the exercise of the right of eminent domain, is to ascertain "first the damage to the fee as if it were owned entire and unincumbered by one person, and then to apportion that amount among all the estates and interests which such persons have in the property." In this case it appeared that an award was made to the landlord of property taken for highway purposes, the award comprising an item for damages to buildings and another for damages to the land. The tenant, who had erected the buildings, was given by the lease the privilege of removal; and, in an action against the landlord, he was held entitled to the amount awarded to the landlord as damages to the buildings.

ALFRED ROLAND HAIG.

DEPARTMENT OF PUBLIC LAW.

COMMONWEALTH'S APPEAL.[1] SUPREME COURT OF PENNSYLVANIA.

Collateral Inheritance Tax—Estate of Non-Resident Member of Limited Partnership—Act of May 6, 1887.

Under the Act of May 6, 1887, P. L., 79, the interest of a non-resident deceased member of a limited partnership association is liable to the collateral inheritance tax where the real and personal property of the association is situated within the State.

A limited partnership association consisted of three members, two of whom were residents of Pennsylvania, and one of Maryland. The capital of the association was made up of land in Pennsylvania, valued at $190,000, and personal property valued at $240,300. The business consisted largely of buying and selling grain, flour, etc., in Pennsylvania and elsewhere. The non-resident member, by his will, bequeathed to his partners, who were also his brothers, all his interest in the association, including "all the property, real and personal, notes, stocks, bonds and accounts."

Held, that the interest of the deceased member was liable to the collateral inheritance tax.

Opinion by Mr. Justice STERRETT.

[1] 151 Pa.. 1, Oct. 3, 1892.

Collateral Inheritance Tax on the Property of Non-Resident Owners.

It is the pleasure of the sovereign power of the State, which continues the ownership in dead men's property to those appointed, either by the owner himself or the State by its intestate laws; hence, having the power to take all or give all, no one will dispute the right to reserve a portion of that which is given to meet the wants of government: Alvaney *v* Powell, 2 Jones' Eq., 51; Dalyrymple's Ap., 10 Md., 150; Strode *v.* Comm., 52 Pa., 189. This is the theory upon which collateral inheritance tax or (more properly) succession duty, is imposed.

The close analogy between the *vicesima hereditatum et legatorum*, which Augustus Cæsar proposed to the Roman Senate for the support of the army, and the modern succession duty, leaves no doubt as to the origin of the system. Gibbon, the historian, who held office under Lord North between 1776 and 1780, probably suggested to that premier the political wisdom of this tax as a source of revenue, and in 1780 an enactment was passed taxing legacies to which the modern Succession Duty Acts of England, and the Collateral Inheritance Tax Laws, adopted by nine States in the Union, trace their parentage: Gibbon's Decline and Fall, Vol. I, p. 133; 3 Dowell's Hist. of Taxation in England, 48; Dos Passos on Collat. Inh. Tax, p. 7; Hanson's Probate Duties, p. 13; William's Case, 3 Bland's Ch. (Md.), 259.

It is not a tax upon the property itself, but upon the transmission or the right to succeed to the interests of the deceased owner, and in the modern collateral inheritance tax laws the relation of the person claiming the estate to the decedent constitutes the ground upon which the abatement is authorized: Eyre *v.* Jacob, 14 Gratt., 427; Miller *v.* Comm., 27 Gratt., 110; Tyson *v.* State, 28 Md., 577; Matter of Howard, 5 Dem., 483; Pullen *v.* Commissioners, 66 N. C., 361; Carpenter *v.* Pa., 17 Howard, 456; Peter *v.* Lynchburg, 76 Va., 927; Matter of McPherson, 104 N. Y., 306; State *v.* Dalyrymple, 70 Md., 294; Wallace *v.* Myers, 38 Fed Rep., 184; *In re* Short's Est., 16 Pa., 63; Strode *v.* Comm., 52 Pa., 181; Clymer *v.* Same, Id., 189; Comm. *v.* Maury, 82 Va., 883; Comm. *v.* Herman, 16 W. V. C., 212. Payment of the tax is a condition precedent to the collateral beneficiary receiving the estate. Strode *v.* Comm., 52 Pa., 151; Clymer's Ap., Id., 189.

"The right to take property by devise or descent is the creation of the law, and secured and protected by its authority. The legislature might, if it saw proper, restrict the sucession to a decedant's estate, either by devise or descent to a particular class of his kindred, say to his lineal descendants and ascendants; it might impose terms and conditions upon which collateral relations may be permitted to take it; or it may tomorrow, if it pleases, absolutely repeal the statute of wills and that of descents and distributions, and declare that upon the death of a party his property shall be applied to the payment of his debts, and the residue appropriated to public uses:" Miller's Exers. *v.* Commonwealth, 27 Gratt. (Va.), 117.

Liability for the tax attaches *eo instante* the death of the testator,

wherever the property may be situate; and if it is not chargeable then, no subsequent importation of it into the taxing State for purposes of administration will render it so: Hood's Ap., 9 Harris, 106; Drayton's Ap., 61 Pa., 176.

In Pennsylvania it has been somewhat anomanously held that the Collateral Inheritance Tax imposed by the Act of May 6, 1887, P. L. 79, is a direct tax upon the property devised to or inherited by collaterals in the hands of the devisees or heirs, and not merely a succession tax imposed upon the persons thus succeeding to real or personal estate: Bittinger's Est., 129 Pa., 338. In that case the devisor of land situate in Maryland was domiciled at the time of his death in Pennsylvania, and the devisee of the land a Pennsylvania corporation. It was held that the Pennsylvania statute had no power to tax land beyond its territorial limits. PAXSON, C. J.: "Does it make any difference that the devisee is a Pennsylvania corporation? We think not. It may be that the State might impose a succession tax upon every citizen of the State who succeeds to either real or personal estate, from whatever source received. This is not such a tax, however:" Commonwealth *v.* Smith, 5 Pa., 142.

In view of the Federal decisions fixing the status of this form of taxation, it seems absurd to regard succession charges as property taxes: Schooley *v.* Rew, 23 Wall., 331; Society *v.* Coite, 6 Wall, 594; Institution *v.* Mass., Id., 681; Mager *v.* Grima, 8 How., 49; Carpenter *v.* Pennsylvania, 17 How., 436. It is upon the idea that the tax is the price paid for the privilege of succession that its constitutionality has been upheld when applied to the transmission of United States securities: Wallace *v.* Myers, 38 Fed. Rep., 184; Strode *v.* Comm., 52 Pa., 189; Clymer's Ap., 52 Pa., 189; Matter of Howard, 5 Dem. (N. Y.), 483., *cf.* Tyson *v.* State, 28 Md., 578; and in Clymer's Ap. (*supra*) it was held that the tax was valid though the legatees elected to accept specific securities of the national government—a conclusion which never could have been reached were the tax a direct change on the property.

Again, it is only upon the succession duty theory that property exempt by law from other forms of taxation can constitutionally be held liable for the payment of collateral inheritance tax: Com. *v.* Kernan, 16 W. N. C., 210; Barringer *v.* Cowan, 2 Jones (Eq.), N. C., 51; Miller's Excrs. *v.* Comm., 27 Gratt. (Va.), 110.

Inasmuch as it is a well-settled principle of statutory interpretation that where a legislative enactment is susceptible of two different constructions, one of which renders it valid, the other invalid, that which renders it valid is to be adopted, the Supreme Court in Bettinger's Appeal might more properly have placed that construction upon the act of 1887, which was necessary to render it constitutional, and in accordance with the spirit of its enactment.

1. *Real Property.*—The proposition that real property cannot be taxed or charged except in the jurisdiction where it is situate, applies equally as well to the succession duty laws as to other forms of taxation: Bittenger's Ap., 129 Pa., 336; 24 W. N. C., 273; S. C., 18 At. Rep., 132; Kintzing *v.* Hutchinson, 34 Leg. Int., 365;

Matter of Wolfe, 19 N. Y. St., 263; Lorillard *v.* People, 6 Dem., 268; Estate of Dewey, N. Y. Law Jour. (1889); Drayton's Ap., 61 Pa., 172; Com. *v.* Coleman, 52 Pa., 468; 368; Hood's Est., 21 Pa., 106.

In view, therefore, of the certainty with which this rule has been established, an examination of the decision of the Supreme Court of Pennsylvania in Miller's Ap., 111 Pa., 321, occasions some surprise. In that case a testator domiciled in Pennsylvania devised land situate in New Jersey to his executors, to be sold to pay pecuniary legacies to certain collateral heirs. It was held that the *land* passed to the legatee as money, and hence, being subject to the law of the testator's domicil, was chargeable with the collateral inheritance tax. "As the order to sell was imperative and absolute, and worked a conversion, . . . we have no choice to regard it as other than personalty. As such it must be regarded as passing by the law of the domicile."

The notion that real estate and everything pertaining to its devolution, transmission and tenure is governed and controlled by the *lex rei sitæ* has been confirmed by a host of authorities of long standing. Story's Conf. Laws, 8th Ed. by Bigelow, and cases cited. Moreover, it is a vital principle in the interstate law of this country, and one which probably, more than any other, has maintained the equilibrium and avoided the clashing of the taxing powers of the several States.

To charge the succession of foreign real estate with the payment of collateral inheritance tax is inconsistent with the spirit of such taxation. Land situate abroad and devised by a domestic will to persons here does not devolve by force of the will nor of the domestic law, but by the permission of the State where the land is situate, and, not depending upon the domestic law, cannot legally, nor in good conscience, be asked to pay the price of succession. (See opinion of GRAY, J., *in re* Swift's Est., 32 N. E. Rep., 1096.)

The Court of Appeals of New York in the very recent case of *In re* Swift's Trusts, 32 N. E. Rep., 1096 (Jan. 25, 1892), dealt with the question in the true light. The testator, a domiciled New Yorker, left real estate in New Jersey, which he directed by his will should be converted into personalty by his executors and distributed among certain collateral kinsmen. The question was whether the tax was chargeable upon the proceeds of such foreign real estate, the distributees being domiciled New Yorkers. It was held that the property being tangible property, situate beyond the State, no taxation imposed by New York could be charged against it.

"The question of the right of a State to tax," said the Court, "is one of fact, and cannot turn upon theories or fictions, which, however serviceable to adjust the rights of parties, were never intended to furnish a basis of constitutional power." The conversion effected by a court of equity is a notional conversion designed to prevent an injury or to better carry out the intention of the parties: Ackroyd *v.* Smithson, 1 Bro. C. C., 503; W. & T.'s L. C. in Eq., p. 1027, Vol. 1. "Equity, like nature, will do nothing in vain;" neither will a fiction of equity perform the

feat of bringing within the jurisdiction of the taxing State that which cannot otherwise be taxed, because of the exclusive rights of the sovereignty where the thing is located.

It seems then that in Pennsylvania the question whether land beyond the jurisdiction of the taxing State is to be charged with the duty, depends upon the legal nature of the realty at the time of its passing from the person who died seized or possessed thereof. In Drayton's Ap., 61 Pa., 172, real estate in Minnesota was directed by a Pennsylvanian testator to be sold "by his executors in their discretion . . . on such terms as to them shall seem expedient. . . . " It was held, that the language of the decedent indicated a mere authority to sell, and not a positive direction, and, hence, did not work the conversion of the realty.

"SHARSWOOD, J.: Had the law of Minnesota so provided, it would have been liable to a collateral inheritance tax in that State. The executors could be compelled to prove the will, and take out letters testamentary there; and there, also, to have settled their account of the proceeds of sale. The land, and of course its proceeds, were under the jurisdiction of that State. . . . We must consider the case as if this Minnesota land had been all the land the testator had; and as if it had been sold under the power, and the proceeds distributed abroad. Surely, the bringing them into this State and depositing them in the bank account of the executor along with other funds of the estate can make no difference. See Hood's Ap., 9 Harris, 106; Comm. *v.* Coleman, 52 Pa., 468.

In England, the case of Forbes *v.* McKenzie, L. R., 10 Eq., 178, at first sight appears to accord with the Pennsylvania doctrine, but an examination discloses that there the property at the time of the decedent's death was personalty. An English testator had bequeathed his interest in a partnership, which was partly composed of land in Bombay, to an English legatee. Upon the ground that the decedent bequeathed his *interest*, rather than the *specific thing* itself, the legacy duty was held to attach: Atty.-Gen. *v.* Brunning, 4 H. & N., 94; Watson *v.* Swift, 8 Beav., 368; Constance *v.* Bradshaw, 4 Hare, 315.

2. *Personal Property.*—The personal property of a decedent, wherever its situs, and, as has been shown, his real property within the taxing State, passing to individuals of the proper degree of consanguinity, are taxable under the collateral inheritance laws: Magee *v.* Grima, 8 How., 490; U. S. *v.* Hunnewell, 13 Fed. Rep., 617; Chatfield *v.* Berchtoldt, L. R., 7 Ch. App., 192; *In re* Ervin, 1 C. & J., 151; Atty.-Gen. *v.* Napier, 6 Exch., 217; Forbes *v.* Steven, L. R., 10 Eq., 178; Orcutt's Ap., 97 Pa., 184; Comm. *v.* Smith, 5 Pa., 143; Alexander's Ap., 3 P. L. J. (Clark), 87; *In re* Short's Est., 16 Pa., 66; State *v.* Dalyrymple, 17 At. Rep., 82; S. C., 70 Md., 294; Alvaney *v.* Powell, 2 Jones' Eq., 51; People *v.* Commrs., 51 Hun., 312. But, with respect to the personal property of non-residents within the taxing State, different jurisdictions have adopted different rules, which it may be convenient to discuss separately.

(*a*) *English Rule.*—In the cases of Atty.-Gen. *v.* Cockerill, 1 Price, 165, and Atty.-Gen. *v.* Beatson, 7

Price, decided in 1815, it was resolved that the situs of personal property, regardless of the domicile of the decedent, was the test of liability for succession duty. After what may very properly be called a thirty years' war, in 1845, during which period each succeeding case was a battle as to whether the domicile of the decedent or the *situs* of the property should be the determining factor, it was adjudged, after two arguments in the House of Lords, that the domicile of the decedent was the decisive test, and that a consistent interpretation would be given to the maxim, "*Mobilia sequuntur personam*," by exempting personal property of all kinds, though actually located in Great Britain, from both legacy and succession duty, where the decedent at the time of his death was not a domiciled Englishman: Thompson *v.* Atty.-Gen., 12 Cl. & Fin., 1. The cases showing this development are: Pipon *v.* Pipon, Ambler, 25; Thorne *v.* Watkins, 2 Ves. Sr., 35; Kirkpatrick *v.* Kirkpatrick, cited in Bruce *v.* Bruce, 5 Ves. Jr., 750; Logan *v.* Fairlie, 2 Sim. & Stu., 284; Atty.-Gen. *v.* Jackson, S Bligh U. R., 15; Jackson *v.* Forbes, 2 Cr. & J., 382; Arnold *v.* Arnold, 2 Myl. & Cr., 256; Est. of Ervin, 1 Cr. & J., 151.

"We cannot consider that any distinction can properly be made between debts due to the testator from persons resident in the county in which the testator is domiciled at the time of his death, and debts due to him from debtors resident in another and different county, but that all such debts do equally form part of the personal property of the testator or intestate, and must all follow the same rule, namely, the law of the domicile of the testator or intestate:" Thompson *v.* Atty.-Gen., 12 Cl. & Fin., 1.

Thus, after an experience of thirty years, during which period the confusion incident to taxing personal property, because of its situs rather than the domicile of its owner, was abundantly manifested, the House of Lords returned to the wise, if not lucrative, rule which makes the test of liability depend upon the domicile of the decedent.

But the principle of Thompson *v.* Atty.-Gen. was qualified where the foreign decedent having given an English character to his property in England by appointing English trustees under an English settlement, it was held that the succession to such property was liable to the duty regardless of the domicile of the decedent: *In re* Cigala's Settlement, 7 Ch. D., 351; Atty.-Gen. *v.* Campbell, L. R., 5 Eng. & Ir. Ap., 524; *Re* Badart's Trusts, L. R., 10 Eq., 288; *Re* Capdeirelle, 2 H. & C., 985.

The theory of these decisions in no wise conflicts with the principle that the domicile of the decedent is the basis of the imposition. If the foreign decedent invokes the aid of English law to assist him in executing some testamentary wish, it is only fair that he should pay the price for such assistance upon the same footing as a native. (See opinion of Sir GEORGE JESSEL, *In re* Cigala's Settlement, 7 Ch., Div., 351).

(*b*) *The American Rule.*—The succession to personal property is governed exclusively by the law of the actual domicile of the testator at the time of his death. It is of no consequence what the former

domicile of the decedent may have been, or what is the actual situs of the personal property at the time of his death: Story Conf. of Laws, § 481, *et seq.* Therefore, the succession of personal property may be taxed, regardless of whether the property is within or without the limits of the taxing State: Orcutt's Ap., 97 Pa., 184; Short's Estate, 16 Pa., 63; Dos Passos, Col. Inh. Tax, p. 79; State *v.* Dalyrymple, 70 Md., 294; S. C., 17 Atl. Rep., 82; Alvaney *v.* Powell, 2 Jones' Eq., 51; Thompson *v.* Atty.-Gen., 12 Cl. & Fin., 1.

It has been shown that the existing English law logically applies the rule embodied in the maxim, *mobilia sequuntur personam.* But the American Courts have unanimously rejected all consistent interpretations of the rule in so far as it prevents a State, not the domicile of the decedent, from taxing the succession of personalty having an actual situs within the taxing State: Eyre *v.* Jacob, 14 Gratt. (Va.), 431; Peters *v.* Lynchburg, 76 Va., 92; Schofield *v.* Lynchburg, 78 Va., 366; Strode *v.* Comm., 52 Pa., 182; Clymer *v.* Comm., 52 Pa., 189; Herman's Ap., 16 W. N. C., 210; Orcutt's Ap., 97 Pa., 185; Mager *v.* Grima, 8 How. (U. S.), 493; Carpenter *v.* Pa., 17 How. (U. S.), 463; Frederickson *v.* La., 23 How. (U. S.), 447; Wallace *v.* Myers, 38 Fed. Rep., 184; Tyson State, 28 Md., 577; Dalyrymple's Case, 10 Md., 298; Matter of Howard, 5 Dem. (N. Y.), 487; Matter of McPherson, 104 N. Y., 318.

"I can think of no more appropriate exercise of the sovereignty of a State or nation over property situate within it and protected by its laws than to compel it to contribute toward the maintenance of government and laws. Accordingly, there seems to be no place for the fiction of which we are speaking *mobilia personam sequuntur* in a well-adjusted system of taxation:" Hoyt *v.* Conner, 23 N. Y., 224, 228. See also Guillander *v.* Howell, 35 N. Y., 657; Graham *v.* The First National Bank, 84 N. Y., 393; Catlin *v.* Hull, 21 Vt., 152; DosPassos on Collat. Inher., 37–92.

To define accurately what kind of property may be legally regarded as within a State, it is now rather difficult, if not impossible, to determine. (See Dos Passos, Ch. Residents and Non-residents.) Tangible property of all kinds may safely be said to be "within a State" for purposes of the tax: State *v.* Dalyrymple, 70 Md., 297; S. C., 17 At. Rep., 82; Comm. *v.* Smith, 5 Pa., 142; Orcutt's Ap., 97 Pa., 179; Comm.'s Ap., 10 Casey, 204; Strode *v.* Comm., 2 P. F. Smith, 181.

The Pennsylvania idea of what constitutes "within the State" is rather peculiar. In Orcutt's Ap., 97 Pa., 197, a resident of New Jersey deposited with a Philadelphia trust company for safe keeping certain United States bonds. He died in New Jersey, where administration on his estate was duly granted. The trust company declined to surrender these bonds to the New Jersey executor unless ancillary letters should be taken out in Pennsylvania. This having been done, the bonds were received from the trust company and, being overdue, were collected, and thereupon the collateral inheritance tax was demanded and the Orphans' Court of Philadelphia ordered it to be paid. This order was reversed upon the ground that the bonds being "simply evidences

of indebtedness . . . were constructively within the possession of the owner."

The rule of Orcutt's Appeal was developed in Comm.'s Ap., 11 W. N. C., 492, where the Court, in deciding that the bonds, stocks and various loans of private and public corporations of Pennsylvania and elsewhere, owned by a Cuban decedent, were exempt from the tax, declared that the Pennsylvania statutes "were intended to embrace only personal property of a tangible nature, and not mere evidences of indebtedness which have no situs, but follow the owner's domicile."

In the principal case, however, it is seen that the tax was held to apply to an interest in the stock of a limited partnership association, incorporated under the Act of 1874, having an extensive plant, consisting of real estate, mills, etc., within the State.

"If, according to the true intent and meaning of the Act of 1887, the 'interest' thus bequeathed was properly situated within this State, it is clearly subject to collateral inheritance tax. We are unable to understand why it was not. The partnership property was largely made up of land, merchandise, grain and other personal property which had a visible, tangible existence and an actual situs in this State. . . As a general rule, intangible personal property of a non-resident, such as bonds, mortgages and other choses in action, is governed as to its *situs* by the fiction of law above noticed, and hence such property is not subject to collateral inheritance taxation under our laws, because it is not situated within the state." Per STERRETT, J.

But whatever the confusion in the cases, Pennsylvania authorities seem to warrant the statement that wherever the property of a non-resident having an an actual situs within the State has an actual, tangible, habitual existence, it is chargeable with the tax: See, generally, Orcutt's Ap., 97 Pa., 179; Commonwealth's Ap., 11 W. N. C., 492; Del Busto's Est., 23 W. N. C., 116; Bennett's Ap., 37 Pitts. Leg. Jour., 316; McKean *v.* Northampton Co., 49 Pa., 519; Kintzing *v.* Hutchinson, 34 Leg. Int., 365.

In Maryland and in New York all property of whatever kind, whether tangible or simply evidenced by the presence of stocks, bonds and the like, having an actual situs within the State, are "within the State" for the purposes of the tax, regardless of the domicile of the owner. In Dalyrymple's Ap., 70 Md., 294, cited by Mr. Dos Passos as the leading case in this country, certificate of National Bank stock, Missouri State bonds, and some cash bequeathed by a non-resident to his brother, also a non-resident, was held liable to the tax. "No reason has been assigned," remarked Justice MCSHERRY, "why the broad language of the statute and the evident design of the legislature should be so narrowed and restricted as to exempt from this tax the estate of a non-resident actually here, notwithstanding that some property may for other purposes be treated as constructively elsewhere. . . . The imposition of the tax cannot depend upon the mere incidental residence of the owner."

In Romaine's Ap., 127 N. Y., 80, a domiciled Virginian for about three years prior to his death "was the lessee of a box in a safe

deposit company in the city of New York, in which he kept certain securities, consisting of stocks and bonds of different corporations and a mortgage upon real estate in said city, as well as several pass books showing deposits by him in various savings banks in the same place to a considerable amount." It was held that the property was subject to the tax under the Collateral Inheritance Tax Act (§1, Chap. 483, Laws of 1885, as amended by Chap. 713, Laws of 1887).

Under the language of the Act of 1888 it was held that property within the State, either real or personal, which passes by will or intestacy from a non-resident decedent to collateral relative or strangers, was not liable to the tax, and that it was limited in its effects to property so passing from resident decedents: Matter of Euston, 113 N. Y., 174; Matter of Taulane, 51 Hun., 213; Matter of Clark, 9 N.Y. Supp., 444.

The Act of 1887, however, remedied the want of scope of the original Act, and no language could be more sweeping: "All property which shall pass by will, or by the intestate laws of this State, from any person who may die seized or possessed of the same while a resident of this State, or if such decedent was not a resident of this State at the time of death, which property or any part thereof shall be within this State," etc. It was upon this enactment that the Court decided Romaine's Appeal.

From this rather limited review it is not hard to foresee that clashing of the succession duty laws of the various States which will doubtless impress on American courts the same lesson which induced the House of Lords, a half century ago, to rigidly adhere to the maxim that "personal property follows the domicile of the owner."

Addenda.—In the valuable treatise of Mr. DOS PASSOS, at pp. 96 and 97, will be found a digest of the American decision on what is *tangible* and *intangible* property within the purview of the collateral inheritance tax statutes.

The following cases support the constitutional power of a State to give property within its jurisdiction a special situs for the purposes of collateral inheritance tax: Alvaney *v.* Powell, 2 Jones' Eq., 51; State *v.* Brevard, Phillips' Eq., 141; People *v.* Sherwood, 113 N. Y., 183; Matter of Vinot, 7 N. Y. St., 650; Matter of Romaine, 127 N. Y., 180.

JOHN A. MCCARTHY.