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How Far Will Multi-State Death Taxation Go--Curry v. McCanless Revisited

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HOW FAR WILL MULTI-STATE DEATH TAXATION GO?

CURRY v. McCANLESS REVISITED

"Eighteen months ago, William K. Vanderbilt died and left an estate of $35,000,000. It is now reported that federal taxes took $25,000,000 and New York state taxes another $5,000,000, thus leaving $5,000,000 for the heir." [1] This quotation, a news item from a leading American newspaper, serves only to emphasize the extent to which our death [2] tax laws have gone in redistributing wealth. But, strange as it may seem, this is only a starting point of the burdensome effect of death taxation, for the full impact of the burden is realized only after one is confronted with the problem of multi-state death taxation.

Suppose, for example, Vanderbilt had died in New York owning stock of a corporation incorporated under the laws of Pennsylvania, New Jersey, and Tennessee. In such a situation all four states would have the right to impose a death tax on the transfer of the stock.[3] Again, suppose Vanderbilt died in New York owning a car which was kept in Tennessee. Could both New York and Tennessee impose a death tax on the value of that car? Today, the answer is no, only Tennessee may do so. Tomorrow, however, may bring a different result.

It is the purpose of this comment to show how the death tax laws today affect the estate of a person who dies in one state leaving tangible or intangible personalty [4] in another state, and also to recall the laws as they existed in the not too remote past and to surmise what they will be tomorrow in the light of recent trends.

The "subject" of the death tax is said to be the privilege of transferring

1. N. Y. Times, Aug. 5, 1945.
2. The term "death" tax is used throughout this paper. States sometimes call these taxes "inheritance" taxes, sometimes "estate" taxes. The Federal Government used to have a federal inheritance tax—now called federal estate tax. The difference between the two lies mainly in who pays what amount. In the case of an inheritance tax on a million dollar estate left equally to ten different persons, each person would pay a tax on $100,000, while in the case of an estate tax, the tax would be paid on the million dollars prior to distribution, thus resulting in a larger tax.
3. *See* State Tax Commission of Utah v. Aldrich, 316 U. S. 174 (1942).
4. That "tangible" may be a house. Or it may be a car. In fact, it may be any number or variety of "things" which you or I can see and touch, like paintings or golf clubs or books. The judges have called these things "tangibles"—tangible realty if a house or land is what is left by the decedent, and tangible personalty if what is left is a car or a ring. On the other hand, what the decedent leaves may be something we aren't supposed to be able to see and touch, like stocks or bonds or contract rights, which the judges have called "intangibles." Finally, there is a kind of no-man's land, an in between area where certain things the decedent leaves are put because they can't be placed anywhere else. When the decedent left a house, it fit like a round peg into a round hole—tangible realty. And when he left a car and a bond, these round pegs were joyfully fitted into their respective round tangible and intangible personalty holes. But the decedent might have died owning certificates representing undivided shares of ownership in real property or a seat on the stock exchange. These things look like realty but they also look like what the judges called intangible personalty.

property or the privilege of succeeding to it, but it is agreed that the tax is not laid upon the property itself. However, the type of property transferred at death determines whether the problem of multi-state taxation will come into play.

ONE MAN—ONE ACRE—ONE TAX

If X dies in New York owning land in Tennessee, only Tennessee can successfully impose a death tax based on the value of that land.[5] The doctrine that land or realty is taxable only by the state in which it is located has been settled since the earliest cases and to this day remains unchallenged. However, suppose X died in New York leaving land in Tennessee which he directs in his will to be sold. Did X by directing the sale of that land in his will "equitably convert" the land into an intangible personalty? Certainly New York tax officials would argue for an affirmative answer to this question because the state of the decedent's domicile can always impose a death tax unless the thing left by the decedent is realty or tangible personalty. The case of *In Matter of Estate of Swift* [6] raised the equitable conversion by will problem. X, living in New York, died owning land in New Jersey. The executors sold this land according to X's testamentary instructions. The New York court rejected the conversion theory, declaring, "neither the doctrine of equitable conversion of lands, nor any fiction of *situs* of movables, can have any bearing upon the question under advisement." [7]

Again, suppose X makes an executory contract for the sale of that land but dies before the date of sale. Does the fact that he died leaving a contract right mean that he died owning an intangible, thus allowing New York to tax? The cases are rare and the question remains unanswered by the Supreme Court; however, cases dealing with these no man's land situations have arisen in the state courts. One such case, particularly interesting because of the reasoning of both the majority and the dissent is the case of *Paul's Estate*.[8] X, a decedent-resident of Pennsylvania, had entered into a contract to sell some land he owned in New Jersey and Missouri, but died before the sale. Could Pennsylvania impose a death tax? The majority said no, but the dissenting judge gave a convincing argument the other way. The contract right, he argued, was an intangible and so subject to a death tax by X's home state just as any other intangible. A similar argument could be employed in regard to other no man's land situations.[9]

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5. Louisville and Jeffersonville Ferry Co. v. Kentucky, 188 U. S. 385 (1903).
6. 137 N. Y. 77, 32 N. E. 1096 (1893).
7. *Id.* at 86.
8. 303 Pa. 330, 154 Atl. 503 (1931).
9. Suppose, for example, X died a resident of Tennessee owning a share or certificate in a trust of realty in New York; or had contracted to lease land there; or had a mortgage on land there. The arguments in all but the last of these cases would run along much the same lines as those in the equitable conversion by sale and by will problems. It seems, how-

ONE MAN—ONE CAR—ONE TAX

If X dies a resident of New York, owning a car permanently kept in Tennessee, only Tennessee can impose a death tax on the value of that car. The rule that tangible personal property—a car, a watch, a ring—is subject to death taxes only by the state where permanently kept, was announced approximately 20 years ago by Mr. Justice Van Devanter in the case of *Frick v. Pennsylvania*.[10] Was this always the law? Certainly not. Before the *Frick* case, it was assumed that the power of the decedent's domicil to impose the tax extended to all personal property, tangible or intangible wherever located and regardless of whether a similar tax was exacted by another state.[11] This doctrine of multi-state death taxation of all personal property received its justification from the application of mutually inconsistent and antagonistic principles. In order to allow the decedent's home state to impose a death tax on personal property located outside of its borders, the fiction of *mobilia sequuntur personam* was applied, which when translated means, movables follow the law of the person;[12] while the "actual situs" of the property was given effect to justify the tax in states other than the decedent's domicil. The *Frick* case modified the law in so far as it applied to tangibles by preventing the application of the fiction *mobilia sequuntur personam* to support the exacting of the tax by the state of the decedent's domicil.

In the *Frick* ease, X died a resident of Pennsylvania leaving paintings and other art treasures located in New York and Massachusetts. The United States Supreme Court, in denying Pennsylvania the right to impose a death tax, stated, "to impose [this tax] without such jurisdiction is mere extortion and in contravention of due process of law. Here the tax was imposed on the transfer of tangible personalty having an actual situs in other states—New York and Massachusetts . . . True, its owner was domiciled in Pennsylvania but this neither brought it under the jurisdiction of that state nor subtracted anything from the jurisdiction of New York and Massachusetts. In these re-

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ever, that in the mortgage situation both Tennessee and New York could successfully impose death taxes, for the land, even though mortgaged, in no way lost its character as realty. X still died owning *land* located in New York. He didn't direct its sale in his will, nor had he entered into a contract to sell it, or own a share of it. He owned it—all of it, himself, and it was located in New York. That set of facts, under the law as laid down from the earliest cases and unquestioned until the present day, should be sufficient to allow New York to impose a death tax. But what about Tennessee? The mortgage was taken out there; credit was given there with the land as security. Furthermore, Tennessee law allowed X, its resident, to obtain the mortgage. It would seem that Tennessee also should be allowed to impose a death tax. But this is only conjecture. The cases are rare, and the questions unanswered by the Supreme Court. Cases dealing with these no-man's land situations have, however, arisen in the state courts.

10. 268 U. S. 473 (1925).

11. In Blackstone v. Miller, 188 U. S. 189 (1903) and Bullen v. Wisconsin, 240 U. S. 625 (1916) the Court observed arguendo that succession to tangible chattels may be taxed wherever found and since the law of the situs accepts its rules of succession from the law of domicil, the tangible is taxed again there.

12. STORY, CONFLICT OF LAWS § 378 (4th ed. 1852).

spects, the situation was the same as if the property had been immovable realty."[13] Thus, the still adhered to "one state death tax doctrine" was announced in regard to tangible personalty. Although it is difficult to reconcile the doctrine announced in the *Frick* case with the theory that the subject of death taxes is not the property itself but the privilege of disposing of it or of succeeding to it, that decision brought about what is submitted as the desirable result of obviating the injustice of "double taxation" as related to tangible personalty.

When the "One Man—One Car—One Tax" doctrine was announced in the *Frick* case, the situs of the property was not in question. Suppose, however, X died owning a fleet of trucks which weren't permanently kept anywhere, but which moved from state to state delivering goods. Would all states through which the trucks passed have the right to impose a death tax on the value of those trucks? This type of problem has not faced the court in the field of interstate death taxation. In the property tax field, however, the court has allowed each state through which the trucks pass to use the "unit rule," under which these states can compute the average number of trucks always moving within their boundaries and tax X on that basis as though the trucks were permanently kept there.[14]

It is not the purpose of this comment to examine the law of property taxes concerning objects which move from state to state, only to suggest that such criteria might be carried over into the death tax field. The death tax problem as stated here remains unanswered, but the property tax rules are available should the question arise. Whether or not these rules would be used by the Court is an open question.

There is, however, a decision by the Court that is useful in determining just what the word "permanent" means. In the *Schnader* case,[15] the decedent, a New York resident, had loaned his paintings to a museum in Pennsylvania. They remained there until his death about two years later. Both states claimed sufficient situs to impose a death tax, New York on the ground that although the paintings were located in Pennsylvania at the time of the decedent's death, they were only temporarily there, whereas Pennsylvania sought to impose a death tax on the ground of permanent location as laid down in the *Frick* case. The Court decided that the paintings had an "actual" situs in Pennsylvania and therefore that the rule of the *Frick* case governed. Mr. Justice Butler, delivering the opinion, observed, "For nearly two years next preceding his death, Clarke was willing—indeed, he authorized the museum director—to sell his collection. . . It does not appear that Clarke ever intended to have the

13. Frick v. Pennsylvania, 268 U. S. 473, 492 (1925).
14. Pullman Palace Car Co. v. Pennsylvania, 141 U. S. 18 (1891); American Refrigerator Transit Co. v. Hall, 174 U. S. 70 (1899).
15. City Bank Farmers Trust Co. v. Schnader, 293 U. S. 112 (1934).

pictures returned to New York. . . The location of the portraits in Pennsylvania was not merely transitory or temporary but it was fixed in an established abiding place in which they remained for a long time . . . By sending them into Pennsylvania . . . and his lack of definite intention ever to have them returned to New York . . . Clarke failed to maintain an actual situs in New York and created one for them in Pennsylvania. The principle applied in Frick v. Pennsylvania governs. . ." [16]

What, then, are the implications of the *Frick* and *Schnader* cases, and what is the "law" today when a man dies leaving a car in another state to somebody else? The answer to the last part of this question has been obvious since the *Frick* case—one man—one car—one tax, by the state where the car is permanently kept. But the first part of the question poses another question—when is the rule in the *Frick* case to be applied? In short, when is an object "permanently kept" in a state so as to give that state sufficient situs to impose a death tax?

First of all, nine times out of ten the state where the car or ring or other tangible is found at the time of the owner's death is the state where the object is permanently kept, thus allowing only that state to collect a death tax. Situations like this would arise when X, living in Minnesota, kept cattle at all times in Missouri or kept jewelry at all times in a safe deposit box in Kansas.

Even in cases where there is some doubt as to the "actual situs" of the object, there is at least a presumption that the state where the object is found is the state of permanent location. What can overcome that presumption? In the *Schnader* case two factors were stressed—intention and length of time. Although intention, or rather the lack of it, is mentioned several times in the decision, ("It does not appear that Clarke ever *intended* . . ."; "his lack of definite intention to do so"), the real basis of the opinion seems to be "actual situs" as determined by length of time, ("not merely transient, transitory or temporary . . . fixed in an established abiding place in which they remained for a long time").[17]

In other words, had Clarke sent the paintings to the Pennsylvania museum only a few days or weeks before his death, the decision might have gone the other way—no "actual situs." But where is the dividing line? Would one year have been long enough? Six months? The judges, even the same judges, might differ according to the facts of the individual case.

Coupled with length of time are intention and purpose. Did X ever intend to bring his car back to his home state? And for what purpose did he send it into another state? The writer believes that even though Clarke, in the

16. *Id.* at 119, 120, 121.
17. *Id.* at 120.

Schnader case, had intended to bring the paintings back to his domiciliary state at some future time, that fact alone would not have been enough to keep the "actual situs" in his home state. He left the paintings in Pennsylvania for too long a period and his *purpose* in so doing was to put them on exhibition for sale.

Suppose that X sent a diamond brooch to another state for repairs and that it took the jeweler two years to obtain the proper parts, X dying at the end of that time but before the brooch was returned. Here, although the length of time approximated that in the *Schnader* case, there was a definite intention to have the brooch returned and the purpose was not for the disposal of the object but rather for its repair. It seems that even Mr. Justice Butler would have denied an "actual situs" in the jewelry store state in such a case. These factors then, length of time, intention, and purpose, with emphasis on the first, seem to be the governing criteria in deciding which of two states has sufficient situs to impose a death tax when a man dies in one state owning an object found in another state.

ONE MAN—ONE BOND—MORE THAN ONE TAX

Although the Supreme Court invalidated multiple state death taxation of tangible property, it did not immediately follow suit with respect to intangibles, the avowed reason being the lack of any "actual situs." However, before the law of multi-state taxation of intangibles was announced, it witnessed an era of successful opposition. In the case of *Farmers Loan and Trust Co. v. State of Minnesota*,[18] the right of the state to impose a death tax by virtue of the domicil of the debtor was denied. X, a New York decedent, died owning bonds issued by the state of Minnesota and by certain municipal corporations, which bonds were kept in New York. Minnesota was denied the right to impose a death tax and New York was granted the exclusive right to do so. Mr. Justice McReynolds, delivering the majority opinion, stated, "We have determined that in general intangibles may be properly taxed at the domicile of their owner and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles. The difference between the two things, although obvious enough, seems insufficient to justify the harsh and oppressive discrimination against intangibles contended for on behalf of Minnesota."[19] Mr. Justice McReynolds had the obstacle of *Blackstone v. Miller*[20] to hurdle, which hurdle he managed to jump only by delving into the social and economic maladjustments that would result from multi-state

18. 280 U. S. 204 (1930).
19. *Id.* at 212.
20. 188 U. S. 189 (1903).

taxation, observing, "*Blackstone v. Miller* . . . lends support to the doctrine that ordinarily choses in action are subject to taxation both at the debtor's domicile and at the domicile of the creditor; that two States may tax on different and more or less inconsistent principles the same testamentary transfer of such property without conflict with the Fourteenth Amendment. The inevitable tendency of that view is to disturb good relations among the States and produce the kind of discontent expected to subside after the establishment of the Union . . . *Blackstone v. Miller* no longer can be regarded as a correct exposition of existing law; and to prevent misunderstanding it is definitely overruled." [21] Mr. Justice Stone concurred in the decision but on a different basis. He asserted that multi-state taxation in itself was not necessarily in contravention of the Fourteenth Amendment; however, before a state can impose a death tax, thought Stone, it must have jurisdiction. In the case at bar, he added, though the contract transferred was called into existence by the law of Minnesota, its obligations could not be constitutionally impaired or withdrawn from the protection which those laws gave it at its inception.[22]

Mr. Justice Holmes and Mr. Justice Brandeis, long time ardent advocates of commonsense constitutional interpretation, dissented. The dissenting view is worthy of note, particularly since it reflects the majority opinion in a subsequent case establishing the present day multi-state taxation law of intangibles. Holmes proclaimed, "No one would doubt that the law of Minnesota was necessary to call the obligation into existence . . . It seems to me that it is the law of Minnesota alone that keeps the debt alive . . . *Blackstone v. Miller* . . . supports my conclusion and I do not think it should be overruled. A good deal has to be read into the Fourteenth Amendment to give it any bearing upon this case. The Amendment does not condemn everything that we may think undesirable on economic or social grounds." [23] The one intangible—one death tax doctrine gradually lost recognition in the light of growing acceptance of this dissenting view until 1939, when it was definitely overthrown by *Curry v. McCanless*.[24]

A decedent resident of Tennessee had created a trust of intangibles reserving control over the income for life and power to revoke the trust by will. The trust was administered in Alabama by a trustee incorporated under the laws of that state. At her death, her executors brought suit seeking a declaratory judgment to determine liability of the trust estate for death taxes. On appeal from the Supreme Court of Tennessee, the Supreme Court of the United States refused to adhere to the doctrine that the Fourteenth Amendment prohibited multi-state taxation of intangibles, and by permitting *both*

21. Farmers Loan & Trust Co. v. State of Minnesota, 280 U. S. 204, 209 (1930).
22. *Id.* at 214.
23. *Id.* at 217, 218.
24. 307 U. S. 357 (1939).

states to exact the tax, subscribed to the view that protection and benefit are together the only test of a state's jurisdiction to tax. The decision was rendered by a 5-4 vote, with the dissenters arguing that since the trust property was never in Tennessee and since the trustee was domiciled in Alabama and administered the trust there, it became localized in Alabama, resulting in a lack of the situs necessary to give Tennessee jurisdiction to exact the tax.

Now it is to be remembered that the state of domicil here was Tennessee. It is also to be remembered that during the preceding one intangible—one state—one tax period, the domiciliary state was selected as the state of situs for death tax purposes and that state alone could collect the tax. Wasn't it odd, then, that the dissenters in the *Curry* case argued that Alabama, *not* the state of the decedent's domicil, was the only state which should be permitted to tax? Not at all, because Alabama was the state of *legal* domicil. In other words, when the decedent set up a trust in Alabama, she transferred the legal title to the stocks and bonds to the trustee there.

But how about the due process and "actual situs" arguments? The *Curry* case was the beginning of the end of the due process clause of the Fourteenth Amendment as an effective argument against multi-state death taxation of intangibles: ". . . we think that neither reason nor authority requires its acceptance in the circumstances of the present case . . . it is difficult to see how it could be said . . . upon what articulate principle the Fourteenth Amendment could be thought to have withdrawn from either state the taxing jurisdiction which it undoubtedly possessed before the adoption of the Amendment by conferring on one state, at the expense of the other, exclusive jurisdiction to tax . . . 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. . . the Fourteenth can hardly be thought to make us do so here . . ."[25]

Mr. Justice Stone, who wrote these words, was referring to the earlier case of *Burnett v. Brooks*.[26] In that case, X, a British subject, died domiciled in England owning British government bonds, bonds of several of the states of the United States, and bonds and stocks of a corporation organized under the laws of State Y. All of these securities were in the possession of Z, a United States resident who collected the income and deposited it in a New York bank to X's credit. Could the United States include these securities in X's gross estate when computing the federal estate tax? The Court said yes—the due process clause of the Fifth Amendment did not apply. Thus the *Curry* case, where two states were involved, saw Mr. Justice Stone refusing to apply

25. *Id.* at 363, 369.
26. 288 U. S. 378 (1933).

the Fourteenth Amendment just as the Court had refused to apply the Fifth Amendment where two nations were involved.

There remained the "actual situs" argument raised by the dissenters—that since the trust property was completely localized in Tennessee, only Tennessee should be allowed to impose a death tax. Mr. Justice Stone and the majority were quick to knock down this argument, countering with what has been called the "benefit and protection" theory, a theory that was to become the big stick in all subsequent multi-state death tax cases. In applying this doctrine the Court reasoned that when the settlor set up a trust in a state other than her domiciliary state she created two sets of legal relationships, one the legal ownership in the Alabama trustee and the other her equitable right to control the action of the trustee with respect to the trust property and to compel him to pay over the income during her life, and her power to dispose of the property at death. The legal ownership of the stocks and bonds by the Alabama trustee gave Alabama the right to impose a death tax, while the fact of domicil accompanied by equitable control gave Tennessee that right also. Mr. Justice Stone pointed to *Bullen v. Wisconsin*.[27] In that case, X, a decedent resident of Wisconsin, had placed stocks and bonds in trust with a trustee in Illinois, retaining income for life, power to revoke the trust, and the right to control the disposition of the principal and income at his death. Wisconsin was allowed to impose a death tax as well as Illinois. The same death tax rights, said Mr. Justice Stone, existed in the *Curry* situation.

Furthermore, said Stone, it is foolish to attempt to ascribe a "fictitious situs" in a single state to intangibles despite the multiple legal interests to which they may give rise. The decedent here had the duty to contribute to the support of the government of her home state. In return she received the benefit and protection of its laws. Similarly, this benefit and protection existed in Alabama, the state where the trust was created. By extending her activities into that state she availed herself of the benefit and protection of Alabama laws. "Protection, benefit, and power over the subject matter are not confined to either state." [28]

What did the *Curry* case mean? First, the Fourteenth Amendment was negatived as an effective argument against multi-state death taxation of intangibles. If there was any doubt about this, it was soon dispelled in a subsequent case.[29] Mr. Justice Douglas, who wrote the opinion, cited the *Curry* case in knocking down the due process argument.

Secondly, the benefit and protection theory was here and here to stay. No longer was the state of legal domicil, or what has been called the state of "trust situs" the only state that could tax. On the contrary, in a trust situation

27. 240 U. S. 625 (1916).
28. Curry v. McCanless, 307 U. S. 365, 368 (1939).
29. Central Hanover Bank v. Kelly, 319 U. S. 94 (1943). (See Chart)

both states could impose a death tax; both give benefit and protection for which they are justly due a return.

How far would the new doctrine be carried? The *Curry* case was a trust situation, but there were strong words in the opinion which foretold the shape of things to come—words such as "Shares of corporate stock may be taxed at the domicile of the shareholder and also at that of the corporation which the taxing state has created and controls. . . ." [30]

One aspect of Mr. Justice Stone's opinion stood out prominently, especially to the dissenters, particularly to Mr. Justice Hughes, who rapped it convincingly in another case decided on the same day—the *Elliott* case.[31] Mr. Justice Stone had been very careful to reflect the difference between tangibles and intangibles as far as multi-state death taxation was concerned. "Very different considerations, both theoretical and practical, apply to the taxation of intangibles . . ." [32] Tangibles, he said, like cars, are located in a single place, thus only that place can tax at death. Not so with intangibles, which can have no situs, and are not localized. These statements were the basis for Mr. Justice Hughes' attack which was launched in a dissenting opinion in the *Elliott* case while arguing for a *one* state death tax for intangibles.

X, a resident of State A, had transferred bonds to a State A trustee, the income to be paid to Y and Z, X retaining until his death the right to revoke the trust. X moved to State B and died a resident there. Could both States A and B impose a death tax? The court said yes, again by a 5-4 vote, the majority basing the decision squarely on the *Curry* holding and its reasoning. Mr. Justice Hughes in his dissenting opinion, declared, ". . . the legal title to the property in question is in a Colorado (State A) trustee, the trust was created under the Colorado law and its administration is subject to the control of Colorado. To say that these securities are not as effectively localized in Colorado, as were the furniture, pictures and other art treasures of Mr. Frick in New York and Massachusetts, where alone their transfer could be taxed, would be to ignore realities and to make important rights turn upon a verbal distinction." [33]

Thus, Mr. Justice Hughes' challenge to the tangible-intangible distinction raised the question, does an adequate distinction exist between tangibles and intangibles to justify the imposition of inconsistent death tax laws? If not, which of the two antagonistic principles, "actual situs" or *mobilia sequuntur personam,* should prevail as a uniform death tax treatment of all personalty, tangible and intangible? The answers will be arrived at through practical considerations rather than through theoretical reasonings.

30. See note 28 *supra.*
31. Graves v. Elliott, 307 U. S. 383 (1939).
32. 307 U. S. 357, 365 (1939).
33. Graves v. Elliott, 307 U. S. 383, 391 (1939).

The Supreme Court had the opportunity to decide these questions in the case of *Pearson v. McGraw*.[34] X, a resident of State A, moved to State B but left securities with a trustee domiciled in State A. Admittedly in contemplation of death, he directed the trustee to sell the securities and to buy federal reserve notes and with the proceeds to purchase more securities. The reason for this transaction was obvious, for if X died having created a trust of intangibles (the securities) in another state, that other state and X's home state would both have the right to impose a death tax on the value of those intangibles. But if X created a trust of tangibles (federal notes) in another state, the one state tax doctrine announced in the *Frick* case would prevail. The Court, without deciding the nature of federal reserve notes, granted both states the right to impose a death tax. Mr. Justice Douglas, who wrote the opinion for the majority, declared, ". . . the various steps in the series must be considered as constituting but one integrated and indivisible transaction—a transfer by decedent of intangibles in contemplation of death." [35] Mr. Justice Stone was not satisfied with this dismissal of the case, asserting in his concurring opinion that the court shirked the "duty of deciding the only federal question which could by any possibility be said to be raised by the record, namely, whether the Constitution precludes taxation of the gift of the banknotes merely because of the physical fact that they are located without the state." [36] Mr. Justice Stone didn't decide, as some writers have asserted, whether the federal reserve notes were tangibles or intangibles.[37] What he did say was, ". . . I am of the opinion that there is nothing in the Constitution to compel a state to treat federal reserve notes for tax purposes as chattels were treated in *Frick v. Pennsylvania* . . ." [38]

The answer to the query of how far the benefit and protection theory would be carried was not far away. The *Curry* and *Elliott* cases were both situations in which the state where the trust was set up and the state of the donor's domicil each tried to impose death taxes and were allowed to do so. A few years later, in the case of *Graves v. Schmidlapp*,[39] the state of the *donee's* domicil and the state where the trust was created tried to impose death taxes. X, a decedent resident of State A, had created a trust of securities in State A, giving to Y, a resident of State B, a power of appointment over the trust property. Y died a resident of State B where his will was probated, having named the successor. Could both States A and B impose a death tax in such a situation? About twenty years previously, in *Wachovia Bank &*

34. 308 U. S. 313 (1939).
35. *Id.* at 317.
36. *Id.* at 319.
37. Brown, *Multiple Taxation of Intangibles*, 40 MICH. L. REV. 806 (1942).
38. 308 U. S. 313, 320 (1939).
39. 315 U. S. 657 (1942).

Trust Co. v. Doughton,[40] the Court had said no under a similar set of facts. State A, Yes, not because X had lived there but because the trust was created there. State B, No, because there was "insufficient situs" there for the imposition of a death tax. The fact that State B happened to be Y's state of domicil was immaterial. Furthermore, said that Court, although there was a power of appointment involved, the exercise of that power would have been effected regardless of the laws of State B, where Y died, for the exercise of the power depended not upon the laws of that state but upon the laws of State A, where the trust was set up. But the benefit and protection doctrine was already deeply imbedded and the *Wachovia* case was specifically overruled. Here again there was no argument about the right of State A, the "trust situs" state, to tax. State A was like Alabama in the *Curry* case and like Colorado in the *Elliott* case. The only question was—could State B, the state of Y's domicil, impose a death tax also? In saying yes, the court through Mr. Justice Stone once more made use of the benefit and protection theory. The fact that Y, the donee, was domiciled in State B was alone enough to allow that state to tax —since the domiciliary state afforded benefit and protection to the decedent. In answer to the *Wachovia* argument that only the law of the state where the trust was created determines whether the power has been validly exercised, Mr. Justice Stone said, that may be true, but the law of the donee's domicil also made a contribution, for the will of the donee was probated and given effect in State B. State B thus gave something for which it could ask a return —the death tax.

The next extension of the *Curry* rule came before the court in the case of *State Tax Commission of Utah v. Aldrich*.[41] X died a resident of State A, owning stocks of corporations incorporated under the laws of State B. The stock certificates had always been kept by X in State A. The corporation, the Union Pacific, had always kept its stock books, records and transfer agents in State A. Could both States A and B impose a death tax? Put another way, can the state of incorporation impose a death tax on the shares of a non-resident decedent? The answer to this question could have been predicted from a reading of the *Curry* case, when Mr. Justice Stone went out of his way to say (though perhaps he wasn't referring specifically to death taxes): "Shares of corporate stock may be taxed at the domicile of the shareholder and also at that of the corporation which the taxing state has created and controls."[42] And this was precisely the way the *Aldrich* case was decided, Mr. Justice Douglas writing the majority opinion. The *Aldrich* case, too, had a predecessor, the case of *First National Bank v. Maine*.[43] That case saw the State of

40. 272 U. S. 567 (1926).
41. 316 U. S. 174 (1942).
42. 307 U. S. 357, 368 (1939).
43. 284 U. S. 312 (1932).

Maine attempting to collect a death tax on the transfer of stock of a corporation incorporated under the laws of Maine. This stock was owned by a Massachusetts resident. The Court denied Maine the right to tax, declaring, ". . . shares of stock, like the other intangibles, constitutionally can be subjected to a death transfer tax by one state only . . . [the state of domicil]." [44] The Court again went into the social and economic desirability factors, discussing the "desirability for uniform rules" and "reciprocal inheritance statutes." However, the *Maine* case was decided before the adoption of the benefit and protection doctrine, and the *Aldrich* case specifically overruled it. Utah, said Mr. Justice Douglas, gave the Union Pacific its very existence; it affords protection to the shareholder's rights and it has power over the transfer by the corporation of its shares of stock—"Certainly that protection, benefit, and power over the shares would have satisfied the test of *Blackstone v. Miller* and *Curry v. McCanless*." [45]

Apart from the holding itself, there is contained in the opinion one passage that represents the way Justices Douglas, Black and others feel about multi-state taxation: ". . . even though we believed that a different system should be designed to protect against multiple taxation, it is not our province to provide it." [46] Mr. Justice Jackson wrote a long and vigorous dissent declaring, "I . . . take today's decision to mean that any State may lay substantially any tax on any transfer of intangible property toward which it can spell out a conceivable legal relationship . . . And since the Due Process Clause speaks with no more clarity as to tangibles than as to intangible property, the question is opened whether our decisions as to the taxation of tangible property are

44. *Id.* at 328.
45. 316 U. S. 174, 180 (1942).
46. *Id.* at 181. The necessity for this judicial nudging of Congress to do something to correct the evils of multi-state death taxation is still further emphasized when one examines the so-called "double domicil" cases. In Texas v. Florida, 306 U. S. 398 (1939), the decedent died in New York but had moved from place to place during his life. He had a hotel room in New York, a winter home in Florida, a rented room in Texas, and a large home in Massachusetts. All of these states claimed a right to impose a death tax on the basis of domicil. Their claims plus the federal estate tax exceeded the value of the estate. The Court has refused to take jurisdiction in all previous double domicil cases, but did so in this instance under the provisions of Art. III, § 2 of the Constitution. An appointed special master found that the decedent was domiciled in Mass. at the time of his death. This report and the master's findings were accepted by the Court, which said, in effect, this man had only one domicil—Mass., and only Mass. could impose a death tax. The inability of the estate to answer all claims required the exercise of the Court's equitable jurisdiction.

In Massachusetts v. Missouri, 308 U. S. 1 (1939), which was not strictly a double domicil case, the Court refused to accept jurisdiction since the estate was capable of satisfying all death tax claims. (X, domiciled in Mass., died leaving an estate there of $12,000. While living in Mass., X had created trusts aggregrating over two million dollars with Missouri trustees. Massachusetts and Missouri had reciprocal exemption tax laws by which intangibles of a non-resident decedent were exempted from taxes for so long as the state of the decedent's domicil did not attempt to impose such a tax on intangibles owned by residents of the other state. Missouri, however, tried to impose a death tax despite this reciprocal agreement. Mass. asked the Court to take jurisdiction on the basis of its decision in the case of *Texas v. Florida,* but the Court refused to do so because of the lack of mutually exclusive claims.)

not due to be overhauled." [47] In effect, Mr. Justice Jackson asked, if the *Curry* doctrine is to be extended this far, shouldn't it be extended to include tangible personalty? Before attempting to answer that question, what was the full significance of the *Aldrich* decision?

The *Maine* case was specifically overruled. Today, if X dies a resident of State A, owning stocks of forty-seven different corporations incorporated under the laws of forty-seven different states, all of the forty-seven different states, if they choose to do so, can impose a death tax as based on the value of the stock of that corporation which they chartered. And the state of domicil, State A, can impose a death tax based on the entire value of all forty-seven stocks. Such an example is unlikely to occur, but it is "the law" today.

Does the *Aldrich* case mean that if X died a resident of State A, owning stocks and bonds of a corporation incorporated under the laws of State A and kept at all times by X in a safety deposit box in a State B bank that State B can impose a death tax on the value of those stocks and bonds? Some writers point to the *Aldrich* case in answering this question in the affirmative. However, a careful examination of that case calls for an opposite conclusion, for it was stated, "In case of shares of stock, 'jurisdiction to tax' is not restricted to the domiciliary State. Another State *which has extended benefits or protection, or which can demonstrate, the practical fact of its power, or sovereignty as respects the shares . . . may likewise constitutionally make its exaction.*" [48] [Italics added]

In other words, the mere fact that I die a resident of California, owning shares of stock which I have buried in a tin box in the ground across the line in Arizona, doesn't entitle Arizona to impose a death tax based on the value of those shares. Similarly, in the safe deposit box example, where the shares lie idly, the paper evidences in another state mean nothing. The state attempting to collect a death tax must have some plain connection of a substantial nature with the subject of the tax.

Is the fact that a corporation does business in a state enough to create the legal relationship necessary to allow that state to impose a death tax? Suppose, for example, that X dies in Missouri owning stocks of Missouri corporations which do business in seven other states. Can those seven states impose a death tax? About twenty years ago, the case of *Rhode Island Hospital Trust Co. v. Doughton* [49] presented a somewhat similar problem. North Carolina attempted to impose a death tax on the transfer of stock of an out-of-state corporation by an out-of-state resident. The tax, however, was not based on the amount of business transacted by the corporation in North Carolina but rather at that proportion of their actual value which the corporate assets

47. 316 U. S. 174, 201 (1942).
48. *Id.* at 181, 182.
49. 270 U. S. 69 (1926).

in North Carolina bore to the total corporate assets. The stockholder, said the Court, didn't own the property in North Carolina—it belonged to the corporation. Therefore, jurisdiction to tax cannot be made to rest upon the situs of part of the corporate property in the state. Nor did the shareholders subject their stock to the taxing jurisdiction of North Carolina by the company's doing business there.

Thus, although the tax in the *Rhode Island Hospital* case was based on the proportionate amount of property owned by the corporation in North Carolina and not on the amount of business done there, the wording of the opinion, as well as the subsequent single state death tax cases made it clear that even on a doing business basis, a death tax wouldn't succeed. Has the picture changed since? Although the issue hasn't squarely faced the Court, it is submitted that the application of the benefit and protection doctrine calls only for an affirmative answer. The state where the corporation does business grants numerous privileges to the corporation and after all, the stockholder is a part owner of the corporation who benefits when it benefits.

The impracticability of such a method of obtaining revenue, however, seems to make it unlikely that the states would resort to such means. Picture a long list of securities left by a dying man. Each state would have to compute for each share of stock left by every decedent just how much business was done within its borders by the issuing corporation. However, it is within the province of each state to do so.

The adoption and extension of the benefit and protection doctrine makes it apparent, in the opinion of the writer, that the Court is getting nearer and nearer to saying outright—one man—one car—more than one tax. That was the law prior to the *Frick* case, the start of the single death tax doctrine. Then came the *Curry* case, which established a distinction between tangibles and intangibles for the purpose of applying death tax laws by invoking the benefit and protection doctrine to intangibles. The *Elliott, Schmidlapp* and *Aldrich* cases followed, extending the benefit and protection doctrine still further. Do these cases mean that more than one state can also tax tangibles? The Court has not yet faced the problem squarely, but a strong argument can be made that way. Under the reasoning of the benefit and protection theory, the owner of the car, ring or painting is given the privilege, in his domiciliary state, of contracting for the sale of these objects and of transferring title to them in any other way. Thus, even though those objects have a permanent situs in another state, benefit and protection are given by the home state.

The attitude of the present Court in this regard is reflected in an examination of the language used in two recent personal property tax cases. In the case of *Greenough v. Tax Assessors*,[50] X died a resident of New York. He

50. Greenough v. Tax Assessors, 67 Sup. Ct. 1400 (1947).

created a testamentary trust of intangibles, the evidences of which were located wholly within New York, and appointed two trustees to carry out the provisions. One trustee and the life beneficiary were residents of New York and the other trustee a resident of Rhode Island. Under a Rhode Island statute, a personal property tax was levied against the resident trustee upon ½ of the total value of the trust corpus, although the trustee did not exercise any of his trust powers in Rhode Island. The estate contended that the tax could not be assessed by virtue of the trustee's residence only and that since the state of Rhode Island did not give benefit and protection to the trust wholly beyond its jurisdiction, the statute as applied to this case was unconstitutional. The United States Supreme Court by a 5-4 vote upheld the tax and declared through Mr. Justice Reed, "... When testamentary trustees reside outside of the jurisdiction of the courts of the state of the seat of the trust, third parties dealing with the trustee on trust matters or beneficiaries may need to proceed directly against the trustee as an individual for matters arising out of his relation to the trust. Or the resident trustee may need the benefit of the Rhode Island law to enforce trust claims against a Rhode Island resident." [51] Thus the henefit and protection doctrine was employed to uphold a tax imposed by a state by virtue of the benefit and protection it has made available to its residents, the fact that the resident trustee in this ease did not enjoy the benefits on behalf of the trust estate being immaterial. This holding seems to be in accord with Mr. Justice Jackson's dissent in the *Aldrich* case. What is the justification for this broad extension of the benefit and protection doctrine? The Court justified it as follows, . . . "When the taxpayer's wealth is represented by intangibles the tax gatherer has difficulty in locating them and there is uncertainty as to which taxing district affords benefits or protection to the actual property that the intangibles represent." [52] If this reason is a sufficient basis for multi-state taxation of intangibles, would tangibles be treated likewise if the actual situs could not be definitely determined as in the case of vehicles in continual transit? According to *Northwest Airlines v. Minnesota* [53] the answer is yes.

A commercial airline, incorporated under the laws of Minnesota and carrying on its activities through the Northwestern States, established St. Paul, Minnesota as its principal place of business. In 1939, all of its planes had been in Minnesota sometime or other, but none for the entire year. Some states in which the air activities were conducted levied a personal property tax on a proportionate part of the total number of planes and Minnesota sought to levy a property tax on the entire fleet. The majority of the Court, 5-4, in upholding the tax, declared through Mr. Justice Frankfurter, "The relation between Northwest [the airline company] and Minnesota, a relation existing

51. *Id.* at 1405.
52. *Id.* at 1403.
53. 322 U. S. 292 (1944).

between no other state and Northwest, and the benefits which this relation affords are the constitutional foundation for the taxing power which Minnesota has asserted." [54] The majority expressly refrained from making a commitment regarding the right of the *other* states to impose a tax on the same planes taxed by Minnesota. By the Court's very refusal to so commit itself, the deeply imbedded doctrine announced in the *Frick* case becomes questionable, particularly since the ever-popular benefit and protection doctrine has invaded the field of tangibles, superseding the "actual situs" argument. In the light of tbe language used by the Court, it appears as though the benefit and protection doctrine will be applied to justify the exacting of a death tax on tangibles by more than one state when the problem squarely faces the Court. Constitutionally, there is nothing to prevent it, since no valid distinction exists between tangibles and intangibles to justify the application of antagonistic principles.

Death tax laws have undergone an evolution, and, as usual, the judges have made the changes. What was true the day before yesterday was not true yesterday. And what was the law yesterday is not the law today. Tomorrow may see still more changes. The writer has prepared a death tax chart, placed on the succeeding pages, which he submits as an aid to the attorney who is faced with a multi-state death tax problem under the law as it is today.

THOMAS A. THOMAS

54. *Id.* at 294.

SUMMARY

PROBLEM	STATE THAT CAN IMPOSE DEATH TAX	BASIS OF DECISIONS	CASES
1. X dies a resident of State A, owning a farm located in State B.	State B only	Physical location—land to be taxable must be within the geographical limits of the taxing state.	Louisville & Jeffersonville Ferry Co. v. Kentucky, 188 U. S. 385 (1903).
2. X dies a resident of State A, owning cattle permanently kept on his farm in State B.	State B only	Physical location of tangible	Frick v. Pennsylvania, 268 U. S. 473 (1925).
3. X, a resident of State A, places stocks in trust with a State B trustee, retaining control until his death.	States A and B	Benefit and protection doctrine—two legal relationships—legal title in trustee and equitable title in settlor.	Curry v. McCanless, 307 U. S. 357 (1939).
4. X, a resident of State A, transfers securities in trust to a State A trustee to pay the income and ultimately to distribute the principal to Y and Z, retaining until his death the right to revoke the trust. X moves to State B and dies there.	States A and B	Benefit and protection doctrine	Graves v. Elliott, 307 U. S. 383 (1939).
5. X, a resident of State A, creates a trust of securities in State B, retaining the right to income foi life.	States A and B	Benefit and protection doctrine	Central Hanover Bank v. Kelly, 319 U. S. 94 (1943).
6. X, a decedent resident of State A, created a trust of securities in State A, giving to Y, a resident of State B, power of appointment over the trust property. Y dies a resident of State B, where his will is probated.	States A and B	Benefit and protection doctrine	Graves v. Schmidlapp, 315 U. S. 657 (1942).
7. X dies a resident of State A, owning stocks of corporations incorporated under the laws of State B—stock certificates always kept by X in State A.	States A and B	Benefit and protection doctrine	State Tax Commission of Utah v. Aldrich, 316 U. S. 174 (1942).
8. X dies a resident of State A, owning stocks of a corporation incorporated in State A but kept at all times by X in a safety deposit box in State B.	State A only	Benefit and protection under the laws of State A but no benefit or protection given by State B.	State Tax Commission of Utah v. Aldrich, 316 U. S. 174 (1942).
9. X, a resident of State A, moves to State B but leaves his securities with a State A trustee. Admittedly in contemplation of death he directs the trustee to sell the securities and buy federal reserve notes, and then to purchase more securities with the proceeds.	States A and B	Benefit and protection doctrine—transfer of intangibles—*Curry* rule applies.	Pearson v. McGraw, 308 U. S. 313 (1939).
10. X, a resident of State A, dies owning stock of a corporation incorporated under the laws of States B, C, and D, and which does business in State E. The stock transfer office is located in State F.	States A, B, C, D, E, and F	Benefit and protection doctrine	Rhode Island Hospital Trust Co. v. Doughton, 270 U. S. 69 (1926); State Tax Commission of Utah v. Aldrich, 316 U. S. 174 (1942).