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SOME LEGAL PROBLEMS IN STATE PERSONAL INCOME TAXATION*

II

EDWIN KESSLER, JR.

EXTENT OF THE STATES' JURISDICTION TO TAX

Perhaps the most difficult and perplexing problems in this entire field arise in the application of the tax to residents and non-residents, to income from sources within the state and from sources without the state. In the leading case of the State Tax on Foreign-Held Bonds31 the United States Supreme Court laid down the rule that "The power of taxation is necessarily limited to subjects within the jurisdiction of the State. Those subjects are persons, property and business. Whatever form taxation may assume it must relate to one of these subjects." Mr. Justice Brown, in a later case, explained this rule:32 "The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares. If the taxing power be in no position to render these services or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another state, the taxation of such property within the domicil of the owner partakes rather of the nature of an extortion than of a tax." Obviously a state may tax the income of a resident earned within the state, for, whether an income-tax is to be regarded as a tax on the person, on the property, or on the business of the taxpayer, in this case all three elements are subject to the jurisdiction of the state. It is quite as obvious that income earned without the state by a non-resident cannot be taxed; income, as such, is not taxable by a state which has no other relation towards it than that of covetousness. It remains to consider the taxability of income earned within the state by non-residents and without the state by residents.

In Shaffer v. Carter33 the Supreme Court assumed that a tax on the total net income of a resident, though derived in whole or in part from sources without the state, would not violate any constitutional provision

32 Union Refrigerator Transit Co. v. Kentucky (1905) 190 U. S. 194, 26 Sup. Ct. 36.
33 Supra note 30.

[863]
and held that a state might tax income earned within its boundaries though the recipient of the income was a non-resident. The argument that the former proposition involved the recognition of the tax as personal in its nature and precluded the Court from sustaining the tax on the income of non-residents was brushed aside. The Court was confronted with a real dilemma and, since theory and philosophic principles could not help, wisely determined to disregard them. Shaffer v. Carter itself gives us a new principle: "That the State, from whose laws property and business and industry derive the protection and security without which production and gainful occupation would be impossible, is debarred from exacting a share of those gains in the form of income-taxes for the support of the Government, is a proposition so wholly inconsistent with fundamental principles as to be refuted by its mere statement. That it may tax the land but not the crop, the tree but not the fruit, the mine or well but not the product, the business but not the profit derived from it, is wholly inadmissible."

But non-residents, taxed on their income earned within the State, may not be discriminated against as non-residents. In Shaffer v. Carter the fact that residents were permitted to deduct from their gross income all losses sustained anywhere while non-residents were authorized to deduct only those incurred within the State, was held not to be a denial of equal protection of the laws. The court said: "The difference is only such as arises naturally from the extent of the jurisdiction of the state in the two classes of cases, and cannot be regarded as an unfriendly or unreasonable discrimination. As to residents it may and does exert its taxing power over their income from all sources, whether within or without the state, and it accords to them a corresponding privilege of deducting their losses wherever these accrue. As to non-residents the jurisdiction extends only to their property owned within the state and their business, trade or profession carried on therein, and the tax is only on such income as is derived from those sources." But if the losses of a resident outside the state are sufficient to offset all his gains within the state he has no tax to pay; in Shaffer v. Carter plaintiff did not show such losses but different treatment of a

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34 In view of the well-settled rule that a state may not tax tangible property permanently situated in another state, this is a further argument that a tax on income is not to be regarded simply as a tax on the source thereof.


36 Supra note 30.

37 Ward v. Maryland (1870, U. S.) 12 Wall. 418; State v. Lancaster (1884) 63 N. H. 267.

38 Supra note 30.

39 252 U. S. at p. 57, 40 Sup. Ct. at p. 227; (1920) 29 YALE LAW JOURNAL, 799.
non-resident in such a case would seem to be an unreasonable discrimination.

The allowance of personal exemptions to residents under the New York law, without equivalent exemptions for non-residents, was held unconstitutional. The law was then amended to give to non-residents the same exemptions that residents enjoyed but it would probably have been sufficient if non-residents were given merely such fraction of the exemptions given to residents as represented the ratio between their income from sources within the state and their total income.

A state may not tax income accruing to a non-resident from a source without the state but it does not necessarily follow that a state may never look beyond its own boundaries in assessing a tax on the income of a non-resident from sources within the state.

The value of property results from the use to which it is put and varies with the profitability of that use, present and prospective. Recognition of this elementary principle led to the sustaining of a state general ad valorem tax on property used in interstate commerce though the value of that property was determined by considering the receipts from such commerce. It was later the basis of a decision upholding a tax law which determined the value of property in the state, owned by express companies engaged in business within and without the state, by taking that fraction of the value of the whole capital stock of such companies which represented the ratio between the gross receipts and mileage within the state and the total receipts and mileage.

In Underwood Typewriter Co. v. Chamberlain, the Supreme Court sanctioned the application of the "unit rule," as it is called, for the allocation of the income of non-residents where it appeared to have been earned from property and activity partly within and partly without the taxing state. Of course any unit rule is bound to be more or less arbitrary and unequal in its application, but it is a generally satisfactory method of assessment or allocation, and any unit rule which is not obvi-

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44 Express Co. v. Ohio State Auditor (1897) 166 U. S. 185, 223, 17 Sup. Ct. 604, 608: "In conclusion let us say that this is an eminently practical age and that no fine-spun theories about situs should interfere to enable these large corporations whose business is carried on through many states to escape from bearing in each state such burden of taxation as a fair distribution of the actual value of their property among those states requires."
45 (1920) 254 U. S. 113, 41 Sup. Ct. 45. The Connecticut tax involved here provided that the ratio between the value of all real and tangible, personal property owned in the state and the value of all its real and tangible personalty, wherever situated, should determine what fraction of the total net income of a foreign corporation should be allocated to Connecticut.

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ously unreasonable or calculated to tax income from outside the state will be upheld.46

But may a state imposing a progressive income-tax look beyond the state boundaries to find what the total income of the non-resident is and then apply the rate applicable to residents who receive income of an equal amount to his income from sources within the jurisdiction? In Maxwell v. Bugbee47 the Supreme Court sustained a New Jersey inheritance tax, levied on property in the state owned by a non-resident decedent, though the tax was progressive and the rate was determined by the total value of the estate regardless of where the property constituting it was situated. Was not the tax, in so far as it was increased by the ownership of property outside the state, a tax on that property? Why should New Jersey benefit from the fact that the non-resident owned property elsewhere? It seems to me that the decision is to be sustained only on the ground that the State of New Jersey might, had it seen fit, have abolished inheritance entirely and, having that arbitrary power, could impose conditions on the exercise of the privilege of inheritance which, but for that power, would be unconstitutional. This argument is not available to support a similar income tax and Maxwell v. Bugbee should not be extended into the field of income taxation. But the language of the opinion is broad, relying rather on the “proper subject” doctrine,48 and one cannot say with any certainty that the Maxwell case will be so limited.

**Who Are “Residents”**

Since income earned outside the state may only be taxed if the recipient is a resident, it becomes of vital importance to know just what constitutes a man a “resident” of a state. Eminent authorities have said that if a person intends to remain where he is for some days, but not indefinitely, that place is his “residence”; his “domicile” is where he has his home and where he intends to live permanently or for an indefinite period, though he may be temporarily absent.49 But in this

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47 Wis. Laws, 1913, ch. 720, sec. 1770b, 7, (e); Reg. of N. Y. State Tax Comm., Art. 457. Art. 470 authorizes non-residents to “submit an alternative basis of apportionment with respect to his own income subject to approval by the Tax Commission.”


49 *Ibid.* 539: “A state may not tax property beyond its territorial jurisdiction, but the subject-matter here regulated is a privilege to succeed to property which is within the jurisdiction of the state. When the state levies taxes within its authority property not in itself taxable by the state may be used as a measure of the tax imposed.” Holmes, J., gave a dissenting opinion in which three of the justices concurred. Cf. *Hamilton Mfg. Co. v. Moss* (1868, U. S.) 6 Wall. 632; but see *Western Union Tel. Co. v. Kansas* (1910) 216 U. S. 8, 30 Sup. Ct. 190.

field "residence" is so generally used in the sense of "domicile" that I here use it in that sense without apology or shame.

In international law it is not unusual to find a citizen of one country domiciled in another, but in the United States, as between the several states, such a thing is impossible. The Federal Constitution provides:69 "All persons born or naturalized in the United States are citizens of the United States and of the states wherein they reside." In the law of the situs of the person it is fundamental that every person must have one and only one domicile or residence. But, using the term "residence" in the more restricted sense advocated by legal writers, a man may have his residence in one state and his domicile in another. Thus where a person domiciled in Washington went to Virginia intending to stay only long enough to complete certain business it was held that, despite his Washington domicile, he was a resident of Virginia and his property could not be attached under a statute permitting attachments in suits against non-residents.68 So a New York court held that a person having his domicile in New York but engaged in business and living temporarily elsewhere was not a resident of New York within the meaning of the statute abolishing the arrest of residents for debts arising under a contract.62 At least one New York court was led astray by failing to note that in tax statutes "residence" generally means "domicile." In Austen v. Crilly,63 though the taxpayer proved a Philadelphia domicile, because he was temporarily living in New York he was held subject to a tax on all his personal property, within and without the state, which the legislature had imposed on "residents."

Under the Federal Income Tax Law residence is "that place where a man has his true, fixed, and permanent home, and to which, whenever he is absent, he has the intention of returning; it indicates permanency of occupation as distinct from lodging or board, or temporary occupation."64 The term is here clearly used in the sense of "domicile."

The New York Tax Commission has ruled: "For the purposes of the income tax law a resident of New York state is a natural person who has his fixed and settled abode in this state to which he returns from incidental and temporary absences and from which he has no present intention of removing. Such residence may not be nor be intended to be of long duration if it be fixed and settled and to continue for the time necessary to accomplish some business or other purpose and is not merely transient.65 As to the constitutionality of this test applied to persons domiciled outside of New York, quaere.

Since income earned outside the state may be taxed only if the

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68 U. S. Const. 14th Amendt. cl. 1.  
70 Forest v. Brisboi (1837, N. Y.) 19 Wend. 11.  
71 (1897, 1st Dept.) 13 App. Div. 247, 42 N. Y. Supp. 1097. As so interpreted and applied the tax was probably unconstitutional.  
recipient is a resident of the taxing state it would seem to follow that no income earned beyond the state while the recipient was a non-resident is subject to taxation. That was the position taken by the Court in *Hart v. Tax Commissioner*, holding the taxpayer entitled to an abatement for such portion of his income as was earned outside the State prior to his acquisition of a domicile in Massachusetts. The New York law provides that the term shall include, among others, "any person who shall at any time during the last six months of the calendar year be a resident of the state" and provides for no abatement such as the Massachusetts court granted. In so far as it does not do so this provision of the law would seem impeachable on constitutional grounds.

Whether X is or is not a domiciled resident of state Y has been generally recognized as a question for the courts of that state; other states have generally recognized the decisions of such courts as conclusive, though not actually binding on them. But when it comes to matters of taxation states are not apt to so lightly relinquish a claim of jurisdiction over the person and the coextensive right to reach income earned outside their territories. Suppose states Y and Z claim X as a resident and both states tax his entire net income. We have seen that a person may have only one domicile and that only the state of his domicile may tax income earned elsewhere. But how shall X seek relief? This question has never, within the writer's knowledge, come before the United States Supreme Court. Yet if the rules of *Shaffer v. Carter* are to be applied, some answer to the question must be found.

There are three grounds on which the Supreme Court might assume jurisdiction to hear an appeal from such conflicting decisions. In the first place, the "state citizenship" clause of the Federal Constitution might be interpreted as prohibiting two states from simultaneously holding any person a resident and citizen of each. Of course the judicial power extends to all cases arising under the Constitution.

Or, secondly, the Supreme Court might set aside, as depriving the taxpayer of his property without due process of law, whichever state decision it should find to be erroneous. The "due process" clause of the Fourteenth Amendment is not limited to judicial process.

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60 (1921) 240 Mass. 37, 132 N. E. 621; (1922) 35 HARV. L. REV. 876.
62 In *Tilt v. Kelsey* (1907) 207 U. S. 43, 28 Sup. Ct. 1, it was held that an adjudication of the Probate Court of New Jersey that the testator was a resident of the state, though essential to the assumption of jurisdiction to grant letters testamentary, was not binding as to the testator's domicile on the New York courts under the "full faith and credit" clause.
64 supra note 30.
66 In *Mühlker v. N. Y. & H. Rd.* (1905) 197 U. S. 544, 25 Sup. Ct. 522, it was held that a decision which was not obviously unsound and in reliance upon which land had been purchased could not be reversed by the State Court without violating the "due process" clause. In *Raymond v. Chicago Traction Co.* (1907) 207
Or, finally, the Supreme Court might hold the tax law itself, as interpreted by the state court, to amount to a deprivation of property without due process of law, in that it subjected persons who were not "residents" within the meaning of Shaffer v. Carter to a tax on income earned without the state.

**What Constitutes "Income from Within the State"**

There is usually no difficulty in deciding what constitutes income from within the state so that it may be taxed though the recipient is a non-resident. Clearly income from property or from any ordinary commercial enterprise carried on within the jurisdiction is included, and so also are dividends of domestic corporations and such portion of the dividends of foreign corporations as may be said to be based on profits made within the state. May a state tax interest payments on a loan merely because the debtor is a resident of the taxing state?

The case of the State Tax on Foreign-Held Bonds held unconstitutional a tax which provided for the withholding of 5% of the interest due on the bonds of a domestic corporation in the hands of non-residents. The decision was on the ground that the statute amounted to an impairment of the obligation of contract, but the language in the opinion suggested another ground. The Court said: "Debts are not property of the debtors in any sense; they are obligations of the debtors and only possess value in the hands of the creditors. They can have no locality separate from the parties to whom they are due. A tax levied by a state simply because the debtor resides there must be deemed an arbitrary seizure of private property held in other states. . . . The bonds are undoubtedly property, but property in the hands of the holders, not of the obligors. So far as they are held by non-residents of the State, they are property beyond the jurisdiction of the State."

Some five years later doubt was cast on the solemniter dictum quoted in the case of State Tax on Foreign-Held Bonds.

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*Supra* note 30.
"Supra" note 30.
"Ibid." 320. The Court here seems to imply that the tax would be good as applied to residents and, resting its decision on the State's lack of jurisdiction, that it secretly regards as unsubstantial the impairment of the obligation of contract point.
above. In Murray v. Charleston\(^6\) a state tax on municipal bonds which required the city to withhold a portion of the interest was held an unconstitutional impairment of the obligation of contract; but the Court suggested that were it not for the withholding provision the tax might have been good even as to non-residents, saying, "We do not care now to enter upon the consideration of the question whether a State can tax a debt due by one of its citizens or municipalities to a non-resident creditor, or whether it has any jurisdiction over such a creditor or over the credit he owns.\(^{67}\)

In the State Tax on Foreign-Held Bonds case,\(^8\) the fact that the bonds were secured by realty in the State was deemed immaterial since in Pennsylvania, the taxing State, mortgages were held to create a lien only, and not to pass title. But in Savings & Loan Society v. Multnomah County\(^9\) the Supreme Court modified the principle laid down in 1872, holding that a non-resident creditor-mortgagee, even if he had only an equitable interest in the mortgaged lands, had such an interest as might be taxed in the state where the land lay.\(^{70}\)

In Board of Assessors v. Comptoir National\(^71\) the doctrine of the State Tax case was further encroached upon. A foreign banking corporation which, through a local agent, lent money in Louisiana, taking checks as evidence of the advances, was held liable to pay a state tax on those credits. The fiction of "business situs" was here given birth; the capital was said to have acquired a "situs" in the State of Louisiana. An important step towards this position had been taken in Blackstone v. Miller,\(^72\) where it was held that New York might impose an inheritance tax on funds of a non-resident decedent which had been on deposit in a New York bank for a little over a year. The Court said: "If the transfer of the deposit necessarily depends upon and involves the law of New York for its exercise, or, in other words, if the transfer is subject to the power of the State of New York, then New York may subject the transfer to a tax. It is plain that the transfer does depend upon the law of New York, not because of any theoretical speculation concerning the whereabouts of the debt but

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\(^{6}\) (1877) 96 U. S. 432.
\(^{9}\) Supra note 64.
\(^{10}\) In Kirtland v. Hotchkiss (1879) 100 U. S. 491, the Court had held that a debt due from a non-resident might be taxed at the domicile of the creditor though secured by a mortgage on lands outside the state. This is interesting as showing the Court's attitude towards bi-state double taxation.
because of the practical fact of its power over the person of the debtor. In *Wheeler v. Sohmer* a succession tax on notes belonging to a non-resident decedent was sustained for no other reason than that the notes were found in New York but in *Buck v. Beach* an Indiana tax on notes kept for safe-keeping in that State by a resident of New York was held unconstitutional.

In *Blackstone v. Miller* Mr. Justice Holmes was unwilling to consider where the situs of the debt might be but thought that control over the person of the debtor and the creditor’s reliance on the laws of the state where the debtor was to collect his claim were sufficient to justify the imposition of an inheritance tax. When the question is squarely presented the Supreme Court may take the same position as to income taxes imposed on interest payments from such a debt; to date it has always sought some further basis for sustaining such a tax, in addition to jurisdiction and control over the person of the debtor.

**Collecting an Income Tax from Non-Residents**

Where the income of a non-resident is taxable as accruing from a source within the state what means are open to the state to enforce payment? How can it collect?

In cases where tapping at the source is feasible that is the most satisfactory method of collection. The English tax employs this method against residents as well as non-residents and it has proven satisfactory ever since its introduction in 1803. Every debtor is ipso facto an

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74 (1914) 233 U. S. 434, 34 Sup. Ct. 607.


76 *Supra* note 73.

77 This complete abandonment of the position taken in the case of the *State Tax on Foreign-Held Bonds* is advocated and predicted by Carpenter, *Jurisdiction over Debts for the Purpose of Administration, Garnishment and Taxation* (1918) 31 Harv. L. Rev. 905.

78 In *Westinghouse Electric & Mfg. Co. v. Los Angeles County* (1922) 188 Cal. 491, 203 Pac. 1076, the credits of a foreign corporation in the state for goods sold on credits to residents were held not to be property within the state and beyond the state’s taxing power. *Pendleton v. Commonwealth* (1909) 110 Va. 299, 65 S. E. 536; *State ex rel. Manitowoc Gas Co. v. Wis. Tax Comm.* (1915) 161 Wis. 111, 152 N. W. 848; but see *Boston Investment Co. v. Boston* (1893) 158 Mass. 461, 483, 33 N. E. 580, 581.

79 The use of this method to collect the tax on the income of residents is largely a matter of choice. It might to some extent prevent evasion or concealment since the tax is paid by a party on whom the burden does not ultimately rest, but it is open to the objections that it does not lend itself conveniently to the application of the progressive principle, that it quite generally requires duplication of returns, that the sums received are subject to rebate if the net income of the taxpayer does not exceed the sum of his exemptions, and that it imposes a burden on the debtor class. But as to non-residents it is necessary as the only really effective way of enforcing payment.
agent of the government to collect the tax. A debtor deducts the amount of the tax from the stipulated interest and pays it over to the government; an employer deducts the amount of the tax from the salaries of his employees; a tenant, from the stipulated rent. Corporations are taxed on their entire net income and no corporate dividends are taxed. To prevent collusion it is provided that any agreement whereby a creditor is to receive his interest without deduction shall be null and void.80

The North Dakota tax alone, of all the state taxes, provides extensively for collection at the source.81 The Wisconsin tax provides for information at the source in the case of corporation employers82 and debtors in general83 as a condition precedent to the right to deduct the amount of the wages or interest paid from gross income. The New York law provides for information at the source as to residents; as to non-residents it provides for withholding the tax on "salaries, wages, commissions, gratuities . . . and other fixed and determinable annual or periodical compensation of whatever kind and in whatever form paid or received, earned for personal services and taxable under this article," if they exceed $1,000 in amount.84 Any person so required to withhold the tax is made personally liable therefor.85 The Federal tax only requires collection at the source in the case of non-resident aliens.86

The employer, tenant, or debtor, stimulated by his being personally liable for the amount of the tax on the salary, rent, or interest due the non-resident, will generally comply with the law and withhold the sum owing to the government. But suppose the non-resident is engaged in business or in the practice of a profession within the state so that his income cannot be tapped at the source, as a practical matter; or suppose the withholding agent, designated by law, violates that law and the state, for one reason or another, finds it impossible to collect the tax from him. How can the state proceed against the non-resident?

If the non-resident has no property within the state and does not see fit to return there is no means of collecting the tax. The courts of the

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81 N. D. Laws, 1919, ch. 224, sec. 8.
82 Wis. Laws, 1913, ch. 720.
83 Wis. Laws, 1917, ch. 231.
84 N. Y. Laws, 1920, ch. 691. See Travis v. Yale & Towne Mfg. Co. (1920) 252 U. S. 60, 76, 40 Sup. Ct. 228, 230: "The contention that an unconstitutional discrimination against non-citizens arises out of the provisions of sec. 366 of the New York law, confining the withholding at source to the income of non-residents, is unsubstantial. That provision does not in any wise increase the burden of the tax upon non-residents but merely recognizes the fact that as to them the state imposes no personal liability, and hence adopts a convenient substitute for it."
85 For a full discussion of these provisions see Powell, Taxation of Personal Income in New York (1922) ch. II.
taxing state could not give a valid judgment against the delinquent; it is perfectly well-settled that service by publication does not warrant a personal judgment against a non-resident. Nor could the taxing state resort to the courts of a sister state for aid in enforcing its revenue laws.

If the tax is levied on the income from property within the jurisdiction of the taxing state it is generally admitted that, like a tax on the property itself, it may be made a lien on the particular property. But unless the statute provides for such a lien there is none, according to the great weight of authority. A tax is neither contractual in its origin—being an enforced contribution levied by the authority of the state irrespective of the consent of the taxpayer—nor is it a debt, and so payment cannot be coerced by common law proceedings in the absence of express statutory authorization. Let us now see to what extent property which is not the source of the income taxed may be subjected to a lien for the amount of that tax.

An Iowa statute provided for the personal liability of land-owners for special assessments on their property, in addition to imposing a lien thereon. Pursuant to this statute, the assessed property having been sold and found inadequate to satisfy the assessment, the Iowa court, in Dewey v. Des Moines, granted a judgment for the balance against a non-resident proprietor who had only been served by publication and never submitted to the jurisdiction of the court. Execution issued on the judgment and other property owned by the non-resident in the state was sold to satisfy it. On appeal to the United States Supreme Court it was held that, while the state might provide for the sale of the assessed property, it could not "under any guise or pretext, proceed further and

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8 Pennoyer v. Neff (1877) 95 U. S. 714; Dewey v. Des Moines (1899) 173 U. S. 193, 19 Sup. Ct. 379 (Nor does appearing before the court to seek relief from an unconstitutional imposition of personal liability amount to a waiver).

9 In Colorado v. Harbeck (1921) 232 N. Y. 71, 133 N. E. 357, where the right to sue in the courts of New York to collect an inheritance tax levied by Oklahoma on a resident of that State was denied, the court said, at p. 82: "Taxes are not debts or contracts. No contractual or quasi-contractual obligation to pay arises out of the assessment of a tax. . . . Under the due process clause of the United States Constitution, where the delinquents are non-residents of the taxing state and outside its jurisdiction so that no personal liability or enforceable duty may be established as against them and where the property involved is without the taxing state so that no 'res' exists upon which the taxing state may impose a lien, the state is powerless to collect the tax in its own courts and powerless to invoke the aid of a sister state to collect its revenues."

10 Shaffer v. Carter, supra note 30.

11 Perry v. Washburn (1862) 20 Calif. 318, 320; Jones v. Gibson (1885) 82 Ky. 561; Appleton v. Hopkins (1855, Mass.) 5 Gray, 530; Lane County v. Oregon (1868, U. S.) 18 Wall. 71; (1908) 71 Tex. L. Rev. 283 and cases cited.


impose a personal liability upon a non-resident to pay the assessment or any part of it" and that the judgment, since the court had no jurisdiction over the person of the defendant, was a nullity, a denial of due process. In *Davidson v. New Orleans*, the Supreme Court had sustained a statute which imposed personal liability on a resident for a special assessment. *Dewey v. Des Moines* was taken to have decided that any statute making a non-resident personally liable for a tax would be invalid.

A few years later, however, the doctrine of the *Dewey* case was limited, if not in part overruled, by the decision in *Bristol v. Washington County*. A non-resident had been taxed on personalty within the State of Minnesota and died before the tax was paid. The statute provided that the tax should be a lien on all the property owned by a delinquent within the state and the Supreme Court, in sustaining the allowance of the amount of the tax pursuant to a claim made against the assets of the estate in the hands of the probate court, said: *"Dewey v. Des Moines* is not to the contrary. What was ruled there was that a citizen of one State cannot be cast in a personal judgment in another State on an assessment levied there on real estate for a local improvement, without service on him, or voluntary appearance, or some action on his part amounting to consent to the jurisdiction."

The result of these cases would seem to be that, where a state levies a tax on the property of a non-resident and that property is not of sufficient value to pay the accrued claims of the State for backtaxes or is taken out of the State so that it cannot be attached, the collector of taxes may, if authorized by statute go against any other property of the non-resident within the jurisdiction. It would seem that the same

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"It is a basic rule governing special or local assessments that the assessment may not be in excess of the value of the benefit conferred. That rule was obviously violated in the *Dewey* case but the Supreme Court could not consider it on appeal since the question was not raised in the lower courts.

As (1877) 96 U. S. 97; cf. *Emrick v. Dicken* (1879) 92 Pa. 78.

In *City of N. Y. v. McLean* (1902) 170 N. Y. 374, 387, 63 N. E. 380, 384, interpreting the application of a tax to stock owned by a non-resident in a domestic corporation, the court said: "Even if the statutes of this state were intended to confer upon officers of the plaintiff authority to maintain an action against the defendant and impose upon him a personal liability for the payment of the tax assessed upon his shares of stock yet, so far as they attempted to confer that right they were beyond the power of the legislature to enact."

(1890) 133 U. S. 666, 10 Sup. Ct. 324.

Ibid. 140, 20 Sup. Ct. at p. 388.


Some ingenious persons have argued that after the non-resident has received his salary for the tax year there is a cleavage, by the express provisions of the
rule should apply to the collection of taxes on income. Not only should subsequent income of non-residents from the same source be subject to the payment of the tax but even income from other sources within the state should be chargeable with its payment. Yet in *Shaffer v. Carter* the Court, after stating the delinquent's claim “that the State is without power to create a lien upon any property of a non-resident for income taxes except the very property from which the income proceeded; that a lien may not be imposed upon a non-resident's unproductive property, nor upon any particular productive property beyond the amount of the tax upon the income that has proceeded from it,” avoided these questions by saying that under the circumstances of the particular case before them “the State did not exceed its power or authority in treating his property interests and his business as a single entity, and enforcing payment of the tax by the imposition of a lien, to be followed by execution or other appropriate process, upon all property employed in the business.”

The problem is further complicated where the delinquent is engaged in some enterprise authorized by the Federal Government or, for some other reason, beyond the regulatory power of the State. Where a corporation was authorized by Act of Congress to maintain telegraph lines along any military or post-road of the United States it was held that non-payment of even a valid tax could not be made the basis of an injunction against the maintaining of such lines. The Court said: “If a resort to judicial proceedings to collect it is deemed expedient, there remains to the court all the ordinary means of enforcing its judgment—execution, sequestration, and any other appropriate remedy in Chancery.”

It would seem equally clear that a State may not make the payment of a valid tax on a person's local, intrastate business a condition precedent to the doing of interstate business or engaging in foreign trade.

statute, and back-taxes cannot be collected by garnishment of future salary. The answer to this seems to be that income is really a flow of wealth and that this fact is not altered by the law's requiring a balancing of accounts at the end of each year.

N. Y. Personal Income Tax, supra note 80, Art. 16, sec. 35x (b) provides: “Every tax imposed by this article, and all penalties, increases and interest thereon, in addition to being a tax against property, business, trade, profession or occupation, as in this article provided, shall also become from the time it is due and payable a personal debt, from the person or persons liable to pay the same, to the State of New York.”

Supra note 30, at p. 58, 40 Sup. Ct. at p. 228.

*Western Union Tel. Co. v. Mass.* (1888) 125 U. S. 530, 8 Sup. Ct. 961.


*Postal Tel. Co. v. Adams* (1895) 155 U. S. 688, 696, 15 Sup. Ct. 268, 269: “Property in a state belonging to a corporation . . . engaged in foreign or interstate commerce may be taxed . . . if payment be not made a condition precedent to the right to carry on the business but its enforcement left to the ordinary means devised for the collection of taxes.”
Bi-State Double Taxation

We have seen how far a state may go in taxing income from sources beyond its jurisdiction and income accruing to persons resident in another state. But if State A taxes X on his total income and State B taxes X on such portion of his income as is derived from the latter State, it is evident that X will be taxed twice on that portion. Is that fact of any consequence as regards the constitutionality of either tax law?

*Kidd v. Alabama* answered this question in the negative. The State of Alabama had imposed a tax on the stock of railroads incorporated in other states in so far as it was held by residents without imposing a similar tax on the stock of corporations, domestic or foreign, doing business in Alabama. The Supreme Court held that Alabama might consider the fact that no tax was imposed on the property or the franchises of foreign corporations doing no business in the State and that the discrimination was reasonable. The Court spoke through Mr. Justice Holmes: "We say untaxed because they are not taxed by the State in question. The real grievance in a case like the present is that, more than probably, they are taxed elsewhere. But with that the State of Alabama is not concerned. No doubt it would be a great advantage to the country and to the individual states if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided. But the Constitution of the United States does not go so far. The State of Alabama is not bound to make its laws harmonize in principle with those of other states. If property is untaxed by its laws, then for the purpose of its laws the property is not taxed at all." In short there is no inhibition upon bi-state double taxation in our Federal Constitution.

There is nothing inherently unjust about double taxation. Only where there is unreasonable discrimination is it objectionable. But

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208 (1903) 188 U. S. 739, 23 Sup. Ct. 401; *Judy v. Beckwith* (1908) 137 Iowa 24, 114 N. W. 558, 568: "Each state is sovereign within its own territorial jurisdiction and its power to tax any and all property therein, except such as is in actual transit through it, cannot be taken away, limited, or lessened by the act of the taxing authorities of any other state"; *Hawley v. Malden* (1914) 232 U. S. 1, 34 Sup. Ct. 201 (that a state in creating a corporation may provide that all its shares shall be taxable there, no matter by whom owned, is no objection to the taxation of such shares at the domicile of a non-resident-owner); *supra*, note 68; cf. *State v. County Court* (1879) 69 Mo. 454, where a statute was interpreted not to include municipal bonds owned by a resident and kept in another state for safe-keeping because that result would have led to double taxation.


210 A single high tax on property is neither easier to justify nor easier to pay than two low ones on the same property resulting from an overlapping classification, or a low tax on the property and another low tax on the income from that property. Seligman, *Essays in Taxation* (1921) 100; *Paddell v. New York* (1908) 211 U. S. 446, 29 Sup. Ct. 139; *St. Louis S. W. Ry. v. Arkansas* (1915) 235 U. S.
our hypothetical case presents such a situation. Had X invested all his money and confined his business undertakings to the state of his residence he would have been taxed only once on his income. Because he received income from another state he was assessed twice. Not only is this result unfair to the taxpayer but also detrimental to the best interests of the states, individually and collectively. If every state exercised to the full the taxing-power recognized in them in *Shaffer v. Carter* and *Kidd v. Alabama*, the effect would be the localization of capital and the restriction of interstate commerce. Let us see if there is not some scheme or plan of taxation on which the state might agree to their mutual advantage.

The Wisconsin tax, speaking generally, is on all income from sources within the State, no matter by whom earned, and on no other income. Massachusetts only taxes certain classes of income and then only when earned by an inhabitant of the State, but regardless of their source. Oklahoma taxes the entire net income of residents and all income earned within the State by non-residents. Practically every conceivable variation of the taxation of intra-state income of non-residents and extra-state income of residents is exemplified in the tax system of one or more states. In poor states where but little foreign capital is invested and where the residents own, in the aggregate, but little property in other states it is really not of very great consequence which system is adopted. In rich farming or industrial states it is of the greatest importance.

Most states have not, as yet, adopted personal income taxes at all. The Wisconsin tax is therefore open to the objection that it tends to discourage investment in the taxing state in favor of neighboring states. The rule of the Massachusetts tax is open to the objection that it practically confers a bounty upon non-residents coming into the State to work, though it has the advantage of inviting foreign capital. The Oklahoma tax is likely to result in unjust bi-state double taxation. All things considered, the rule of the New York tax law, at least until income taxes are more widely adopted in the United States, is to be preferred. The New York law, like that of Oklahoma, taxes residents on their entire income and non-residents on their income from sources within the State, but in addition provides that “Whenever a taxpayer other than a resident of the State has become liable to income tax to the State or country where he resides upon his net income for the taxable

350, 35 Sup. Ct. 99; Meyers v. Commonwealth (1910) 110 Va. 609, 66 S. E. 824; *Opinion of the Justices* (1911) 76 N. H. 588, 79 Atl. 31; *cf. Opinion of the Justices* (1916) 220 Mass. 613, 108 N. E. 570; State v. Pinder (1919, Del.) 7 Boyce 415, 108 Atl. 43; *contra, City of Chicago v. Collins* (1898) 175 Ill. 445, 458, 51 N. E. 910: “It is a fundamental maxim in taxation that the same property shall not be subject to a double tax payable by the same party, either directly or indirectly.”

10 Supra note 30.

10 Supra note 106.
year, derived from sources within this State and subject to taxation under this article, the Tax Commission shall credit the amount of income tax payable by him under this article with such proportion of the tax so payable by him to the state or country where he resides as his income subject to taxation under this article bears to his entire income upon which the tax payable to such other state or country was imposed" if such other state grants a substantially similar credit to residents of New York.\textsuperscript{111}

But the day is not far distant when personal income taxes will be as prevalent throughout the United States as taxes on real estate are to-day. Then will this question have to be answered: As between the several states should an individual's income be taxed where it is earned or where he resides? Wisconsin taxes only such income as is derived from sources within the State. The theory of the New York tax is that each state should merely tax its residents on their entire income. It is submitted that the latter policy is preferable both as regards expediency and the fair claims of the states.

The argument that the levy of a tax on income derived from another state, merely because the recipient is a resident, is an arbitrary exercise of the taxing power, without economic justification, because that state which contributes to the earning of the income should tax it, proves too much. Is not the success of the Oklahoma business or the productivity of the Oklahoma well due as much to the New York entrepreneur or the New York capital, which makes its development possible, as to the Oklahoma customers or the Oklahoma oil field? Indeed, acting on this argument, would require the taxation of the income from the business or well in the scattered states of the Union and abroad where the ultimate consumers live. The argument that the state which protects the source of the income should tax the income is plainly a non sequitur. The state which protects the source should tax the source; an ad valorem tax on the property for adequate compensation for the protection furnished. There may be some abstract justice in the claim that each state should be allowed to tax a portion of the income but no theoretical, much less practical, method of equitable apportionment has yet been propounded and the obstacles in the way of collecting a tax on non-residents have already been pointed out.

\textsuperscript{111} N. Y. Personal Income Tax, \textit{supra} note 80, Art. 16, sec. 363.