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TAXATION - JURISDICTION TO TAX - MULTIPLE TAXATION OF INTANGIBLES

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TAXATION — JURISDICTION TO TAX — MULTIPLE TAXATION OF INTANGIBLES — In two recent decisions of the United States Supreme Court, *Curry v. McCanless*,[1] and *Graves v. Elliott*,[2] a majority of the justices refused to adhere to the doctrine that the Fourteenth Amendment prohibits taxation of intangibles by more than one state, and subscribed instead to the view that control and benefit are together the only test of jurisdiction of the states to tax. In *Curry v. McCanless*, the decedent, a resident of Tennessee, had created a trust of intangibles, reserving control over the income during her 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 in a chancery court in Tennessee against the State Tax Commission of Alabama and the Commissioner of Finance and Taxation of the state of Tennessee, seeking a declaratory judgment determining liability of the trust estate for inheritance taxes. On appeal from a decree of the Supreme Court of Tennessee, declaring that Tennessee could tax and Alabama could not, it was held that both states had power to tax. In *Graves v. Elliott*, the decedent, while residing in Colorado, established a trust of intangibles to be administered in that state. She reserved power to revoke and modify the trust during her life. Later she removed to New York where she resided until her death. After the state of Colorado had levied an inheritance tax at her death upon the trust estate, proceedings were commenced in New York to assess death taxes under the New York tax law. On certiorari, it was held that New York had power to tax. The theory of the decisions was that legal ownership by the trustee and the power reserved to the settlor were distinct intangible rights, each taxable at the domicile of its owner.[3] Chief Justice Hughes,

[1] 307 U. S. 357, 59 S. Ct. 900 (1939).

[2] 307 U. S. 383, 59 S. Ct. 913 (1939).

[3] "She [decedent] thus 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 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. . . . If it be thought that it is the identity of the intangibles with the person of the owner at the place of his domicile which gives power over them and hence 'jurisdiction' to tax, and this is the reason underlying the maxim mobilia sequuntur personam, it is certain here that the intangibles for some purposes are identified with the trustee, their legal owner, at the place of its domicile and that in another and different relationship and for a different purpose—the exercise of the power of disposition at death, which is the equivalent of ownership—they are identified with the place of domicile of the testatrix, Tennessee. . . . We can find nothing in the history of the Fourteenth Amendment and no support in reason, principle, or authority for saying that it prohibits either state, in the circumstances of this case, from laying

Justices McReynolds, Butler and Roberts dissented in both cases: they ascribed a tax situs to the corpus of each trust at the domicile of the trustee and invoked the due process clause of the Fourteenth Amendment to prohibit taxation a second time at the settlor's domicile.

The majority relied on *Bullen v. Wisconsin;*[4] the dissenting justices on *Wachovia Bank & Trust Co. v. Doughton.*[5] In the *Bullen* case the Court had held that the domicile of the settlor, who had created a trust of intangibles in another state, had jurisdiction to levy an inheritance tax at his death, where he had reserved control over the income and power to revoke the trust during his life. In the *Wachovia Trust Company* case it was held that the domicile of the donee of a general testamentary power of appointment, in a trust of intangibles which the settlor-donor had established and which was administered in another state, lacked jurisdiction to impose an inheritance tax upon the corpus at the donee's death. Justices Holmes, Brandeis and Stone had dissented in *Wachovia Trust Co. v. Doughton,* for the reason that the result in that case was irreconcilable with *Bullen v. Wisconsin.* The fact that the settlor could have exercised the power at any time during his life in the *Bullen* case, while in *Wachovia Trust Co. v. Doughton* the donee could not have exercised her power except by will, was to their minds a distinction without a difference. In *Curry v. McCanless* Justice Stone suggested another ground for distinguishing the cases—the fact that in the *Bullen* case the creator of the power and the person by whom the power was to be exercised were one and the same, while in the *Wachovia Trust Company* case they were different persons. "For purposes of taxation, a general power of appointment, of which the testatrix here was both donor and donee, has hitherto been regarded by this Court as equivalent to ownership of the property subject to the power,"[6] he said, citing *Bullen v. Wisconsin* as authority and referring to *Wachovia Trust Co. v. Doughton* by way of contrast. But this is probably another distinction without a difference. In the last analysis the cases appear to be inconsistent. The *Bullen* case proceeds on the "control and benefit" theory; the power was probably treated there as an intangible taxable at the domicile of its owner, just as it was in the cases commented

the tax." Justice Stone in Curry v. McCanless, (U. S. 1939) 59 S. Ct. 900 at 907, 908.

"For reasons stated in our opinion in Curry v. McCanless . . . we cannot say that the legal interest of decedent in the intangibles held in trust in Colorado was so dissociated from her person as to be beyond the taxing jurisdiction of the state of her domicile more than her other rights in intangibles." Justice Stone in Graves v. Elliott, (U. S. 1939) 59 S. Ct. 913 at 915.

[4] 240 U. S. 625, 36 S. Ct. 473 (1916).

[5] 272 U. S. 567, 47 S. Ct. 202 (1926).

[6] Curry v. McCanless, (U. S. 1939) 59 S. Ct. 900 at 908.

upon. By like reasoning there was adequate foundation for the imposition of a tax by the domicile of the donee in *Wachovia Trust Co. v. Doughton.* The explanation of that case is probably to be found in the Court's growing aversion at that time to multiple taxation. The case is virtually overruled by *Curry v. McCanless and Graves v. Elliott.*

The majority took substantially the same position in *Curry v. McCanless* and *Graves v. Elliott* that Justices Holmes, Brandeis and Stone advanced ten years ago, when they had opposed the new doctrine prohibiting multiple taxation of intangibles.[7] Justices Holmes and Brandeis had thought the doctrine an unwarranted limitation upon powers reserved to the states.[8] Justice Stone's view had been that control and benefit are the only test of jurisdiction to tax; and though tangibles are taxable in one state only, namely, the state in which they are physically located, intangibles by their very nature cannot be made subject to the same rule.[9]

Jurisdiction to tax tangibles—land and chattels—is exclusively in the state in which they are physically located, said Justice Stone for the majority, in *Curry v. McCanless,* because "the benefit and protection of laws enabling the owner to enjoy the fruits of his ownership and the power to reach effectively the interests protected . . . are . . . narrowly restricted to the state in whose territory the physical property is located."[10] But intangibles do not have the attributes of physi-

[7] The doctrine is usually associated with the following cases: Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83, 50 S. Ct. 59 (1929) (dictum that the domicile of beneficiaries of a trust of intangibles administered in another state lacked jurisdiction to levy a property tax upon their equitable interests); Farmers' Loan & Trust Co. v. Minnesota, 280 U. S. 204, 50 S. Ct. 98 (1930) (held that Minnesota lacked jurisdiction to levy an inheritance tax upon obligations of that state and its municipalities, at death of a non-resident owner); Baldwin v. Missouri, 281 U. S. 586, 50 S. Ct. 436 (1930) (held that Missouri lacked jurisdiction to levy an inheritance tax upon bonds, notes and funds deposited with a bank in that state by a non-resident owner); Beidler v. South Carolina Tax Comm., 282 U. S. 1, 51 S. Ct. 54 (1930) (held that the state of incorporation lacked jurisdiction to levy an inheritance tax upon a debt of the corporation for a loan advanced on an open account by its principal stockholder, a non-resident); First National Bank v. Maine, 284 U. S. 312, 52 S. Ct. 174 (1932) (held that the state of incorporation lacked jurisdiction to levy an inheritance tax upon shares of the corporation owned by a non-resident).

The doctrine evoked a flood of comment. References are collected in LORENZEN, CASES AND MATERIALS ON THE CONFLICT OF LAWS, 4th ed., 926 (1937).

[8] See the dissenting opinion of Justice Holmes in First National Bank v. Maine, 284 U. S. 312, 52 S. Ct. 174 (1932).

[9] See the concurring opinions of Justice Stone in Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83, 50 S. Ct. 59 (1929); Farmers' Loan & Trust Co. v. Minnesota, 280 U. S. 204, 50 S. Ct. 98 (1930); dissenting opinions in Baldwin v. Missouri, 281 U. S. 586, 50 S. Ct. 436 (1930), and First National Bank v. Maine, 284 U. S. 312, 52 S. Ct. 174 (1932).

[10] Curry v. McCanless, (U. S. 1939) 59 S. Ct. 900 at 904. However, said Justice

cal things. They have no location in space. Any situs ascribed to them is a fiction. "The power of government over them and the protection which it gives cannot be exerted through control of a physical thing. They can be made effective only through control over and protection afforded to persons whose relationships are the origin of the rights."[11] There are many situations in which this control may be exercised and this protection afforded by more than one state; and, since this is the ultimate test of jurisdiction, there are many situations in which more than one state has power to tax.[12] Though multiple taxation is perhaps unfair,[13] it is also unfair to avoid this result by ascribing a fictitious situs to intangibles in one state and invoking the prohibition of the Fourteenth Amendment against their taxation in another state, which through control over and benefits conferred upon the object taxed, has an adequate constitutional basis for imposing a tax. "If we enjoyed

Stone in a footnote, there is nothing in the Constitution to prevent multiple taxation of land and chattels, in the sense of several taxes which fall upon different legal interests in the same property. For example, a state may tax a resident upon a contract for the purchase of foreign land or chattels, upon a mortgage of foreign land, upon shares of stock in a corporation the sole assets of which consist of foreign land; and the state where the tangible property is physically located may also tax. Cases are cited in the same footnote. Ibid., at 905, note 3.

[11] Ibid., at 905.

[12] Mr. Justice Stone's analysis suggests a question. States other than the state in which tangibles are located exercise power over and confer benefits upon the physical thing in much the same way that power is exercised and protection afforded in respect to intangibles—by control over and protection afforded to persons who have rights in the property. Thus the courts of a state may render a money judgment which can be sued upon and enforced against foreign tangibles. A court having jurisdiction over the person can compel the owner to convey foreign tangibles. In fact, it is not unknown for a court to render a judgment in rem against foreign land, and for courts of the state in which the land is located to enforce it. Yet it is recognized that this control and benefit are not enough to establish the power of a state to tax tangibles outside its borders. Why? Justice Stone's answer is that the control exercised and benefit conferred by a state in respect to tangibles located elsewhere is perforce indirect and insubstantial, and therefore insufficient to confer jurisdiction to tax. "The power of government and its agencies to possess and to exclude others from possessing tangibles, and thus to exclude them from enjoying rights in tangibles located within its territory, affords adequate basis for an exclusive taxing jurisdiction. . . . Other states have been said to be without jurisdiction and without constitutional power to tax tangibles if, because of their location elsewhere, those states can afford no substantial protection to the rights taxed and cannot effectively lay hold of any interest in the property in order to compel payment of the tax." Curry v. McCanless, (U. S. 1939) 59 S. Ct. 900 at 904.

[13] The thought that multiple taxation is unfair, together with the thought that there is no sound reason for treating intangibles differently than tangibles for taxation purposes, compose the chief arguments urged in support of the doctrine prohibiting taxation of intangibles by more than one state. See the opinion of Justice Sutherland in First National Bank v. Maine, 284 U. S. 312 at 326-327, 52 S. Ct. 174 (1932), and the dissenting opinion of Chief Justice Hughes in Graves v. Elliott, (U. S. 1939) 59 S. Ct. 913 at 917-918.

the freedom of framers it is possible that we might, in the light of experience, devise a more equitable system of taxation than that which they gave us," Justice Stone concluded. "But we are convinced that that end cannot be attained by the device of ascribing to intangibles in every case a locus for taxation in a single state despite the multiple legal interests to which they may give rise and despite the control over them or their transmission by any other state and its legitimate interest in taxing the one or the other. While fictions are sometimes invented in order to realize the judicial conception of justice, we cannot define the constitutional guaranty in terms of a fiction so unrelated to reality without creating as many tax injustices as we would avoid and without exercising a power to remake constitutional provisions which the Constitution has not given to the courts."[14]

Any state which has power over and confers benefits upon intangibles "through control over and protection afforded to those persons whose relationships are the origin of the rights," has jurisdiction to tax. This reasoning now has the support of a majority of the Court. Though *Farmers Loan & Trust Co. v. Minnesota*[15] and *Baldwin v. Missouri*[16] are perhaps consistent with it,[17] surely *Beidler v. South Carolina Tax Commission*,[18] *First National Bank v. Maine*,[19] and the dictum in *Safe Deposit & Trust Co. v. Virginia*,[20] are not. If this reasoning continues to receive the support of the majority and is carried to its logical conclusion, *First National Bank v. Maine* and *Beidler v. South Carolina Tax Commission* eventually will be overruled. In light of *Curry v. McCanless* and *Graves v. Elliott*, the dictum in *Safe Deposit & Trust Co. v. Virginia* is practically outlawed now.

In the course of his opinion in *Curry v. McCanless*, Justice Stone said 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

[14] Curry v. McCanless, (U. S. 1939) 59 S. Ct. 900 at 909.

[15] 280 U. S. 204, 50 S. Ct. 98 (1930), summarized in note 7, supra.

[16] 281 U. S. 586, 50 S. Ct. 436 (1930), summarized in note 7, supra.

[17] See Justice Stone's concurring opinion in Farmers' Loan & Trust Co. v. Minnesota, 280 U. S. 204, 50 S. Ct. 98 (1930). In Curry v. McCanless, (U. S. 1939) 59 S. Ct. 900 at 906, Justice Stone cited Baldwin v. Missouri, 281 U. S. 586, 50 S. Ct. 436 (1930), apparently with approval, as one of the cases "where the owner of intangibles confines his activity to the place of his domicile," as distinguished from situations where "the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state, in such a way as to bring his person or property within the reach of the tax gatherer there."

[18] 282 U. S. 1, 51 S. Ct. 54 (1930), summarized in note 7, supra.

[19] 284 U. S. 312, 52 S. Ct. 174 (1932), summarized in note 7, supra.

[20] 280 U. S. 83, 50 S. Ct. 59 (1929), summarized in note 7, supra.

measured by all its intangibles."[21] Justice Reed, who concurred in Justice Stone's opinion, expressly reserved his conclusion on this point. This reservation on the part of Justice Reed is significant in light of his opinion in *Newark Fire Insurance Company v. State Board of Tax Appeals*,[22] decided the same day. This case raised the question whether the state of New Jersey could levy a property tax upon intangibles of a New Jersey corporation, which, it was alleged, had acquired a business situs in New York.[23] The eight justices participating agreed that New Jersey had power to tax, but they were unable to agree in their reasoning. One opinion was delivered by Justice Reed, who stated that there was a presumption that intangibles of a corporation are taxable by the domiciliary state, and that it had not been established by the record that the appellant's intangibles had acquired a business situs in New York. Justice Reed's opinion intimated that if a business situs in New York had been established, the domiciliary state would have been without power to tax.[24] Another opinion was delivered by Justice Frankfurter, who took the view that the domiciliary state had power to tax the corporation's intangibles in any event, regardless of whether a tax on the same intangibles might be levied by another state on the basis of business situs. His opinion seems to follow the dictum in

[21] Curry v. McCanless, (U. S. 1939) 59 S. Ct. 900 at 906.

[22] 307 U. S. 313, 59 S. Ct. 918 (1939).

[23] It is generally agreed that intangibles of a corporation may be taxed by the state of incorporation. Cream of Wheat Co. v. Grand Forks County, 253 U. S. 325, 40 S. Ct. 558 (1919), or by a state in which they have acquired a business situs. Wheeling Steel Corp. v. Fox, 298 U. S. 193, 56 S. Ct. 773 (1936), noted 35 MICH. L. REV. 1032 (1937); First Bank Stock Corp. v. Minnesota, 301 U. S. 234, 57 S. Ct. 677 (1937), noted 36 MICH. L. REV. 337 (1937). The Supreme Court has avoided passing upon the question whether intangibles of a corporation may be taxed both at the business situs and at the domicile of the corporation, since it first announced the doctrine that the Fourteenth Amendment prohibits multiple taxation. The Cream of Wheat Co. case, cited above and generally referred to as authority for an affirmative answer to this question, was decided more than ten years before the doctrine prohibiting multiple taxation of intangibles made its appearance.

With respect to the business situs doctrine, see generally Brown, "Multiple Taxation by the States—What is Left of It?" 48 HARV. L. REV. 407 at 420 et seq. (1935); Powell, "The Business Situs of Credits," 28 W. VA. L. Q. 89 (1922); 76 A. L. R. 806 (1932).

[24] Some insight into Justice Reed's position on this point is given by his opinion in Newark Fire Ins. Co. v. State Board of Tax Appeals, (U. S. 1939) 59 S. Ct. 918 at 921 (1939): "The conception of a business situs for intangibles enables the tax gathering entity to distribute the burden of its support equitably among those receiving its protection. It makes the notion of a situs for particular intangibles more definite. It is not the substitution of a new fiction as to the mass of choses in action [i.e., like the fiction of situs ascribed to intangibles under the doctrine that the Fourteenth Amendment prohibits their taxation by more than one state] for the established fiction of a tax situs at the place of incorporation."

Curry v. McCanless.[25] Justice Reed's opinion was supported by three of the justices who dissented in the *Curry* and *Graves* cases. Justice Frankfurter's opinon was concurred in by Justice Stone, Black and Douglas. Justice McReynolds did not take part in the case. Since he concurred in the dissenting opinions in the *Curry* and *Graves* cases, it is reasonable to suppose that if he had participated in this case he would have supported Justice Reed's position. The *Newark Fire Insurance Company* case suggests that a majority of the Court is opposed to double taxation of the intangibles of a corporation even though a majority is willing to permit double taxation of property held in trust. Perhaps the corporate situation represents the last refuge of the doctrine prohibiting multiple taxation.[26]

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[25] Compare the following remarks of Justice Frankfurter in Newark Fire Insurance Co. v. State Board of Tax Appeals, 307 U. S. 313 at 324, 59 S. Ct. 918 (1939): "Questions affecting the factional 'situs' of intangibles, which received full consideration in Curry v. McCanless, decided this day, do not concern the present controversies."

[26] It should be noted that multiple taxation of intangibles has been avoided to some extent by legislation or by constitutional provision in several states. See, for example, Mich. Comp. Laws (1929), § 3672; also N. Y. Constitution, art. 16, § 3, adopted Nov. 8, 1938 [McKinney, Supp. 1939]. See also compilation of such statutes in Prentice-Hall, Inheritance and Transfer Tax Service, ¶501. And multiple taxation will still be avoided to this extent, however great the possibilities for taxation by more than one state may appear to be in light of the Court's interpretation of the due process clause in Curry v. McCanless and Graves v. Elliott.