimore*,<sup>17</sup> decided in 1905, upheld a property tax by the State of incorporation notwithstanding foreign domicile of the stockholder; but in *Hawley v. Malden*,<sup>18</sup> in 1914, the owner's domicile was permitted a like tax. Then, after the 1930 outlawry of multiple taxation, came *First National Bank of Boston v. Main*,<sup>19</sup> wherein the Court, faithful to its mission, denied Maine the power to tax the inheritance of stock of a Maine corporation owned by a Massachusetts decedent. Again, *mobilia sequuntur personam*.

The income tax cases have scarcely felt the pressure of the campaign against multiple taxation. *Shaffer v. Carter*<sup>20</sup> allowed taxation by the State of the source of the income; *Maguire v. Trefry*<sup>21</sup> permitted taxation at the domicile. In *Senior v. Braden*,<sup>22</sup> decided in 1935, the latter case was questioned, the Court evidently feeling the logical necessity of invalidating double income taxation, but it soon became settled, in *People ex rel. Cohn v. Graves*,<sup>23</sup> that the Court would continue to uphold both taxes.

The doctrine of "business situs," permitting taxation apart from domicile, has proved useful in dealing with corporations, such as those of Delaware, whose domicile is technically in one State but economically and practically in another. Thus, in *Wheeling Steel Corp. v. Fox*,<sup>24</sup> decided in 1936, it was held that

<sup>14</sup>*Supra*, note 11.

<sup>15</sup>*Supra*, note 1. See also, *Beidler v. S. Car. Tax Comm.*, 282 U. S. 1, 51 S. Ct. 54, 75 L. Ed. 131 (1930).

<sup>16</sup>281 U. S. 586, 50 S. Ct. 436, 74 L. Ed. 1056 (1930).

<sup>17</sup>196 U. S. 466, 25 S. Ct. 297, 49 L. Ed. 556 (1905).

<sup>18</sup>232 U. S. 1, 34 S. Ct. 201, 58 L. Ed. 477 (1914). *Cf.* *Frick v. Pa.*, *supra*, note 6.

<sup>19</sup>*Supra*, note 2. Subsequent developments were foreshadowed by Mr. Justice Stone's dissent, arguing for taxation by State of incorporation.

<sup>20</sup>252 U. S. 37, 40 S. Ct. 221, 64 L. Ed. 445 (1920).

<sup>21</sup>253 U. S. 12, 40 S. Ct. 417, 64 L. Ed. 739 (1919).

<sup>22</sup>295 U. S. 422, 55 S. Ct. 800, 79 L. Ed. 1520 (1935).

<sup>23</sup>300 U. S. 308, 57 S. Ct. 466, 81 L. Ed. 668 (1937). *Cf.* *Lawrence v. State Tax Comm.*, 286 U. S. 276, 52 S. Ct. 556, 76 L. Ed. 1102 (1931).

<sup>24</sup>298 U. S. 193, 56 S. Ct. 773, 80 L. Ed. 1143 (1936).

West Virginia, where a Delaware corporation had its principal place of business, kept its books, etc., might tax the accounts receivable, bank accounts, etc., "existing" or arising from business done in other States. It was implied that Delaware could not tax. In a case decided the following year, *First Bank Stock Corp. v. Minnesota*,<sup>23</sup> the same principle upheld a tax by Minnesota, where the management functioned, upon foreign bank stock owned by a Delaware holding company, engaged in chain banking in Minnesota, Montana and the Dakotas.<sup>24</sup>

The first direct approval of double taxation (apart from the income tax cases) came with the decision in 1938 of *Schuylkill Trust Co. v. Pennsylvania*,<sup>25</sup> permitting taxation of corporate stock, owned by a non-resident, by the State of incorporation. Said the Court, "The property right so represented is of value, arises where the corporation has its home, and is therefore within the taxing jurisdiction of that State; and this, notwithstanding the ownership of the stock may also be a taxable subject in another State." *First National Bank of Boston v. Maine*<sup>26</sup> was not overruled but can be distinguished only on the ground, generally repudiated, that different considerations govern property taxation and inheritance taxation.

It is with respect to taxation of trust property, or inheritance thereof, however, that there has been most emphatic rejection of the tenet that multiple taxation *per se* violates the due process clause. Cases decided prior to 1930 had taken the position that, at least insofar as concerns property taxes, jurisdiction rests with the State in which the trust is administered, the theory being quite analogous to that of "business situs." Ordinarily, as in the leading case of *Safe Deposit Trust Co. v. Virginia*,<sup>27</sup> such State has coincided with location of the property or documentary evidence thereof and also with domicile of the trustee. In that case it was held that the foreign State of the beneficiary's domicile could not tax his interest in the trust. But only last May the Supreme Court, reviving the discredited case of *Bullen v. Wisconsin*<sup>28</sup> as authority, held in *Curry v. McCann*

<sup>23</sup>301 U. S. 234, 57 S. Ct. 677, 81 L. Ed. 1061 (1937).

<sup>24</sup>On the question whether taxation at such "commercial domicile" precludes taxation by the technical domicile, see *Newark Fire Ins. Co. v. State Board of Tax Appeals*, 307 U. S. 313, 59 S. Ct. 918, 83 L. Ed. 1312 (1938), where four Justices argued for the negative but four were noncommittal.

<sup>25</sup>302 U. S. 506, 58 S. Ct. 295, 82 L. Ed. 392 (1938).

<sup>26</sup>*Supra*, note 2.

<sup>27</sup>280 U. S. 83, 50 S. Ct. 59, 74 L. Ed. 180 (1929). There are decisions, involving testamentary trusts being administered by trustees appointed by Courts, denying power to tax to the jurisdiction of the trustee's domicile, the trust being administered in a different State. *Newcomb v. Page*, 244 Mass. 516, 113 N. E. 458 (1916). *Cf. Putnam v. Middleborough*, 209 Mass. 456, 95 N. E. 749 (1911).

<sup>28</sup>240 U. S. 625, 36 S. Ct. 473, 60 L. Ed. 830 (1916). But in *Wachovia Bank & Trust Co. v. Doughton*, 272 U. S. 567, 47 S. Ct. 202, 71 L. Ed. 413

less<sup>30</sup> that, where a Tennessee decedent had established but reserved powers of revocation and alteration by deed or will over an Alabama trust and had exercised the power by bequeathing the property to the same trustee but on different trusts, both States had the power to impose inheritance taxes upon the entire trust property. Control over the property by the settlor, said the Court, was a potential source of wealth which justified taxation by the State of her domicile. Likewise, administration and legal ownership by the trustee justified taxation by Alabama. In other words, jurisdiction no longer depends upon an artificial concept of situs, exclusive or otherwise, but upon practical considerations tending to show identity of economic interests with, and resulting substantial interests of, the various States concerned. But why, asked Chief Justice Hughes, in his dissenting opinion in the companion case of *Graves v. Elliott*,<sup>31</sup> should power to revoke have justified domiciliary taxation here, whereas in *Frick v. Pennsylvania* power to remove chattels from the State of their situs to the domiciliary State did not justify such a tax? But the case of *Pearson v. McGraw*,<sup>32</sup> decided at the current term, dispels any doubt that the Court will adhere to the position taken.

Today, as was true even when multiple taxation was prohibited, there is the additional danger of conflicting findings of domicile. The now classic illustration is the *Dorrance*<sup>33</sup> litigation, wherein both New Jersey and Pennsylvania found that the decedent was domiciled in their respective States, both collected taxes upon the entire estate, and the United States Supreme Court denied *certiorari* in both cases. Some hope of relief was afforded by the decision in *Texas v. Florida*,<sup>34</sup> where the Supreme Court took original jurisdiction to determine the conflicting claims of domicile, but the hope was cut short by the holding

(1926), the domiciliary State was denied the power to tax succession to a foreign trust as to which the decedent had and exercised a power of appointment by will.

<sup>30</sup>*Supra*, note 3.

<sup>31</sup>305 U. S. 667, 59 S. Ct. 151, 83 L. Ed. 432 (1939). Cf. 25 IOWA L. REV. 165 (1939).

<sup>32</sup>307 U. S. ...., 60 S. Ct. 211, 84 L. Ed. 139 (1939).

<sup>33</sup>*Dorrance's Estate*, 309 Pa. 151, 163 Atl. 303 (1932), *cert. den.* 287 U. S. 660, 53 S. Ct. 222, 77 L. Ed. 570 (1932) and 288 U. S. 617, 53 S. Ct. 507, 77 L. Ed. 990 (1932); *Dorrance v. Thayer-Martin*, 115 N. J. Eq. 268, 170 N. E. 601 (1934), *aff'd* 116 N. J. L. 362, 184 Atl. 743 (1936), *cert. den.* 298 U. S. 678, 56 S. Ct. 949, 80 L. Ed. 1399 (1936); *Hill v. Martin*, 296 U. S. 393, 56 S. Ct. 278, 80 L. Ed. 293 (1935). For a history of this litigation, see Ohlander, *Double Inheritance Taxation*, 14 TAX MAG. 387, 390, 448 (1936). And see Tweed and Sargent, *Death and Taxes Are Certain—But What of Domicile?* 53 HARV. L. REV. 68 (1939).

<sup>34</sup>306 U. S. 398, 59 S. Ct. 563, 83 L. Ed. 817 (1939). Cf. 52 HARV. L. REV. 1178 (1939).

at the current term, in *Massachusetts v. Missouri*,<sup>25</sup> 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 death<sup>26</sup> 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.<sup>27</sup>

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.*,<sup>1</sup> 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.<sup>2</sup> Being appurtenant, such rights

<sup>25</sup>307 U. S. ...., 60 S. Ct. 39, 84 L. Ed. 38 (1939). Cf. 26 VA. L. REV. 231 (1939).

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

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

<sup>1</sup>107 Mont. 330, 85 P. (2d) 350 (1938).

<sup>2</sup>*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."