INDEX.

Notice of Appeal.

(Filed Jan. 18, 1917.)

New Jersey Supreme Court.

CHARLES L. ZABRISKIE, *et als.*, Executors of the Last Will and Testament of CHARLES FREDERIC ZABRISKIE, deceased, *Prosecutors,* *vs.* EDWARD I. EDWARDS, Comptroller of the Treasury of the State of New Jersey, *Defendant.*	*On Certiorari.* *Notice of Appeal.*

To the Honorable John W. Wescott, Attorney General of New Jersey, attorney for the defendant, or to whom it may concern:

TAKE NOTICE that the Prosecutors above named appeal to the Court of Errors and Appeals, the last resort in all causes, from the judgment entered in the above entitled cause and from each and every part thereof.

Yours, etc.,

LUM, TAMBLYN & COLYER,
Attorneys for Prosecutors.

Dated January 12, 1917.

Service of a copy of the within Notice of Appeal is hereby acknowledged this 15th day of January, 1917.

JOHN W. WESCOTT,
Attorney of Defendant.

Grounds of Appeal.

(Filed Jan. 18, 1917.)

New Jersey Court of Errors and Appeals

CHARLES L. ZABRISKIE, *et als.*, Executors of the Last Will and Testament of CHARLES FREDERIC ZABRISKIE, deceased, *Prosecutors-Appellants,* *vs.* EDWARD I. EDWARDS, Comptroller of the Treasury of the State of New Jersey, *Defendant-Respondent.*	*On Certiorari.* *Grounds of Appeal.*

To the Honorable John W. Wescott, Attorney General of New Jersey, attorney for the Defendant-Respondent, or to whom it may concern:

TAKE NOTICE that the following are the grounds of appeal which the Prosecutors-Appellants hereby assign and upon which they will rely at the hearing:

1. Because the appraisement and assessment of the transfer or inheritance tax was confirmed.

2. Because the assessment of said transfer or inheritance tax should have been vacated and set aside.

3. Because the rights and property assessed and taxed in this case were not subject to taxation or assessment.

4. Because the Comptroller of the State of New Jersey who made the said assessment had no authority or jurisdiction to make the same, and the act of the said State Comptroller in making said assessment is void for want of jurisdiction.

5. Because said assessment is illegal, invalid and void for the reason that the same does not allow for the exemption of property to the amount of five thousand dollars passing and transferred to each child of decedent.

6. Because said assessment is illegal, invalid and void for the reason that there has been no transfer within the purview of the Transfer Tax Act of New Jersey of the estate in remainder created by the will of decedent after the life estate therein devised and bequeathed.

7. Because said assessment is illegal, invalid and void in that said tax upon said estates in remainder should not be levied or assessed until the persons entitled to said property come into the beneficial enjoyment, seizin or possession thereof.

8. Because the assessment herein is in violation of Article 12, Section 7, Paragraph 4 of the Constitution of the State of New Jersey, which provides that property shall be assessed for taxes under general laws and by uniform rules, according to its true value.

9. Because said assessment herein violates the essential quality of taxation which requires that taxes be imposed under a rule of uniformity.

10. Because said assessment is unconstitutional in that it attempts to subject to taxation property rights and the succession thereto and

transfer thereof, which cannot be subjected to taxation by the State of New Jersey.

11. Because Chapter 228 of the Laws of 1909 as amended by Chapter 151 of the Laws of 1914 and as further amended by Chapters 58 and 59 of the Laws of 1914, and as further amended by Chapter 392 of the Laws of 1915, under which said assessment purports to have been made, are each and all of them unconstitutional in that they and the assessment made thereunder subject the prosecutors herein to unreasonable searches and seizures in violation of Article I, Section 6 of the Constitution of the State of New Jersey.

12. Because Chapter 228 of the Laws of 1909 as amended by Chapter 151 of the Laws of 1914 and as further amended by Chapters 58 and 59 of the Laws of 1914, and as further amended by Chapter 392 of the Laws of 1915, under which said assessment purports to have been made, are each and all of them unconstitutional in that they violate Section 2, Sub-Division 1, Article IV of the Constitution of the United States, which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

13. Because Chapter 228 of the Laws of 1909 as amended by Chapter 151 of the Laws of 1914 and as further amended by Chapters 58 and 59 of the Laws of 1914, and as further amended by Chapter 392 of the Laws of 1915, under which said assessment purports to have been made, are each and all of them unconstitutional in that they violate Article 14 of Amendments to the Constitution of the United States, Sub-division 1, which provides that "no

state shall make or enforce any law which shall abridge the privileges or immunities of citizens in the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

14. Because Chapter 228 of the Laws of 1909 as amended by Chapter 151 of the Laws of 1914, and as further amended by Chapters 58 and 59 of the Laws of 1914, and as further amended by Chapter 392 of the Laws of 1915, under which said assessment purports to have been made, are each and all of them unconstitutional in that they violate Article IV of Amendments to the Constitution of the United States, providing the rights of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures, etc.

15. Because the transfer tax under review in this action on the transfer of stock in New Jersey corporations forming part of the estate of Charles Frederic Zabriskie, late a non-resident of New Jersey, is assessed pursuant to the third or last paragraph of Section 12 of an act entitled "An Act to tax the transfer of property, of resident and non-resident decedents, by devise, bequest, descent, distribution of statute, gift, deed, grant, bargain and sale, in certain cases," approved April 20, 1909, as amended by Chapter 151, P. L. 1914, as amended by Chapter 392 of the Laws of 1915, entitled, "An Act to amend an act, entitled, 'An Act to tax the transfer of property of resident and non-resident decedents, by devise, bequest, descent, distribution by statute, gift, deed, grant,

bargain and sale, in certain cases,' '' and said paragraph of said Section 12 is inoperative as against the transfer of the aforesaid stock because the assessment of tax pursuant to the said paragraph denies to Charles Frederic Zabriskie and his estate, his executors, the beneficiaries under his will and his residuary legatees, all citizens and residents of the United States and the citizens and residents of other States of the United States than New Jersey and non-residents of the State of New Jersey, privileges and immunities enjoyed by citizens of the State of New Jersey, and therefore contravenes Article 4, Section 2, Paragraph 1 of the Federal Constitution, and the prosecutor claims the protection thereof.

16. Because the assessment of the tax referred to in the foregoing reasons is assessed under the statutes hereinbefore referred to, which are inoperative and ineffective to tax the transfer of the stock in New Jersey corporations left by the said decedent, because said New Jersey corporations are incorporated under the General Corporation Act of the State of New Jersey and the enforcement of said acts would be inconsistent with the provisions contained in said act and the charter of said companies with reference to the transfer of stock in New Jersey corporations upon the books of said New Jersey corporations and the only power that the State of New Jersey has to tax a transfer of stock is its power over the charter provisions and acts incorporating corporations of the State of New Jersey and to enforce the provisions of Chapter 228 of the Laws of 1909 as amended by Chapter 151 of the Laws of 1914 and as amended by Chapter 392 of the

Laws of 1915 would violate the following provisions of the State Constitution:

Art. IV, Sec. 7, Paragraph 3.

Art. IV, Sec. 7, Paragraph 4.

Art. IV, Sec. 7, Paragraph 12.

17. Because Chapter 228 of the Laws of 1909 as amended by Chapter 151 of the Laws of 1914 and as amended by Chapter 392 of the Laws of 1915 is unconstitutional and violates Article IV, Section 7, Paragraph 3 of the Constitution of the State of New Jersey in that the object thereof is not expressed in the title.

18. Because Chapter 228 of the Laws of 1909 and as amended by Chapter 151 of the Laws of 1914 and as amended by Chapter 392 of the Laws of 1915 is unconstitutional and violates Article IV, Section 7, Paragraph 4 of the Constitution of the State of New Jersey in that said law embraces more than one object in contravention thereof.

19. Because Chapter 228 of the Laws of 1909 as amended by Chapter 151 of the Laws of 1914 and as amended by Chapter 392 of the Laws of 1915 is unconstitutional and violates Article 1, Section 10, Paragraph 1 of the Federal Constitution because the enforcement thereof will impair the obligation of contracts.

Yours, etc.,

LUM, TAMBLYN & COLYER,
Attorneys for and of Counsel with Prosecutors-Appellants.

RALPH E. LUM,
Of Counsel.

Service of a copy of the within Grounds of Appeal is hereby acknowledged this 15th day of January, 1917.

JOHN W. WESCOTT,
Atty. for Defendant-Respondent.

Writ of Certiorari.

(Allowed September 28, 1916.)

THE STATE OF NEW JERSEY to HON-
(L. S.) ORABLE EDWARD I. EDWARDS, Comptroller of the Treasury of the State of New Jersey.

We being willing for certain reasons to be certified of a certain appraisement, assessment or fixing of the transfer inheritance tax upon the transfer of shares of stock in New Jersey corporations standing in the name of Charles Frederic Zabriskie, deceased, and passing under his last will and testament to the beneficiaries therein named, made the eighth day of April, Nineteen Hundred and Fifteen, do command you that you send under your hand and seal to our Justice of our Supreme Court of Judicature at Trenton on the eleventh day of October next, said appraisement, assessment and order fixing said tax together with all things touching and concerning the same as fully and entirely as they remain before you together with this writ, that we may further cause to be done thereon what of right we shall see fit to be done.

WITNESS William S. Gummere, Chief Justice of our Supreme Court at Trenton, the twenty-eighth day of September, A. D. Nineteen Hundred and Sixteen.

WM. C. GEBHARDT,
Clerk.

LUM, TAMBLYN & COLYER,
Attorneys.

Allocatur: September 26, 1916.

SAMUEL KALISCH,
J. S. C.

Return.

(Filed October 10, 1916.)

New Jersey Supreme Court.

CHARLES L. ZABRISKIE, CHARLES STEWART PHILLIPS and MINNIE R. ZABRISKIE, Executors of the Last Will and Testament of CHARLES FREDERIC ZABRISKIE, deceased. *Prosecutors,* *vs.* EDWARD I. EDWARDS, Comptroller of the Treasury of the State of New Jersey, *Respondent.*	*On Certiorari.* *Return to Writ.*

I, Edward I. Edwards, pursuant to the command of within writ and for a return thereto, do hereby annex copies of all the papers relating to the transfer or inheritance tax levied against the estate of Charles Frederic Zabriskie, deceased, as within I am commanded.

Witness my hand, this tenth day of October, A. D. nineteen hundred and sixteen.

E. I. EDWARDS,
Comptroller of the Treasury of the State of New Jersey.

Return.

19,702.

Tax on transfer of shares of stock in New Jersey Corporations standing in the name of a non-resident decedent.

Estate of Charles Frederic Zabriskie.
Late of New York City.
Executor: Charles Lemaire Zabriskie.
Post office address Stitt and Phillips, 113 Fulton St., N. Y. C.

Date of Death of Decedent, April 20, 1914.

SHARES OF STOCK IN NEW JERSEY CORPORATIONS.

No. of Shares. Pfd.	Com.	Name of Company	Market Value	Total
700	....	Virginia-Carolina Chemical Co..	$100.00	$ 70,000.00
400	....	Bethlehem Steel Corporation..	83.00	33,200.00
100	....	Pressed Steel Car Company...	103.375	10,337.50
200	....	Railway Steel Spring Company.	90.00	18,000.00
1000	....	American Car & Foundry Co..	115.50	115,500.00
1st 300	....	United States Rubber Company	101.50	30,450.00
400	....	Central Leather Company....	99.25	39,700.00
800	....	United States Steel Corp.....	108.25	86,600.00
100	....	American Malt Corporation...	44.00	4,400.00
200	....	American Cotton Oil Company	95.00	19,000.00
				$427,187.50

Interests taxable:

Legacy (item 4 of will), $3,000.00 at 5% $150.00

Interests of widow:

Item 5 of will.....	$ 4,267.33	
	32,344.00	
Item 6 of will.....	150,633.00	
	$187,244.33	
Stat. exemption	5,000.00	
	$182,244.33	
$ 45,000.00 at 1%.....		$ 450.00
100,000.00 at 1½%.....		1,500.00
37,244.33 at 2%.....		744.89

Return.

Interests of two children:			
Item 5 of will	$ 37,656.00		
Item 6 of will	163,009.08		
	175,385.43		
	$376,050.51		
Statutory exemption	10,000.00		
	$366,050.51		
$ 90,000.00 at 1%		$ 900.00	
200,000.00 at 1½%		3,000.00	
76,050.51 at 2%		1,521.00	
		$8,265.89	
		.71197	
Tax		$5,885.07	
Appraised Value of Estate	$600,126.65	$427,187.50	.71197
Deductions	33,582.10		
Net Estate	$566,544.55		
Legacies, etc.	77,517.33		
Residue	$489,027.22		

Total Appraised Value of Shares in New Jersey Corporations	$427,187.50
Tax payable if decedent had lived in New Jersey and all the property had been located in this State	8,265.89
Percentage of whole estate invested in New Jersey stocks	.71197
Tax due New Jersey	5,885.07

STATE OF NEW YORK,
COUNTY OF NEW YORK. } *ss.*

Charles Lemaire Zabriskie, being duly sworn, deposes and says he is the son of Charles Frederic Zabriskie, deceased, and one of the executors of his will, that said Charles Frederic Zabriskie died a resident of the Borough of Manhattan, City of New York, on the 20th day of April, 1914, leaving a will which was admitted to probate by the 27th day of April, 1914, and that Letters Testamentary under said

Return.

will were issued to Charles Stewart Phillips, and to Minnie R. Zabriskie, decedent's widow, and to Charles Lemaire Zabriskie, the deponent, on April 28, 1914.

That the beneficiaries under the will of said decedent are said Minnie R. Zabriskie, his widow, and decedent's children, Anita Louise Zabriskie, and Charles Lemaire Zabriskie, deponent, also the Rector, Church Wardens and Vestrymen of the Protestant Episcopal Church of St. Ignatius, located in the Borough of Manhattan, City of New York (incorporated in the State of New York), also a cousin of deceased, Jessie Crawford Roome, the legacy to the last named being but two hundred and fifty dollars;

That attached hereto is the inventory and statement of the Estate sworn to by deponent and his co-executor Charles Stewart Phillips and filed with the New York State Appraiser in the proceeding to determine the Transfer Tax to be paid in this State of New York.

(Signed) CHARLES LEMAIRE ZABRISKIE.

Sworn to before me this
February 1st, 1915.

(Signed) HENRY P. MILLER,
Notary Public Nassau Co.

C't'f filed in New York Co., No. 90.

Return.

SURROGATE'S COURT,
NEW YORK COUNTY.

IN THE MATTER OF THE TRANSFER TAX UPON THE ESTATE OF CHARLES FREDERIC ZABRISKIE, deceased.

STATE OF NEW YORK, }
COUNTY OF NEW YORK. } *ss.*

Charles Stewart Phillips and Charles Lemaire Zabriskie severally duly sworn, depose and say:

I. That they reside respectively at No. 146 Central Park West and at No. 37 West 75th Street, in the Borough of Manhattan, New York City.

II. That said Charles Frederic Zabriskie died on the 20th day of April, 1914, a resident of the County of New York, leaving his last will and testament which was duly admitted to probate by the Surrogate's Court of the County of New York on the 27th day of April, 1914, and on April 28th, 1914, Letters Testamentary under said will were issued to Minnie R. Zabriskie and to deponents.

III. That the real property of which said decedent died seized and possessed consisted of his residence, No. 37 West 75th Street, in the Borough of Manhattan, New York City, a four story high stoop brown stone front dwelling, lot 22 feet wide and 102 feet 2 inches deep, which was assessed by New York City for taxation for the year 1914, at $42,000.00, the fair market value of which at the time of decedent's death was forty thousand dollars, also dwelling and premises on Lake Street, in the Village of Cooperstown, New York, the fair market value

of which at the time of decedent's death was $25,000, and a garage and stable on Fair Street in the Village of Cooperstown, New York, the fair market value of which at time of decedent's death was $3,000.

IV. The following is a statement of the personal property of deceased, and of the fair market value thereof at the time of decedent's death.

Clothing	$ 50.00
Horse and carriages, etc., sold shortly after decedent's death for	395.00
Furniture and other personal property in residence of deceased No. 37 West 75th street (Manhattan), New York City; also watch and automobile, as per appraisal attached	3,877.90
Furniture and other personal property in dwelling of decedent at Cooperstown, N. Y., as per appraisal attached	912.38
Furniture and other personal property in stable and garage at Cooperstown, N. Y., as per appraisal attached	82.05
Account in First National Bank of Cooperstown, N. Y.	856.16
Account in Bank of Manhattan Company, N. Y. City	1,465.66

STOCKS.

100	shares	Home Insurance Co. stock @ 400	40,000.00
120	"	Manhattan Company stock (par $50), @ 320	19,200.00
300	"	American Locomotive Co. pfd. stock, @ 97	29,100.00
700	"	Virginia-Carolina Chemical Co. pfd. stock @ 100	70,000.00
400	"	Bethlehem Steel Co. pfd. stock @ 83	33,200.00
100	"	Pressed Steel Car Co. pfd. stock @ 103⅜	10,337.50
200	"	Railway Steel Spring Co. pfd. stock @ 90	18,000.00
1000	"	American Car & Foundry Co. pfd. stock @ 115½	115,500.00
300	"	United States Rubber Co. 1st pfd. stock @ 101½	30,450.00
400	"	Central Leather Company pfd. stock @ 99¼	39,700.00
800	"	United States Steel Co. pfd. stock @ 108¼	86,600.00

Return.

100	"	American Malt Co. pfd. stock @ 44....	4,400.00
200	"	American Cotton Oil Co. pfd stock @ 95	19,000.00
500	"	Wheeling & Lake Erie 1st pfd. stock @ $14 per share	7,000.00
			$600,126.65

Of the above stocks 200 shares of the Bethlehem Steel Company preferred stock, 300 shares of the United States Steel preferred stock and the 500 shares of Wheeling and Lake Erie 1st preferred were in the speculative account of deceased with Thomas Denny & Co. and held by them subject to claim upon same, as shown by the account, of $11,495.35, which amount of claim has been paid by sale of some of these stocks, and should therefore be deducted.

V. That the funeral and other expenses, debts and claims against the estate of decedent, all of which have been paid and should be allowed in this proceeding, are as follows:

1914.			
May	6	Doctor N. L. MacBride.....	$ 95.00
"	8	Eric Johnson, undertaker	482.00
"	12	New York Tribune, publishing notice for claims	55.08
"	12	New York Law Journal, publishing notice for claims	19.00
"	21	Fred L. Marshall, Collector, income tax....	43.02
"	21	New York City personal tax against deceased, 1913	178.00
"	23	Dr. Lewis A. Coffin	295.00
"	26	G. W. Keeler for appraising furniture at residence	75.00
June	1	Mrs. Dalrymple for dress	50.00
"	6	Dr. W. Travis Gibb.....	294.00
"		Paid cost of building retaining wall at Cooperstown, N. Y., property; contract of deceased	400.00
		Paid for appraisals Cooperstown, N. Y., property	25.00
Sept.	16	Samuel Watson for headstone, etc., at grave	56.00
Oct.	17	Trinity Church, care of cemetery plot.....	5.00
Nov.	4	Wm. H. Whiting & Co. for appraisal of 37 West 75th St., New York City.....	10.00
			$2,082.10

Return.

VI. There should also be allowed for expenses of administration fifteen hundred dollars, and also three sets of Executors commissions.

VII. That decedent had a safe deposit box in the vault of the New York Stock Exchange; and that Minnie R. Zabriskie, the wife of decedent, was born April 4th, 1855.

VIII. That, to best of deponents' information and belief, at the time of the death of decedent he had no safe deposit box, no bonds, no mortgages or promissory notes, no deposits on individual or joint account in any trust company, bank or banking institution, no life insurance, no interest in any estate or business, owned no shares of stock in corporations, and owned no personal or real property, except as hereinbefore set forth; and after diligent search being made, only the property herein mentioned can be found, and deponents verily believe there is no other.

IX. That, to best of deponents' information and belief, prior to his death decedent made no transfer of property *be* deed, gift, sale or gift in contemplation of death or intended to take effect at or after his death, and that decedent had no power of appointment over property, real or personal.

(Signed)

CHARLES STEWART PHILLIPS.

CHARLES LEMAIRE ZABRISKIE.

Sworn to before me this
November 16th, 1914.

(Signed) HENRY P. MILLER,
Notary Public Nassau Co.

C'T'F filed in New York Co.
No. 90.

Return.

I, Charles Frederic Zabriskie of the Borough of Manhattan, City of New York, do make, publish and declare this to be my last will and testament, hereby revoking any former wills by me made.

First: I direct that my just debts and the expenses of my funeral be paid as soon as practicable after my decease.

Second: I give and bequeath my personal apparel, watch or watches, jewelry, trinkets, photographic cameras and apparatus, and books, to my wife Minnie R. Zabriskie, my daughter Anita Louise Zabriskie, and my son Charles Lemaire Zabriskie, and to the survivors or survivor of them.

Third: I give and bequeath the sum of two hundred and fifty dollars to my cousin Miss Jessie Crawford Roome.

Fourth: I give and bequeath the sum of Three Thousand Dollars to the Rector, Church Wardens and Vestrymen of the Protestant Episcopal Church of St. Ignatius, at present located at 87th Street and West End Avenue, in the Borough of Manhattan, City of New York.

Fifth: I give and bequeath to my wife, Minnie R. Zabriskie, all my household furniture, goods, furnishings, utensils, plate and silver, pictures, bric-a-bric, and works of art of all kinds, automobiles, horses, carriages, harness, and stable equipments, of which I may die possessed, to be *her's* absolutely, and I also give to my wife during her life the use of my residence property Number Thirty Seven (37) West Seventy-fifth Street, in the Borough of Manhattan, City of New York, and also the use during her life of all my real estate at Coopers-

Return.

town, State of New York. And upon the death of my wife, I give, devise and bequeath my said real property to my daughter Anita Louise Zabriskie and my son Charles Lemaire Zabriskie, equally; and if either should not survive my wife, the share of the one not surviving shall go to his or her issue, if any; and in default of such issue, the same shall go to the survivor of my said two children. Any other real property I may own at the time of my decease I give, devise and bequeath to my said two children equally.

Sixth: All the rest, residue and remainder of my personal property, I give and bequeath as follows:

One-sixth thereof to my daughter Anita Louis Zabriskie:

One-sixth thereof to my son Charles Lemaire Zabriskie:

The remaining four-sixths thereof, I give and bequeath to the Executrix and executors of this my will, in trust, to be kept invested for the benefit of my wife, Minnie R. Zabriskie, the net income there*form* to be paid to her during her life, and, upon her death, I give and bequeath the principal of said four-sixths of my residuary personal estate, one-half thereof to my daughter Anita Louise Zabriskie, and one-half thereof to my son Charles Lemaire Zabriskie, and if either shall not survive my wife, then in such case, I give and bequeath the share of the one not surviving my wife to his or her issue, if any; and in default of such issue, then, in such case, to the one of my said two children surviving my wife.

Seventh: The provisions of this will for the benefit of my wife and in lieu of her dower in my real estate.

Return.

Eighth: I authorize and empower my executrix and executors, upon the written consent of my wife, to sell at public or private sale and to convey my said real property in the Borough of Manhattan, New York City, and at Cooperstown, New York State; the proceeds of such sale or sales to be kept invested under the said provision relating to said real property, and to be substituted in place thereof, my wife to have the income therefrom during her life, and the principal to go to my said two children the same as said real property is devised.

Ninth: I nominate and appoint my wife, Minnie R. Zabriskie, Executrix, and my friend Charles Stewart Phillips of the Borough of Manhattan, City of New York, and my son Charles Lemaire Zabriskie, Executors, of this my last will and testament; and I direct that no bonds or security shall be required of them or either of them in the performance of their duties as Executrix and Executors.

In Witness Whereof, I have hereunto subscribed my name and set my seal this seventeenth day of November, in the year one thousand nine hundred and thirteen.

CHARLES F. ZABRISKIE, (L.S.)

The foregoing instrument was at the date thereof, and in the Borough of Manhattan, City of New York, signed, sealed, published and declared by the said Charles Frederic Zabriskie, as and for his last will and testament, in the presence of us, who at his request, and in his presence, and in the presence of each other, have subscribed our names as witnesses thereto;

Return.

John H. Stitt, No. 68 Decatur Street.
(Brooklyn) New York City.
Jas. M. Lewis, 522 Monroe Ave., Elizabeth, N. J.
Chas. Stewart Phillips, Hotel San Remo.
(Manhattan) New York City.

A true copy.
WM. C. GEBHARDT,
Clerk.

Reasons.

Filed Nov. 10, 1916.

New Jersey Supreme Court.

CHARLES L. ZABRISKIE, CHARLES STEWART PHILLIPS and MINNIE R. ZABRISKIE, Executors of the Last Will and Testament of CHARLES FREDERIC ZABRISKIE, deceased. *Prosecutors,* *vs.* EDWARD I. EDWARDS, Comptroller of the Treasury of the State of New Jersey, *Respondent.*	*On Certiorari.* *Reasons.*

The said prosecutors, by Lum, Tamblyn & Colyer, their attorneys, come and pray that the assessment of the transfer tax in the above entitled matter be set aside, reversed and for nothing holden for the following reasons:

1. That the rights and property assessed and taxed in this case were not subject to taxation or assessment.

2. That the Comptroller of the State of New Jersey who made the said assessment had no authority or jurisdiction to make the same, and the act of the said State Comptroller in making said assessment is void for want of jurisdiction.

3. That said assessment is illegal, invalid and void for the reason that the same does not

Reasons.

allow for the exemption of property to the amount of five thousand dollars passing and transferred to each child of decedent.

4. That said assessment is illegal, invalid and void for the reason that there has been no transfer within the purview of the Transfer Tax Act of New Jersey of the estate in remainder created by the will of decedent after the life estate therein devised and bequeathed.

5. That said assessment is illegal, invalid and void in that said tax upon said estates in remainder should not be levied or assessed until the persons entitled to said property come into the beneficial enjoyment, seizin or possession thereof.

6. That the assessment herein is in violation of Article 12, Section 7, Paragraph 4 of the Constitution of the State of New Jersey, which provides that property shall be assessed for taxes under general laws and by uniform rules, according to its true value.

7. That said assessment herein violates the essential quality of taxation which requires that taxes be imposed under a rule of uniformity.

8. That said assessment is unconstitutional in that it attempts to subject to taxation property rights and the succession thereto and transfer thereof, which cannot be subjected to taxation by the State of New Jersey.

9. That Chapter 228 of the Laws of 1909 as amended by Chapter 151 of the Laws of 1914 and as further amended by Chapters 58 and 59 of the Laws of 1914, and as further amended by Chapter 392 of the Laws of 1915, under which said assessment purports to have been made, are each and all of them unconstitutional in that they and the assessment made

Reasons.

thereunder subject the prosecutor herein to unreasonable searches and seizures in violation of Article I, Section 6 of the Constitution of the State of New Jersey.

10. That Chapter 228 of the Laws of 1909 as amended by Chapter 151 of the Laws of 1914 and as further amended by Chapters 58 and 59 of the Laws of 1914, and as further amended by Chapter 392 of the Laws of 1915, under which said assessment purports to have been made, are each and all of them unconstitutional in that they violate Section 2, Subdivision 1, Article IV of the Constitution of the United States, which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

11. That Chapter 228 of the Laws of 1909 as amended by Chapter 151 of the Laws of 1914 and as further amended by Chapters 58 and 59 of the Laws of 1914, and as further amended by Chapter 392 of the Laws of 1915, under which said assessment purports to have been made, are each and all of them unconstitutional in that they violate Article 14 of Amendments to the Constitution of the United States, Sub-division 1, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens in the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

12. That Chapter 228 of the Laws of 1909 as amended by Chapter 151 of the Laws of 1914, and as further amended by Chapters 58

Reasons.

and 59 of the Laws of 1914, and as further amended by Chapter 392 of the Laws of 1915, under which said assessment purports to have been made, are each and all of them unconstitutional in that they violate Article IV of Amendments to the Constitution of the United States, providing the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures, etc.

13. Because the transfer tax under review in this action on the transfer of stock in New Jersey corporations forming part of the estate of Charles Frederic Zabriskie, late a non-resident of New Jersey, is assessed pursuant to the third or last paragraph of Section 12 of an act, entitled "An Act to tax the transfer of property, of resident and non-resident decedents, by devise, bequest, descent, distribution of statute, gift, deed, grant, bargain and sale, in certain cases," approved April 20, 1909, as amended by Chapter 151, P. L. 1914, as amended by Chapter 392 of the Laws of 1915, entitled, "An Act to amend an act, entitled, 'An Act to tax the transfer of property of resident and non-resident decedents, by devise, bequest, descent, distribution by statute, gift, deed, grant, bargain and sale, in certain cases,'" and said paragraph of said Section 12 is inoperative as against the transfer of the aforesaid stock because the assessment of tax pursuant to the said paragraph denies to Charles Frederic Zabriskie and his estate, his executors, the beneficiaries under his will and his residuary legatees, all citizens and residents of the United States and the citizens and residents of other States of the United States than New Jersey and non-residents of the State of New Jersey,

Reasons.

privileges and immunities enjoyed by citizens of the State of New Jersey, and therefore contravenes Article 4, Section 2, Paragraph 1 of the Federal Constitution, and the prosecutor claims the protection thereof.

14. Because the assessment of the tax referred to in the foregoing reasons is assessed under the statutes hereinbefore referred to, which are inoperative and ineffective to tax the transfer of the stock in New Jersey corporations left by the said decedent, because said New Jersey corporations are incorporated under the General Corporation Act of the State of New Jersey and the enforcement of said acts would be inconsistent with the provisions contained in said act and the charter of said companies with reference to the transfer of stock in New Jersey corporations upon the books of said New Jersey corporations and the only power that the State of New Jersey has to tax a transfer of stock is its power over the charter provisions and acts incorporating corporations of the State of New Jersey and to enforce the provisions of Chapter 228 of the Laws of 1909 as amended by Chapter 151 of the Laws of 1914 and as amended by Chapter 392 of the Laws of 1915 would violate the following provisions of the State Constitution:

Art. IV, Sec. 7, Paragraph 3.
Art. IV, Sec. 7, Paragraph 4.
Art. IV, Sec. 7, Paragraph 12.

15. Because Chapter 228 of the Laws of 1909 as amended by Chapter 151 of the Laws of 1914 and as amended by Chapter 392 of the Laws of 1915 is unconstitutional and violates Article IV, Section 7, Paragraph 3 of the

Reasons.

Constitution of the State of New Jersey in that the object thereof is not expressed in the title.

16. Because Chapter 228 of the Laws of 1909 and as amended by Chapter 151 of the Laws of 1914 and as amended by Chapter 392 of the Laws of 1915 is unconstitutional and violates Article IV, Section 7, Paragraph 4 of the Constitution of the State of New Jersey in that said law embraces more than one object in contravention thereof.

17. Because Chapter 228 of the Laws of 1909 as amended by Chapter 151 of the Laws of 1914 and as amended by Chapter 392 of the Laws of 1915 is unconstitutional and violates Article I, Section 10, Paragraph 1 of the Federal Constitution because the enforcement thereof will impair the obligation of contracts.

LUM, TAMBLYN & COLYER,
Attorneys for Prosecutor.

I hereby consent to the filing of the within Reasons as of time.

JOHN W. WESCOTT,
Attorney for Defendant.

Stipulation in re printing Record.

(Filed Nov. 10, 1916.)

New Jersey Supreme Court.

CHARLES L. ZABRISKIE, CHARLES STEWART PHILLIPS and MINNIE R. ZABRISKIE, Executors of the Last Will and Testament of CHARLES FREDERIC ZABRISKIE, deceased. *Prosecutors,* *vs.* EDWARD I. EDWARDS, Comptroller of the Treasury of the State of New Jersey, *Respondent.*	*On Certiorari.* *Stipulation.*

It is hereby stipulated and agreed between the attorneys for the prosecutors and the Attorney General of New Jersey representing the respondent, as follows:

1. That the attorneys for the prosecutors shall not be obliged to prepare and print the record in the above entitled cause nor bring the above entitled proceeding on to argument before the Supreme Court until after the determination of the cause now pending before the Supreme Court, in which Security Trust Company

as Executor of Howard S. Collins, deceased, is prosecutor and the above named defendant is defendant, in which said cause substantially the same reasons for reversal have been filed.

LUM, TAMBLYN & COLYER,
Attorneys for Prosecutors.

JOHN W. WESCOTT,
Attorney for Defendant.

Stipulation of Additional Facts.

(Filed Jan. 8, 1917.)

New Jersey Supreme Court.

CHARLES L. ZABRISKIE, *et als.*, Executors of the Last Will and Testament of CHARLES FREDERIC ZABRISKIE, deceased, *Prosecutors,* *vs.* EDWARD I. EDWARDS, Comptroller of the Treasury of the State of New Jersey, *Defendant.*	*On Certiorari.* *Stipulation.*

It is hereby stipulated and agreed by and between the attorneys for the prosecutors and the defendant respectively in the above entitled cause that the following is a statement of additional facts to be used upon the final argument upon the return of the writ of certiorari granted herein:

1. That the statement of facts set forth in the affidavits and schedules annexed thereto of Charles Lemaire Zabriskie and Charles Stewart Phillips, copies of which are annexed to the return in this action, shall for the purposes of this action, be taken as true.

2. That the Comptroller of the Treasury of the State of New Jersey has refused to give his

consent in writing to the transfer of the shares of stock of the New Jersey corporations, a list and description of said shares being set forth in the affidavit mentioned in Paragraph 1 of this stipulation, although requested at various times so to do by the prosecutors herein and their attorneys, unless and until certain taxes or assessments levied upon said shares of stock and computed in the manner set forth in the return herein marked "TAX ON TRANSFER OF STOCK IN NEW JERSEY CORPORATIONS STANDING IN THE NAME OF A NON-RESIDENT DECEDENT," be first paid.

LUM, TAMBLYN & COLYER,
Attorneys for Prosecutors.

JOHN W. WESCOTT,
Attorney for Defendant.

Order.

(Filed Jan. 11, 1917.)

New Jersey Supreme Court.

CHARLES L. ZABRISKIE, *et als.*, Executors of the Last Will and Testament of CHARLES FREDERIC ZABRISKIE, deceased, *Prosecutors,* *vs.* EDWARD I. EDWARDS, Comptroller of the Treasury of the State of New Jersey, *Defendant.*	*On Certiorari.* *Rule.*

It appearing that the attorneys for the prosecutors and the Attorney General on behalf of the defendant have entered into a stipulation as to additional facts to be used upon the return of the writ of certiorari granted herein:

It is thereupon ORDERED that the said stipulation entered into as aforesaid be made part of the record of this action and be used as evidence on the hearing and determination thereof.

Dated January 8th, 1917.

SAMUEL KALISCH,
J. S. C.

On motion of

LUM, TAMBLYN & COLYER,
Attorneys for Prosecutors.

Stipulation.

(Filed Dec. 12, 1916.)

New Jersey Supreme Court.

CHARLES L. ZABRISKIE, CHARLES STEWART PHILLIPS and MINNIE R. ZABRISKIE, Executors of the Last Will and Testament of CHARLES FREDERIC ZABRISKIE, deceased. *Prosecutors,* *vs.* EDWARD I. EDWARDS, Comptroller of the Treasury of the State of New Jersey, *Respondent.*	*On Certiorari.* *Stipulation.*

It is hereby stipulated and agreed between the attorneys for the prosecutors and the Attorney-General of the State of New Jersey, representing the respondent, that,—

1. The reasons heretofore filed in the above entitled cause are in all respects identical with the reasons heretofore filed in the case of *Lawrence Maxwell, et als.* vs. *Edward I. Edwards, Comptroller, etc.,* in which said cause the Supreme Court has determined that the tax was properly levied and should be sustained.

2. That the tax brought up by the writ of certiorari in the above entitled matter may be affirmed upon the same opinion as heretofore filed in the case of *Maxwell* vs. *Edward I. Edwards, Comptroller,* etc., and that a rule for

judgment sustaining the tax in the above entitled matter may be immediately entered for the purpose of facilitating an appeal by the prosecutors and without prejudice to such right to appeal.

LUM, TAMBLYN & COLYER,
Attorneys for Prosecutors.

JOHN W. WESCOTT,
Attorney General,
Attorney for Respondent.

Rule for Judgment.

(Filed Jan. 11, 1917.)

New Jersey Supreme Court.

CHARLES L. ZABRISKIE, CHARLES STEWART PHILLIPS and MINNIE R. ZABRISKIE, Executors of the Last Will and Testament of CHARLES FREDERIC ZABRISKIE, deceased, *Prosecutors,*	*On Certiorari.*
vs.	*Rule for Judgment.*
EDWARD I. EDWARDS, Comptroller of the Treasury of the State of New Jersey, *Respondent.*	

The stipulation of the attorneys for the respective parties brings this matter before me on the same reasons and grounds as were involved in the case of *Lawrence Maxwell, et als.* vs. *Edward I. Edwards, Comptroller,* in which cause the Supreme Court has determined that the tax was properly levied and should be sustained.

On the grounds therein stated the writ will be dismissed and the tax levied affirmed in the above entitled matter.

SAMUEL KALISCH,
J. S. C.

Ordered Dec. 16th, 1916.

The Evening Post Job Printing Office, Inc., 156 Fulton St., N. Y.

New Jersey Court of Errors and Appeals.

SECURITY TRUST COMPANY, Administrator, &c., of APPLETON R. HILLYER, Deceased, Relator-Appellant, AGAINST EDWARD I. EDWARDS, Comptroller of the Treasury of the State of New Jersey, Respondent.	**Mandamus.** **On Appeal from Supreme Court.**

BRIEF FOR RELATOR-APPELLANT.

This is an appeal from an order of the Supreme Court overruling the demurrer of the prosecutor to the answer of the State in mandamus.

This writ was brought to compel the Comptroller of the State of New Jersey to assess a tax or in the alternative to consent to the transfer of the shares of stock of New Jersey corporations standing in the name of the decedent Appleton R. Hillyer at the time of his death. Said decedent died on or about the 21st day of April, 1915, a resident of the City of Hartford in the State of Connecticut. Letters of Administration upon the Estate of said decedent were duly issued to the Relator, Security Trust Company, a corporation of the State of Connecticut, by the Court of Probate in and for the District of Hartford in the State of Connecticut.

No Letters of Administration, ancillary or otherwise, have been applied for or granted in the State of New Jersey. Said decedent at the time of his death owned no real estate within the State of New Jersey.

Under the laws of Connecticut governing distribution in cases of intestacy decedent's widow and daughter succeed to intestate's property in the proportion of one-third and two-thirds respectively.

The Relator, Security Trust Company, as Administrator, submitted to the respondent, the Comptroller of the Treasury of the State of New Jersey, a return wherein was set forth full particulars regarding all the shares of stock of New Jersey corporations owned by decedent at the time of his death, but upon the respondent's further demand that the Relator furnish him with information as to property, *real and personal, situated without the jurisdiction of the State of New Jersey and the value and nature thereof*, the said Relator refused to divulge such information, whereupon the respondent refused to assess the tax herein and refuses to consent to the transfer of said shares of stock. The statute governing in the controversy is Chapter 228 of the laws of 1909 as amended by Chapter 151 P. L. 1914. The sections of that Act as amended in 1914 pertaining to the facts in the case at bar are Numbers one (1) and Twelve (12) thereof. Section one (1) of the Act provides so far as relevant:

> "A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations, except as hereinafter provided, in the following cases:
>
> * * * * *
>
> Second. When the transfer is by will or intestate law, or real property within this State, or of goods, wares and merchandise

within this State, or of shares of stock of corporations of this State, or of national banking associations located in this State, and the decedent was a nonresident of the State at the time of his death.

* * * * *

Third. * * * Property transferred to any child or children, husband or wife, of a decedent, or to the issue of any child or children of a decedent, shall be taxed at the rate of one per centum on any amount in excess of five thousand dollars, up to fifty thousand dollars; one and one-half per centum on any amount in excess of fifty thousand dollars, up to one hundred and fifty thousand dollars; two per centum on any amount in excess of one hundred and fifty thousand dollars, up to two hundred and fifty thousand dollars; and three per centum on any amount in excess of two hundred and fifty thousand dollars. * * *"

The "Ratio Provision" *applicable only to estates of non-residents* contained in Section Twelve (12) of the Act reads as follows:

"A tax shall be assessed on the transfer of property made subject to tax as aforesaid, in this State of a non-resident decedent if all or any part of the estate of such decedent, wherever situated, shall pass to persons or corporations taxable under this act, which tax shall bear the same ratio to the entire tax which the said estate would have been subject to under this act if such non-resident decedent had been a resident of this State, and all his property, real and personal, had been located within this State, as such taxable property within this State bears to the entire estate, wherever situated; *provided*, that nothing in this clause contained shall apply to any specific bequest or devise of any property in this State."

The definitive section of the Act, Number Twenty-six (26) is also quoted for convenience of reference:

26. The words "estate" and "property", wherever used in this act, except where the

> subject or context is repugnant to such construction, shall be construed to mean the interest of the testator, intestate, grantor, bargainor or vendor, passing or transferred to the individual or specific legatee, devisee, heir, next of kin, grantee, donee or vendee, not exempt under the provisions of this act, whether such property be situated within or without this State. The word "transfer", as used in this act shall be taken to include the passing of property, or any interest therein, in possession or enjoyment, present or future, by distribution by statute, descent, devise, bequest, grant, deed, bargain, sale or gift.

Likewise the Saving Paragraph, Number Twenty-seven (27) of the Act:

> 27. In case for any reason any section or any provisions of this act shall be questioned in any court, and shall be held to be unconstitutional or invalid, the same shall not be held to affect any other section or provision of this act.

Relator's refusal to divulge the required information as to the total value of the estate situated beyond the jurisdiction under the circumstances in this case is based upon the following grounds:

FIRST: That the statute enacting the foregoing ratio provision in connection with the provisions according exemptions in certain cases and imposing taxes upon graduated amounts at progressive rates is in contravention of the Constitutions of the United States and of the State of New Jersey in that it does not constitute due process of law and denies equality under the law based upon arbitrary distinctions,

(*a*) As between estates, successions or property of resident and non-resident decedents, and

(*b*) As between estates, successions or property of non-resident decedents in like case involving illegal classification.

SECOND: That the requirement of such information sought to be enforced under the circumstances in this case constitutes not due process of law but an invasion of relator's rights under and within the prohibitions of the Constitutions of the United States and of the State of New Jersey, insuring the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures, &c.

POINT I.

The remedy invoked by relator under the circumstances in this case is proper. The writ of mandamus should be granted.

Relator's resort to this extraordinary remedy is considered justifiable under the peculiar circumstances in the case at bar.

It will be borne in mind that the return submitted to the State Comptroller discloses:

(*a*) The value of the property within the jurisdiction of the statute in New Jersey.

(*b*) The known proportions in which the property passes under the intestate laws of Connecticut,

(*c*) The relationship of the distributees to the decedent, and,

(*d*) At the same time relator's rights to the deduction of a proportionate amount of debts and expenses is specifically waived.

It is as though the statute in question required in addition to these solely pertinent facts a return showing the color, race or religion of the decedent upon which a tax was to be graded accordingly in defiance of relator's constitutional rights.

Concededly New Jersey has no power to tax the

succession to property in Connecticut. Nothing more remains to be disclosed concerning property in this State, therefore the New Jersey Comptroller has all the information he is lawfully entitled to. To demand further information as to property in Connecticut under the threat of confiscating the property of relator's intestate in this State already disclosed, is the wrong which the interposition of this court is sought to prevent. There is no other adequate remedy. Review of any assessment following the demanded disclosure of the value of property in Connecticut by writ of *certiorari* would be a remedy for the act of wrongful assessment but would not afford relief for this invasion of relator's privacy. Review of assessment made by the Comptroller upon relator's compliance with the demand for further information is not a commensurate remedy.

In Rex *v.* Barker Burr, 1267, Lord Mansfield defines the nature and function of this writ, saying:

> "A prerogative writ, to the aid of which the subject is entitled, upon a proper case, previously shown to the satisfaction of the court. The original nature of the writ, and the end for which it was framed, direct upon what occasions it should be used. It was introduced to prevent disorder from a failure of justice and defect of police, thereupon it ought to be used upon all occasions where the law has established no specific remedy and where in justice and good government there ought to be one. Within the last century it has been liberally interposed for the benefit of the subject and advancement of justice. The value of the matter or the degree of its importance to the public police is not scrupulously weighed. If there is a right and no other specific remedy, this should not be denied."

The question of the constitutionality of the enactments in question may properly be considered upon this application.

> "In cases where the duty to perform an act depends solely on the question whether a stat-

> ute or ordinance is constitutional and valid the question may sometimes be determined on a petition for a writ of mandamus."
>
> Welch *v.* Swasey, 79 N. E. Rep. 745.

In Compton *v.* Comptroller, 52 N. J. L. 150, the proper construction of the statute was considered upon an application for a writ of mandamus and the duty of the Comptroller was declared and his action enforced.

It is not denied that if Hillyer's administrator had claimed the right to a deduction of a proportionate amount of the total debts and expenses, as it might well have done, the disclosure of the total value of the estate would be necessary in order to determine what portion of the debts were allowable from the New Jersey property.

Nor that if Hillyer had left a will bequeathing a portion of his property to one class and a further portion to another class as regards relationship to the decedent so that the proportions payable to each ultimate beneficiary out of the property within the jurisdiction of this State could not be ascertained without reference to the total value of the estate wheresoever, in that event as well the disclosure of the total value of the estate would be necessary. *But no other legitimate occasion could arise for requiring such disclosure.*

Hillyer's admiuistrator in resisting the demands of the administrative taxing authorities as to what was, under the circumstances, purely his private affair, relied upon the principle so well enunciated in the case of Interstate Commerce Commission *v.* Brimson, 154 U. S. 447, at p. 478, wherein the Court say:

> " Neither branch of the legislative department, *still less any merely administrative body*, established by Congress, possesses or can be invested with *a general power of making inquiry into the private affairs of the*

citizen (Kilbourn *v.* Thompson, 103 U. S. 168, 190). We said in Boyd *v.* United States (116 U. S. 616, 630)—and it cannot be too often repeated—that the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the Government and its employees of the sanctity of a man's home and the privacies of his life. As said by Mr. Justice Field in *re* Pacific RR. Commission (32 Fed. Rep. 241, 250): 'Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves not merely protection of his person from assault, but exemption of his private affairs, books and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value.' "

POINT II.

The enactments in question arbitrarily distinguish between the case of estates, successions or property of resident and non-resident decedents.

There can be no disagreement between the parties to this controversy on certain fundamentals in respect of succession to property within the jurisdiction. Among others, that whether residence was here or elsewhere, providing decedent was a citizen of the United States or an alien entitled to claim under customary treaty rights, such succession must be under equal laws. Those rights, that is, as to succession enjoyed by resident citizens of this State, must be accorded equally to others entitled to make valid claim thereto. Nevertheless, the State has

power at least to regulate, if not indeed to prohibit, succession altogether and to impose taxation as a condition of the privilege enjoyed; but, again, such prohibition or taxation must be imposed under equal laws, for otherwise the right of inheritance under equal laws would have no value.

Counsel for the State in the *Maxwell* case in the court below has been at pains to argue that there are no constitutional guaranties attaching to property of deceased persons. Granting that is so, the constitutional rights to equality of operation of laws *permitting* inheritance and *regulating or taxing* its enjoyment remain to be reckoned with. And the question here is simply whether or not the statute under consideration imposes taxes under equal laws. At the outset it will not be denied that if the statute imposed the tax only in case the decedent was a non-resident, it would be obviously invalid. Likewise if the tax imposed was greater solely in case of non-residence of the decedent. The greater right includes the lesser. The same result would follow if the statute provided that in computing the tax larger exemptions should be accorded in case the decedent was a resident of the state. And that is in effect just what the statute under consideration provides, for, *let the salient fact be noted that the ratio provision applies only in case of the non-residence of the decedent.*

The lawmakers failed to observe the fact that *the total succession to the property of the resident decedent is not necessarily under the laws of this State.* If the property succeeded to in such or in any case is real property beyond the boundaries of this State the *lex rei sitæ* governs the succession regardless of the domicile of the deceased owner. Therefore, in the first place the ratio provision operates to impose a tax if the decedent was a *non-resident and owned property beyond the jurisdiction of this State, based upon that consideration, but it imposes no tax equally in case the decedent was a resident o-*

this State and owned property beyond the jurisdiction. To illustrate:

EQUATION "A".

WITHIN THE STATUTE!

Hillyer, the *resident*, owned property in New Jersey valued at $10,000. and real property in New York City valued at $1,000,000.; divides his estate equally between wife and daughter. Each being entitled to $5,000. exemption under the statute, there is no tax due the State of New Jersey.

NO TAX!

WITHIN THE STATUTE!

Hillyer, the *non-resident*, owned property in New Jersey valued at $10,000. and real property in New York City valued at $1,000,000; divides his estate equally between wife and daughter. Each being entitled to $5,000. exemption under the statute the tax is computed under the ratio provision as follows:

Computation.

$505,000.		
5,000.	exempt	
500,000.		
45,000.	@ 1%	450.
455,000.		
100,000.	@ 1½%	1,500.
355,000.		
100,000.	@ 2%	2,000.
255,000.	@ 3%	7,650.
		11,600.

$11,600. x 2 = $23,200. = Tax on daughter and widow.

Property in N. J. is $\frac{1}{101}$ of whole; *therefore tax due is $229.70.*

Or if Hillyer's estate be not exempt as in the foregoing illustration because of his residence here, the tax would be much greater upon the succession assuming his non-residence. To illustrate:

EQUATION "B".

WITHIN THE STATUTE!	WITHIN THE STATUTE!
If Hillyer died a *resident* of New Jersey leaving $300,000. real or personal property in this state and $1,000,000. *real estate* in Connecticut the tax would be computed as follows:	If Hillyer died a *non-resident* of New Jersey leaving $300,000. real or personal property in this state and $1,000,000 *real estate* in Connecticut the tax would be computed as follows:
Widow's 1/3 = $100,000.	Widow's 1/3 = $433,333
$5,000, exempt.	$5,000. exempt.
45,000. @ 1 % $450.	45,000. @ 1 % 450.
50,000. @ 1½% 750.	100,000. @ 1½% 1,500.
	100,000. @ 2 % 2,000.
	183,333. @ 3 % 5,499.99
Widow's tax $1,200.	Widow's tax $9,449.99
Daughter's 2/3 = $200,000.	Daughter's 2/3 = $866,666.
$5,000. exempt.	$5,000. exempt.
45,000. @ 1 % 450.	45,000. @ 1 % 450.
100,000. @ 1½% 1,500.	100,000. @ 1½% 1,500.
50,000. @ 2% 1,000.	100,000. @ 2 % 2,000.
	616,666. @ 3 % 18,499.98
Daughter's Tax $2,950.	Daughter's Tax $22,449.98
	Invoking Ratio Provision the tax, if Hillyer is a non-resident, is
If a resident:	$\frac{300000}{1300000}$ x 31,899.97 or
	If a non-resident
Aggregate tax $4,150.	Aggregate tax $7,361.00
An arbitrary difference of over	$3,000.00

(The method of computation adopted above is that approved in Torrance *v.* Edwards, 99 Atl. 136, to which appellant wishes it to be understood exception is taken.)

But whether the method of computation above is as in the Torrance case or as *in re* Schwartz, 209 N. Y. 537, and *re* Jourdan, 206 N. Y. 653, the result is inevitably the same. The Ratio Provision operates to arbitrarily distinguish between the case of the resident and the non-resident decedent.

Agreement upon the fundamentals above stated is based upon the following:

In Eyre *v.* Jacob, 14 Gratt. 429, one of the early leading succession tax cases, it is declared:

> "The tax upon such a subject shouid be regulated in strict proportion to the value of the benefit which it secures."

To the same effect is the decision in Hood's estate, 21 Pa. St. 106.

> "* * * The decision is, nevertheless, authority for the doctrine that property lying beyond the jurisdiction of the State is not a subject upon which her taxing power can be legitimately exercised. Indeed it would seem that no adjudication should be necessary to establish so obvious a proposition. The power of taxation, however vast in its character, is necessarily limited to subjects within the jurisdiction of the State."
>
> State Tax on Foreign Held Bonds, 15 Wallace, 300, 319.

> "* * * The only law which can impose the terms is the law that creates the right."
>
> Neilson *v.* Russell, 76 N. J. L. 655.

> "In order to be valid the tax must be levied by the authorityhthat confers the privilege, upon property which passes by virtue of the privilege."
>
> Kingsbury *v.* Chapin, 196 Mass. 533.

> "* * * The attempt of the State to collect a tax where the decedent was not subject to its

jurisdiction, is limited to that which possesses the legal attributes and characteristics of property here."

Matter of Bronson, 150 N. Y. 1.

It is obvious that the only property upon which the powers of taxation can operate in any case is that over which jurisdiction extends.

"A state can no more subject to its power a single person or a single article of property whose residence or legal *situs* is in another state, than it can subject all the citizens or all the property of such other state to its power."

Cooley on Taxation, 2d Edition, pp. 5, 55, 159.

"The jurisdiction of the demand" (for taxes) "is therefore found in the reciprocal duties of protection and support between the State and those who are subject to its authority, and the exclusive sovereignty and jurisdiction of the State over all persons and property within its limits for governmental purposes."

Cooley on Taxation (3rd Ed.), p. 3.

"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."

Union Transit Co. *v.* Kentucky, 199 U. S. 194, 202.

The State of New Jersey admittedly grants no privilege of succession to real property beyond its territorial limits. No more does it grant such privilege of succession to personal property of non-residents having no *situs* here.

The anomaly produced by the ratio provision becomes luminous in the case of a farmer who being domiciled in the taxing state owns two farms valued at $5,000. each, one lying within and the other without the state boundaries, and devises both to

his widow. Granting an exemption of $5,000. there is no tax. But if the decedent be domiciled in the foreign state, the widow is called upon under the operation of the ratio provision to pay a succession tax of $25.00 upon the same farm within the taxing state. The right of succession to the farm within its boundaries is undoubtedly granted by the taxing state. The right of succession to the farm in the foreign state is not. Wherein is the value of the right to succeed to the farm within the state boundaries increased by the value of the right to succeed to the farm beyond? If it is not increased by and and in no way dependent upon the value of the farm beyond the state boundaries, why tax in one case and not in the other?

The argument against taxing succession to land in another state or taking its value into consideration in taxing land in the state of location is equally cogent applied to the cattle grazing there, if the succession taxed is in case of a non-resident decedent.

In fine not only does the statute in question operate to impose taxes based upon property beyond the jurisdiction in one case and not in the other, but in so doing the ratio provision compels the accordance in case of the non-resident decedent of only *proportionate exemptions* and *proportionate graduated amounts* upon which the tax is computed.

If the lawmakers had extended the provision in question to cover the case of the resident as well as the non-resident decedent as was done in Kansas (1915) this particular pitfall would have been avoided although others would remain.

It would not have done to eliminate real property beyond the state boundaries entirely from the calculation or formula prescribed because there would still be left to be reckoned with the personal property of the non-resident having no *situs* here for that would remain equally property beyond the jurisdiction of this state for purposes of taxation. Such a solution of the problem would still leave the

inequality complained of and considered under the following Point III. uncured.

It is obvious from the foregoing that the New Jersey enactments in question were not framed on a plan or principle calculated to produce equality and uniformity as between successions in case of resident decedents and successions in case of non-resident decedents. Furthermore no one can longer remain blind to the flagrant injustice and entire disregard of constitutional requirements involved in the operation of the Ratio Provision under review.

In view of the foregoing, speculation as to the underlying processes of the legislators whereupon the foregoing Ratio Provision was enacted, assuming that its results were contemplated at all, may not be important but is, nevertheless, not without interest.

Classification involving discrimination as between resident *citizens* and non-resident *aliens* in the operation of tax statutes had been the subject of approval where not in contravention with the treaties of the United States with other countries in divers instances; notably the following: Mager *v.* Grima, 8 How. 490; 12 Law Ed. 1168; Frederickson *v.* Louisiana, 23 How. 445; 16 Law Ed. 577; Peterson's Estate, 151 N. W. 66; L. R. A. 1916 A, 469; Stixrud's Estate, 58 Wash. 339; 109 Pac. 343, 33 L. R. A. N. S. 632.

Manifestly, however, the status of the non-resident citizen and the non-resident alien is entirely unlike. The early leading case in the United States Supreme Court emphasizing the dissimilarity is Paul *v.* Virginia, 8 Wall. 168; 19 Law Ed. 347. In that case Justice Field says, in referring to Article 4, Section 2, Paragraph 1 of the Federal Constitution:

> "It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. *It*

> *relieves them from the disabilities of alienage in other States;* it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; *it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property* and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this. *Lemmon* v. *People*, 20 N. Y. 607.
>
> Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists."

Other leading cases in the United States Supreme Court, following the principle laid down in Paul *v.* Virginia, are: Ward *v.* Maryland, 12 Wall. 418; 20 Law Ed. 449; Blake *v.* McClung, 172 U. S. 239; 43 L. Ed. 432.

Again, classification involving discrimination as between domestic corporations organized for charitable purposes and like foreign corporations, had been also approved (Matter of Prime, 136 N. Y. 347; also Matter of Board of Education *v.* Illinois, 203 U. S. 553; 51 Law Ed. 314; 8 Annotated Cases, 157; affirmed *in re* Speed's Estate, 216 Illinois, 23; 74 N. E. 809; 108 Am. Stat. 109). In the latter case an exemption from inheritance taxation of bequests for charitable uses, whether to natural persons or corporations confined to residents of the taxing State, having been adjudged valid, Mr. Justice McKenna quotes the following language of the lower court:

> "In laying such a tax the legislature may consider the relation which the person or cor-

> poration given the right of succession sustains to the deceased, to the property, or to the state, and may regulate the amount of the tax to be required in view of such relation, and in exercising this power may lay a tax on the right of one class of persons or corporations to take, and may deem it wise to impose no tax upon the right of other classes of persons or corporations to take."

He then adds:

> " A Federal Court would hesitate indeed to put impediments on this power or declare invalid any classification of persons or corporations that had reasonable regard to the purpose of the state and its legislation."

The ground upon which this discrimination was sustained is indicated in the language of the opinion in the matter of Prime, *supra.*

At page 176:

> " It is the policy of society to encourage benevolence and charity but it is not the proper function of a state to go outside of its own limits and devote its resources to support the cause of religion, education or missions for the benefit of mankind at large. * * *"

The status of the particular successor validated the discrimination.

But where the discrimination attempted by the classification was between beneficiaries of like relationship *to the deceased, to the property* and *to the state*, it must be disapproved (*In re* Johnson, 73 Pac. Report 424). In that case the effect of the California statute exempting resident nephews and nieces and taxing non-resident nephews and nieces, was held to be an extension of the exemption to the beneficiaries whether resident or non-resident.

Of course the State may discriminate as between resident and non-resident citizens in the exercise of

its *police power*. As was said in Bells Gap Railroad Co. *v.* Pennsylvania, 134 U. S. 232:

> "But neither the amendment—broad and comprehensive as it is—nor any other amendment was designed to interfere with the *power of the State sometimes termed its police power*, to prescribe regulations to promote the health, peace, morals, education and good order of the people and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity." (No italics in opinion.)

In District of Columbia *v.* Brooke, 214 U. S. 138, the case arose under regulations promulgated in pursuance of the police power of the Capitol District, exercised by Congress to preserve the health of the District by providing for the construction of a sewer. In enforcing the assessment therefor, the resident lot owners were subject to imprisonment but the non-resident lot owners were naturally subject to a different penalty upon failure of payment. The question involved was not that of revenue only. The case is not authority for the proposition that the expense of the sewer was to be borne by non-resident lot owners accordingly as *they might have cesspools or sewers* at their domiciles beyond the jurisdiction. To quote from the opinion in that case:

At page 151:

> "It is not contended that the Act of Congress is not impartial within the classes. The act treats all resident lot owners alike and all non-residents alike.
>
> * * * * * *
>
> The statute under consideration in the case at bar enjoins a duty on both resident and non-resident lot owners, a duty necessary to be followed to preserve the health of the city. *There is a difference only in the manner of enforcing it, a difference arising from the different situation of the lot owners*, and therefore, competent for Congress to regard in its legislation. *In*

> *other words, under the circumstances presented by this record the distinction between residents and non-residents is a proper basis for classification. It might not be under other circumstances* (Blake *v.* McClung, 172 U. S. 239; s. c. 176 U. S. 59; Sully *v.* American National Bank, 178 U. S. 289." (Italics ours.)

Travelers Insurance Company *v.* Connecticut, 185 U. S. 364, has been urged in support of the right of the state to discriminate as between the case of the resident and the non-resident. That such discrimination was neither intended nor resulted from the act in question there is apparent from a careful examination of the opinions in the case. The statute approved in that case was a special tax act of the State of Connecticut "dealing with the question of taxation of the shares of stock in a local corporation", and the discrimination complained of was characterized in the opinion of Mr. Justice Brewer thus:

> "But this apparent discrimination against the non-resident disappears when the system of taxation prevailing in Connecticut is considered."

And again, quoting from the opinion of the Supreme Court of Connecticut:

> "'But the claim that in this case the inequality operates against non-residents or citizens of other states as a class is unfounded.'"

Other cases relied upon with the same purpose, referred to in brief of special counsel for the state, filed in the *Maxwell* case, subjected to the same test, will be found equally inapplicable.

It is interesting to observe in connection with Point III, *post*, that the statute in case of non-residence of stockholders in Travelers Insurance Company *v.* State of Connecticut, *supra*, imposed an equal burden upon all non-resident stockholders: it did not hold that non-resident stockholders should

pay a greater or lesser tax contingent upon their ownership of real or personal property beyond the boundaries of the State of Connecticut. All the non-resident stockholders were treated alike, all the resident stockholders were treated alike by the statute and the resident and non-resident as nearly alike as human ingenuity could devise under the circumstances.

POINT III.

The enactments in question arbitrarily distinguish between estates, successions or property of non-residents in like case, being based upon illegal classification.

A homely analogue to the situation created by the *Ratio Provision* in the statute under consideration is found in the case of the crafty shopkeeper who sells the same merchandise at one price to a shopper from the street and at a higher price to the carriage customer. The State, in the above instance, regulates the universal successions to property within its jurisdiction by imposing a higher premium upon the succession to such property equal in value when passing in case of a wealthier non-resident than when passing in case of a poorer non-resident, the successors being of like relationship. In the final analysis it is found that there is no more justification in ethics for the one case than there is legal justification for the other. Condemnation of the practice rests upon the same foundation in both cases:

Classification of customers or taxpayers based upon circumstances which are extraneous considered in their relation to the value of the merchandise sold

or to the extent of the protection afforded, is fundamentally unsound.

Not only does elementary morality require equality of treatment in either case, but self interest also would suggest that those with ample means above all should not be discouraged in the business of investment in this state by such attempted discrimination.

The fundamental error of the Ratio Provision considered under this point is found, it is believed, in the illegal classification of successors to property of non-resident decedents within the jurisdiction according to the value of such successions to property without the jurisdiction. There can be no dispute as to the power of this state to classify upon the basis of *wealth succeeded to within the state or within the jurisdiction.* In this connection there is found in Magoun *v.* Illinois Trust & Savings Bank, 170 U. S. 283, at pages 292 and 293, the following:

> "Our inquiry must be not what will satisfy the provisions of the State Constitutions, but what will satisfy the rule of the Federal Constitution. *The power of the States over successions may be as plenary in the abstract as appellee contends for, nevertheless it must be exerted within the limitations of that constitution. If the power of devise or of inheritance be a privilege, it must be conferred or regulated by equal laws.*
>
> This brings us to the law in controversy. The appellant attacks both its principles and its provisions—its principles as necessarily arbitrary and its provisions as causing discriminations and creating inequality in the burdens of taxation.
>
> Is the act open to this criticism? The clause of the Fourteenth Amendment especially invoked is that which prohibits a State denying to any citizen the equal protection of the laws. What satisfied this equality has not been and probably never can be precisely defined. Generally it has been said that it 'only requires the

same means and methods to be applied impartially to all the constituents of a class so that the law shall operate equally and uniformly upon all persons in similar circumstances'. Kentucky Railroad Tax Cases, 115 U. S. 321, 337."

At page 300:

"*If there is unsoundness it must be in the classification.* The members of each class are treated alike, that is to say, all who inherit $10,000. are treated alike—all who inherit any other sum are treated alike. *There is equality therefore within the classes.* If there is inequality it must be because the members of a class are arbitrarily made such and burdened as such, upon no distinctions justifying it. This is claimed."

* * * * *

"*It only requires that the law imposing it shall operate on all alike under the same circumstances. The tax is not on money; it is on the right to inherit; and hence a condition of inheritance, and it may be graded according to the value of that inheritance.*"

The test of legality of classification is as stated in Southern Ry. *vs.* Greene, 216 U. S., p. 400, at page 417:

"*While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is proposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification.* Gulf, Colorado & Santa Fe Ry. *v.* Ellis, 165 U. S. 150, 165; Cotting *v.* Kansas City Stock Yards Co., 183 U. S. 79; Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540, 559." (Our italics.)

And again in Billings *v.* Illinois, 188 U. S. 97. At page 101:

> "*If there had been a proper classification there could not have been a denial of the equal protection of the laws*, and we, therefore, expressed and illustrated the principle upon which it should be based. We said it was established by cases that classification must be based on some reasonable ground. It could not be a 'mere arbitrary selection'. But what is the test of an arbitrary selection? It is difficult to exhibit it precisely in a general rule. Classification is essentially the same in law as it is in other departments of knowledge or practice. It is the grouping of things in speculation or practice because they agree with one another in certain particulars and differ from other things in those same particulars. Things may have very diverse qualities and yet be united in a class. They may have very similar qualities, and yet be cast in different classes." (Italics ours.)

At page 102:

> "But there classification—indeed, all classification, must primarily depend upon purpose—the problem presented. Science will have one purpose, business another and legislation still another. The latter, of course, on account of the restraints upon the legislature, may not be legal—may not be within the power of the legislature. To dispute that power, however, is not the same thing as to dispute a classification, and yet that there may be dependence—more freedom of classification in some instances has been indicated by the cases. A State cannot regulate interstate commerce, however accurate its classification of objects may be. On the other hand, the taxing power of a State is one of its most extensive powers. *It cannot be exercised upon persons grouped according to their complexions.*" (Our italics.)

So, too, it is asserted the taxing power of this State cannot be exercised upon the succession to

property of persons not subject to its jurisdiction, grouped according to the value of succession to property beyond the jurisdiction in the domiciliary State. Can it be seriously claimed that the State, for instance, may lawfully demand a tax from one legal representative of a non-resident decedent having, say, $5,000. invested in New Jersey shares and a Ford car at the State of the domicile, both species of property passing to a widow, while it exempts the transfer of shares of like value in like case to the representative of another non-resident decedent who preferred his widow to go afoot.

The Ratio Provision would operate in the above cases as follows:

EQUATION "C".

Non-resident "A".		Non-resident "B".	
Widow sole beneficiary.		Widow sole beneficiary.	
Property in New Jersey	$5,000.	Property in New Jersey	$5,000.
Ford car in State of domicile	500.	*No other property at State of domicile.*	
Total	$5,500.	Total	$5,000.
Exempt in New Jersey	$5,000.	Exempt in New Jersey	$5,000.
Taxable at 1%	$500.		
Proportion of tax of $5. due upon New Jersey shares according to Ratio Provision, approximately	$4.45	No tax due New Jersey.	

In further illustration of this point let us assume that Hillyer left property valued at $300,000. within the jurisdiction of this statute and that it passed one-third to his widow and two-thirds to his daughter. In that case if there were no other property in Connecticut the tax would be, (accepting for the moment the Comptroller's method of computation approved in the Torrance case) as follows:

EQUATION "D".

Tax on widow's share:

1/3 =	$100,000.	
	5,000. exempt,	
	$95,000.	
	45,000. @ 1%	$450.
	$50,000. @ 1½%	750.
	Total tax on widow...	$1,200

Tax on daughter's share :

2/3 =	$200,000.	
	5,000. exempt.	
	$195,000.	
	45,000. @ 1%	$450.
	$150,000.	
	100,000. @ 1½%	1,500.
	$50,000. @ 2%	1,000.
	Total tax on daughter.....	$2,950.

AGGREGATE TAX, *$4,150.*

Now, if Hillyer's administrator, the appellant in this case, had responded to the Comptroller's demand for information as to the value of the property in Connecticut by reporting its value at $1,000,000., in addition to the $300,000. already disclosed, the Comptroller would have found a tax due amounting to *$7,361* (see computation, Pt. II, Equation "B").

If Hillyer's administrator had reported the value of the property in Connecticut at $2,000,000. making total property wheresoever valued at $2,300,000. the Comptroller of the State of New Jersey would have demanded a tax of approximately *$10,000.*

If the value of the property in Connecticut had been reported at $3,000,000., the amount of the property in New Jersey remaining the same, the Comptroller would have demanded a tax in excess of *$10,000.*

Under the heading of this point, it is deemed not inappropriate to refer to the following expressions of the court found in the opinion in Western Union Telegraph Company *v.* Kansas, 216 U. S. 1:

At page 28:

> " In Mugler *v.* Kansas, 123 U. S. 623, 661, it was said that the courts, when determining whether a statute is consistent with the fundamental law, must not deem themselves 'bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority.' "
>
> * * * * *
>
> " In Minnesota *v.* Barber, 136 U. S. 313, 319, 326, the particular statute there assailed as repugnant to the Constitution of the United States was not saved by the fact that it was applicable to citizens of all the States, including citizens of the State which enacted it. This Court said (p. 319): 'There may be no purpose upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void.' "

At page 30:

> " Looking, then, at the natural and reasonable effect of the statute, disregarding mere forms of expression, it is clear that the making of the payment by the Telegraph Company, as a charter fee, of a given per cent. *of its authorized capital*, representing, as that capital clearly does, *all* of its business and property, both within and *outside of the state*, *a condition* of its right to do local business in Kansas, is, in its essence, not simply a tax for the privilege of doing local business in the state, but a burden and tax on the company's interstate business and on its property located or used outside of

the State. The express words of the statute leaving no doubt as to what is the *basis* on which the fee, specified in the state statute, rests. That fee, plainly, is not based on such of the company's capital stock as is represented in its local business and property in Kansas. The requirement is a given per cent. of the company's authorized capital, that is, of its capital wherever or however employed, whether in the United States or any foreign countries, and whatever may be the extent of its lines in Kansas as compared with its lines outside of that State. What part of the fee exacted is to be contributed to the company's domestic business in Kansas and what part to interstate business, the State has not chosen to ascertain and declare in the statute. It strikes at the company's entire business wherever located, and in terms, makes it a *condition* of the telegraph company's right to transact purely local business in Kansas that it shall contribute for the benefit of the state school fund a given per cent. of its whole authorized capital representing all of its property and all its business and interests everywhere.

In Western Union Tel. Co. *v.* Massachusetts, 125 U. S., 530, 549, 552, a tax nominally upon the shares of the capital stock of the company was held to be in effect a tax only on property owned and used by the company in Massachusetts, because and *only because* the basis established for the ascertainment of the value of such property was the *proportion of the company's line in the State to their entire length throughout the whole country.* Such a tax was held not to be forbidden by the Constitution, because *based* on the company's stock representing only its business and its property inside the state."

* * * * *

At page 37:

"We repeat that the statutory requirement that the Telegraph Company shall, as a condition of its right to engage in local business in Kansas, first pay into the state school fund a given per cent. of its authorized capital, representing all its business and property everywhere, is a burden on the company's interstate commerce and its

> privilege to engage in that commerce, in that it makes both such commerce, as conducted by the company, and its property outside of the State, contribute to the support of the State's schools. Such is the necessary effect of the statute, and that result cannot be avoided or concealed by calling the exaction of such a per cent. of its capital stock a 'fee' for the privilege of doing local business. To hold otherwise is to allow form to control substance."

In view of the principles and authorities referred to under Point II foregoing it is impossible to reconcile with reason the distinctions under which the tax is imposed as between the estates of non-residents based upon the value of property beyond the jurisdiction. The protection accorded succession to Hillyer's property within the jurisdiction on the assumption that there is no property beyond is no greater than the protection afforded if the property succeeded to beyond the jurisdiction is one, two or three millions. Therefore, to distinguish in the amount of tax imposed based upon such considerations is an arbitrary exercise of the taxing power in this instance.

POINT IV.

The "favored status" ascribed in case of non-resident decedents is questionable and established upon an arbitrary basis.

The legislature in the exercise of its wide and undoubted power to select objects of taxation has specified certain property succession to which in case of non-residence of decedents shall be subject to tax, namely, "goods, wares and merchandise, shares of stock of corporations of this state or of national bank associations located in this state".

There is indeed no doubt as to the power of the state to tax succession to other species of property besides that included in the statute, providing such property have *situs* here although the decedent be domiciled elsewhere. The forbearance evidenced in the statute under review which omits taxation upon successions to bonds and mortgages, commercial paper, bank deposits, debts, within this state, &c., is urged as a constituent or equivalent of the equality of taxation required under constitutional guarantees. If the statute under review had included *all* property of non-residents within the jurisdiction in its operation, as was the case in Chapter 57 of the Laws of 1914 in effect from March 26, 1914, to April 9, 1914, the defense of favored status would not be available. Now what is the truth as to the favored status of non-residents under this statute? In the first place there is no favored status of non-residents as a class. The favored status extends only to that class of non-residents who leave money in our banks or other property not subject to the statute. The expressed belief in a favored status for the non-resident decedent as contradistinguished from the resident decedent arises from a misconception of the actual situation under consideration. If we stripped non-residents, caught loitering with investments having *situs* within our jurisdiction, of all their clothing, excepting the shirt next to their skins, while we stripped our own residents entirely, it should be remembered that our residents still have the advantage of being stripped at home, while the non-resident is in a strange land, scantily clad. That is, we tax our residents because of our power over them by reason of their domicile. We tax non-residents because of our power over their property here. The tax in the first place is upon the theory that as regards succession in the case of residents, the principle of *mobilia personam sequuntur* applies. The tax in the latter case is imposed in disregard of that principle or fiction. Is it in any case a favor to tax the non-

resident upon a different theory than the resident is taxed, thereby subjecting the non-residents in effect to a *double tax?* It should be borne in mind that most of the states and foreign governments impose like taxes on their own citizens upon the ground of domicile as we do upon ours.

It is a well known fact that the bulk of invested wealth of non-resident decedents is reached by a statute taxing shares of stock of our corporations, therefore, when we tax the non-residents at all, in most cases they are stripped as naked as the residents. It follows that the tax in both cases is generally imposed upon all they have got. What method of determining favor status is provided by the statute? Would the status of the non-resident be still said to be favored if we taxed succession to everything but gold collar buttons? Or if we taxed everything but Corot landscapes? Or simply money in bank in New Jersey? Or money deposited in a particular bank in some city readily accessible to depositors from the great metropolis across the North River? As the argument on the part of the Comptroller is understood, the fact that the non-residents might have kept their shirts if they had had any, places them in a favored status which relieves the state from responsibility as to the method whereby or the extent to which their outer clothing has been removed. In other words, so long as the non-residents are permitted to keep their shirts, if they have any, this State may take the rest of their clothing without regard to constitutional requirements. This is a strange argument truly and should have in the appellate court the weight it deserves.

Suppose we exempt the non-resident entirely as to succession to personalty over which we have dominion and tax only succession to real estate within our boundaries while both real and personal property are taxable in the case of the resident upon the ground of domicile? Does that still greater forbearance permit us to double or multiply the tax on real property in case the decedent is a non-resident,

over and above the tax demanded upon succession to both real and personal property in case the decedent is a resident? Suppose the general property tax on personalty to be wiped out entirely, does that permit of confiscation of real property or discharge us from imposing the tax upon real property by due process, or in accordance with other constitutional requirements?

To the contention of the appellants in the case at bar that the particular statute in question should bear equally whether the decedent is a resident or non-resident the state is heard in reply offering its questionable and uncertain generosity of "favored status". The fundamental necessity of equality under this particular statute is thought to be observed by the accordance of a questionable sop in case the decedent is a non-resident and leaves property of a certain species not covered by the statute. The argument of favored status has some force if heard in palliation of the wrongful discrimination as between the case of resident and non-resident but not otherwise. Of course the discrimination complained of would be more injurious if more taxable objects had been included in the statute in case of non-residence of decedents.

It must not be overlooked that the favored status relied upon as a constituent or equivalent of equality under this statute is likewise established upon an arbitrary basis, that is, in order to redress the transparent inequalities arising from the discriminatory method of assessment appearing in equations A and B in Point II foregoing it must be assumed that the value of the equations be increased by the addition of the amount of property, succession to which is exempt in the case of non-residents, but taxable in the case of residents, required to equalize the tax. Or, in other words, the non-resident who is taxed *must leave money in our banks or look out for the consequences when we tax his stock in our corporations.* The inequalities as between the case of one non-resident and another in like case appearing in equation C of Point III foregoing are incurable

by the addition of any amount of property exempted from the statute.

Should favored status be held as a constituent or equivalent of the required equality of laws in this case what is to hinder the legislature next year in transferring some of the exempt species of property to the taxable column, and so on from year to year until nothing is left upon which to claim favored status but the gold collar button?

The imponderability alone of "favored status" renders it impossible of acceptance as an element of equality in the operation of any law.

POINT V.

The ratio method historically and generally considered.

The origin of the ratio method of ascertainment of inheritance tax in case of non-resident decedents is not without bearing in the present controversy. Under a New York slatute imposing inheritance taxes only upon collaterals so-called, the executors of the non-resident distributed the property within the jurisdiction of the State of New York to persons of the exempt class under the statute and claimed exemption from tax. This they were accorded in the Matter of James, 144 N. Y. 6. Under a similar statute in this state, Tilford's executors made a like claim for exemption, which was denied in Tilford *v.* Dickinson, 79 N. J. L. 302, the facts in that case appearing in the opinion of the court following:

> "Wesley H. Tilford died on March 9th, 1909, while a resident of the State of New York. He died possessed of personalty worth $11,626,-897.98, of which $7,601,962.50 was composed of shares of stock of certain corporations incorporated under the laws of New Jersey.
>
> The decedent left a will of which he appointed Henry M. Tilford sole executor. The

will was probated and letters testamentary were issued in the State of New York. By this will the testator bequeathed to certain collateral relatives legacies amounting to $4,150,000. The residue went to brothers and sisters of the decedent, one of the brothers being the executor and the prosecutor of this writ. By the will, the executor was authorized either to sell and convert the property or any of it, and pay the legacies out of the proceeds, or to transfer the securities themselves to the legatees in payment of the legacies.

The executor has paid the collateral inheritance tax due to the State of New York. The executor has elected to pay the $4,150,000 legacies to the collateral legatees, out of that portion of the estate which does not comprise shares of stock in New Jersey corporations, with the exception of eight hundred and forty-one shares of the capital stock of the Standard Oil Company, which he has used to assist in paying the legacies to the collateral legatees. The remainder of the estate, including all the shares of stock of the New Jersey corporations (except the eight hundred and forty-one shares of Standard Oil Company stock already mentioned), the executor has elected to transfer to himself as residuary legatee, he being a brother of the testator, and to another brother and to a sister, who are also legatees.

The register of the Prerogative Court appointed an appraiser to determine the testator's estate. The appraiser fixed the value of the stock of the New Jersey corporations at the sum of $7,601,962.50, but made a deduction from the value of the stock of these corporations in the ratio provided for by the act of 1909 (Pamph. L., p. 236), and fixed the tax at $138,378.52, this being calculated upon the reduced valuation, under the statute, of $2,767,570.47.

There is no contest respecting the imposition of a collateral inheritance tax upon the value of the eight hundred and forty-one shares of Standard Oil Company stock, which was used by the executor in the payment of the collateral legatees. The contest is in respect to the remainder of the stock of the New Jersey corporations, devoted by the executor to the payment

of legacies to persons exempt from taxation under our statute, the question being whether this property is exempt, although the property so used had its *situs* in this state at the death of the decedent." * * *

"The prosecutor insists that the property in this state which was by the New York executor turned into the residuum of the estate, is exempt from taxation because it passed to a brother and sister of the decedent.

In the argument addressed to the court upon this point much stress was laid upon the construction placed by the New York Court of Appeals upon their statute of 1887 in the case of the Matter of James, 144 N. Y. 6." * * *

"This statute was construed, as already remarked, *In re* James, *supra*. The question therein involved was identical with the question presently propounded. A decedent domiciled in Great Britain left property there, as well as in the State of New York. He gave legacies to collateral relatives, and left the residue of his estate to his two brothers. The executor paid the collateral legacies out of the property situated in Great Britain, leaving the property situated in New York to go into the residuary estate, and thus to decedent's brothers. The New York court held that the devotion of the New York property to the payment of decedent's brothers, who were in the exempt class under the New York statute, rendered that property immune from the imposition of collateral tax under the New York statute." * * *

"The question then is, what is the significance to be assigned to our statute in respect to the question involved? Our act of 1906 (Pamph. L., p. 432), while differently phrased, does not differ in substance from the statutes of the two states construed in the case already cited. The statute imposes a transfer or succession tax upon all property transferred by will, or by the intestate laws in the instances mentioned, except when the property passes to one of the exempted class of persons or objects. When a decedent is a non-resident, and a portion of his estate has its *situs* in this state, it is settled by the cases already cited that upon his dying intestate, and there are distributees be-

longing to both classes—taxable and exempt—that portion of his estate within this state is taxable. *The extent of its taxability is now fixed by our statute of 1909* (*Pamph. L, p. 236*), *which statute, however, was not in existence at the date of the death of the present decedent.*" (Italics ours.)

The Court, therefore, held that even in the absence of the ratio provision a similar proration should nevertheless obtain.

The first ratio provision in the New Jersey statute was enacted with the sole end in view of preventing the evasion of tax attempted in the Tilford estate. The effect of its operation in the case of a different scheme of taxation involving the accordance of exemptions and the imposition of tax at progressive rates upon graduated amounts, plainly was not contemplated.

The ratio provision of the Act of 1909 was under review in Beers *v.* Edwards, 84 N. J. L. 32, and in upholding the section in question the court say:

"The only question raised in this case is the proper construc-ion of section 12 of the Transfer Tax act of 1909. *Pamph. L.*, p. 325. The decedent was a resident of New York. A large part of his property was real estate in that state. In fixing the tax on the transfer of stocks in New Jersey corporations, the comptroller computed the entire tax of the estate upon an amount which included the value of the New York real estate. To this inclusion of the New York real estate the prosecutors object. The language of the statute with which we are concerned is: 'Such property located within this state shall be subject to a tax, which said tax shall bear the same ratio to the entire tax which the said estate of such decedent would have been subject to under this act if such nonresident decedent had been a resident of this state, as such property located in this state bears to the entire estate of such nonresident decedent wherever situated.' Stated more narrowly, the case turns on the meaning of the clause 'the entire tax which the said estate of such decedent would have been subject to under the act if such nonresident decedent

had been a resident of this state.' When the exact question is thus stated, we think the difficulty in answering it disappears. If the decedent had been a resident of this state, no tax could have been imposed on real estate situated in New York, since that portion of his property was beyond the jurisdiction of New Jersey, and to tax it would violate the rights secured by the fourteenth amendment to the federal constitution. It suffices to cite *Louisville, &c., Ferry Co.* v. *Kentucky*, 188 U. S. 385, and *Union Transit Co.* v. *Kentucky*, 199 *Id.* 194, as to the general principle, and *In re Swift's Estate*, 137 N. Y. 77, and *Connell* v. *Crosby*, 210 Ill. 380, as to the applicability of the principle to inheritance taxes. The result follows logically from the legal theory upon which inheritance taxes are justified, that the rights of testamentary disposition and of succession are creatures of law upon the exercise and operation of which the lawmaker may impose terms. *Neilson* v. *Russell*, 47 Vroom, 27, 655. The succession to land in New York, whether by will or intestacy, depends upon the law of New York, and that privilege not being the creature of New Jersey cannot be made subject to terms by this state. Since no tax could have been imposed by reason of the New York real estate if the decedent had resided here, that real estate cannot, under the language of the statute, be included in estimating the entire tax upon the estate for the purpose of ascertaining the amount to be imposed on the New Jersey stocks. We do not mean to say that the legislature might not have adopted another basis for the computation of the entire tax; it might perhaps have enacted that the entire tax should be the amount to which the estate would have been subject if the decedent had been a resident of New Jersey, and all his property had been situated there. Instead of so enacting, the legislature made a distinction; it took as one term of the proportion the tax to which the estate would have been subject if the decedent had been a resident; it took as another term of the same proportion 'the entire estate of such nonresident decedent *wherever situated*'. The legislature, therefore, had in mind the distinction between

> the estate taxable by reason of the decedent's domicile and the entire estate *wherever situated*. In the one clause it used the words 'entire tax', in the other clause the words 'entire estate'."

The same provision had been approved in Carr *v.* Edwards, 55 Vroom, 667.

Now, if the rates prescribed by the present statute varied only according to *relationship to the decedent*, the present case would be identical with that involved in the statute under consideration in Carr *v.* Edwards, and that case would be contolling here, for the reason that the criterion of taxation established by the operation of the Ratio Provision in the statute under consideration in Carr *v.* Edwards was *solely* the relationship of the particular successor to the decedent. If the particular successor there was of the class denominated "collateral", the tax measured was at the rate of five per centum (5%), but if the particular successor was not of that class no tax was measured.

It is interesting to note at this point that the operation of the Ratio Provision, endorsed by the Court in Carr *v.* Edwards, was nevertheless susceptible of imposing a tax upon the transfer of the property of a non-resident within the jurisdiction valued at less than $500, whereas the statute explicitly exempted transfers of property valued at $500 or under. Take a suppositious case of a non-resident whose rights arise under that statute:

Total estate everywhere, say $4,000.	
Passing to collaterals, one-half.....	$2,000
Passing to lineals, one-half	2,000
New Jersey Property, say.....	400
Tax on whole estate according to Ratio Provision at five per cent. (5%).	100
Proportion thereof payable on the New Jersey property.....	10

RESULT: Tax of $10.00 due on transfer of proportion of four hundred dollars ($400).

WHEREAS: The statute explicitly says such transfer is exempt from tax being less than $500 in value.

The criteria of variation of tax established by the statute under review however are entirely different from those of the former statute. In addition to classification of the particular legatees according to relationship to the decedent, there is another classification made, to wit: that based upon the value of the total amount received in the hands of each particular successor, or ultimate beneficiary, an initial amount received by each beneficiary being exempt.

It is at once apprehended that the foundation of the approval of the operation of the Ratio Provision in Carr v. *Edwards was the fortuitous circumstance in that case that the classification or criteria established by that statute* HAD A REASONABLE AND JUST RELATION TO THE UNIVERSAL SUCCESSION TO PROPERTY IN RESPECT TO WHICH THE CLASSIFICATION WAS PROPOSED, *i. e., property of a non-resident within the jurisdiction valued at* $500 *or over;* that is to say, the five per centum (5%) rate applied solely to that proportion of the property of the non-resident within the jurisdiction, *regardless of the value of the property of the non-resident passing to like successors without the jurisdiction.*

> "It is true that the tax is not necessarily five per cent. upon the whole New Jersey succession. The amount depends on the ratio of the New Jersey property to the entire estate wherever situated. This, however, merely affords a measure of the tax imposed; the tax is still by the very words of the section imposed upon the property located within this state. The reason for adopting this provision was to make sure that the rate of taxation in case of non-resident decedents should equal but not exceed the rate imposed in the case of resident decedents." (Carr *v.* Edwards, *supra.*)

And in case the particular successors to property valued at $500 or over within the jurisdiction of this state belong to the class denominated as collaterals, the applicability of the Carr *v.* Edwards case governing the operation of the Ratio Provision

even under the instant statute is unquestioned for the reason stated.

It is further apprehended that in case the value of the property within the jurisdiction does not equal or exceed $500 in value, the classification or criteria established by the operation of the Ratio Provision as it stands in either statute would cease to have a reasonable and just relationship to the object of the statute, to wit: that property less in value than $500 should not be subject to any tax at all and in that case the classification following the operation of the Ratio Provision would necessarily merit condemnation.

The ratio method of assessing inheritance taxes was recognized as fundamentally unsound in the Massachusetts case, Attorney General *v.* Barney, 211 Mass. 134.

The Massachusetts statute contained no ratio provision, but the taxing officials ascertained the tax in exactly the same manner as the New Jersey statute directs, *i. e.*, by proration of exemptions and graduations. The facts in that case appear from the opinion as follows:

> "The defendant is the administrator with the will annexed of one Frank D. Sweetser, who at the time of his death was domiciled in Martinez in the State of California. The will was duly proved in California. By the will the testator gave to a niece a legacy of $500 and bequeathed the rest and residue to two sisters and a brother in equal shares. The estate amounted to $16,144.20, of which $1,116.07 was in this Commonwealth. This was all that was actually or constructively here, or that came into the hands of the defendant. The legacy of $500 was paid by the executor in California and he distributed the rest and residue, amounting to nearly $5,000 each, between the sisters and the brother. The defendant paid from the estate in his hands the debts due to Massachusetts creditors, the expenses of administration here and the funeral charges incurred here, and at the request of the executor in California divided what re-

mained, which amounted to $631.08, equally between the residuary legatees, each receiving in full $210.36. The Treasurer and Receiver General has assessed a legacy and succession tax upon the estate thus paid over to and distributed by the defendant amongst the residuary legatees and brings this bill to enforce its payment, contending that the amounts severally received by the residuary legatees from the estate in California should be taken into account in determining whether the bequests to them exceeded $1,000 in value, and if they do, as it is plain that they do if that rule is to be applied, that then the estate in the hands of the defendant is liable to a legacy and succession tax. We do not understand the defendant to controvert this if the rule contended for by the Treasurer and Receiver General is the correct rule. The defendant on the other hand contends that the amounts received by the residuary legatees from the California estate should not be taken into account in determining whether the bequests to them exceed $1,000 in value, and if it should not, then he contends, and the Attorney General, as we understand him, concedes, that the tax was unlawfully and improperly assessed.

"The testator died in November, 1908. The statute then in force was St. 1907, c. 563, § 1, now St. 1909, c. 490, Part IV, § 1. That statute, so far as applicable to the case before us, provides that 'All property within the jurisdiction of the Commonwealth, corporeal or incorporeal, and any interest therein, whether belonging to inhabitants of the Commonwealth or not, which shall pass by will, or by the laws regulating intestate succession, or by deed, grant, or gift, except in cases of a *bona fide* purchase for full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor, to any person, absolutely or in trust, except', etc. Then follow the exceptions which include husband and wife and children and certain other near relatives and connections of the decedent. These are divided into two classes, A and B. The statute then goes on: 'And such property

which shall so pass to or for the use of a member of class A shall be subject to a tax of one per cent of its value for the use of the Commonwealth if such value does not exceed', etc. The same language is used in regard to class B, except that the tax is three per cent instead of one per cent. It is manifest that the words 'such property' refer to the words with which the section begins, namely: 'All property within the jurisdiction of the Commonwealth * * * which shall pass by will' or in the manner there specified. In other words it is on property within the Commonwealth, and on that alone that the tax is imposed. The Attorney General not only does not controvert this but agrees that the statute must be so construed. After providing that administrators and executors shall be liable for the taxes the statute continues: 'but no bequest, devise or distributive share of an estate which shall so pass to or for the use of a husband, wife, father, mother, child or adopted child of the deceased, unless its value exceeds ten thousand dollars, and no other bequest, devise or distributive share of an estate unless its value exceeds one thousand dollars, shall be subject to the provisions of this act'. It is plain, we think, that the 'bequest, devise or distributive share' referred to is of property within the jurisdiction of this Commonwealth. The section deals with property in this Commonwealth and nowhere else. *The word 'estate' in the connection in which it is used means, and can only mean, property in this Commonwealth. It necessarily follows that in determining whether 'a bequest, devise or distributive share' is or is not exempt the tax commissioner has no right to take into account the amount received by the devisees or distributees from property situated in another State or country. To do so would be to tax the devisee or distributee indirectly for such property to an amount equal to the amount of the exemption here, and would be contrary to the principle on which the legacy and succession tax is based, which is that it is 'an excise tax upon the privilege of passing title to property on the death of its owner'.* Kingsbury *v.* Chapin, 196 Mass. 533, 537. *In order to be*

valid the tax must be levied by the authority that confers the privilege upon property which passes by virtue of the privilege. (Italics ours.)

"It is immaterial what the practice of the administrative officers of the Commonwealth charged with the duty of collecting legacy and succession taxes may have been in regard to considering property within and without the Commonwealth. It is only when a statute is of doubtful import and the practice has been long continued and acquiesced in by all parties interested that it can be resorted to in aid of the construction of the statute. In the present case we discover no such ambiguity in the meaning of the statute as to justify as an aid to construction a resort to the practice of the officers charged with its execution, even if we assume that the practice had been sufficiently long continued to render it otherwise admissible.

"There is noting in the previous history of the statute which tends to show that it should be construed differently from what we have construed it."

The employment of the ratio method upon the taxation of express companies, telegraph companies or railroad companies has been approved in a number of cases, some of which are referred to as authorities in the opinion of the court below in the Maxwell case (165 U. S. 252; 166 U. S. 171). Reliance upon such authorities, involving the peculiarly difficult taxation of such properties, in support of an entirely different scheme, is dangerous in the extreme. The ratio methods approved in these cases, it will be noted, were applied for the purpose of ascertaining *the value of the property within the jurisdiction.* None of the statutes involved in any of these or similar decisions proposed to tax property of these peculiar corporations situated within the state upon the basis of the value of property situated without the state.

In none of these cases is found present the elements of the problem in the case at bar, *i. e.*, the necessity for accordance of equality of exemption

and equality of graduated amounts upon which the tax is to be computed at progressive rates.

Mr. Justice Holmes, speaking of this phase of the matter for the Supreme Court of the United States (Fargo *vs.* Hart, 193 U. S. p. 499), uses the following language:

> "It is obvious, however, that this notion of organic unity may be made a means of unlawfully taxing the privilege, or property outside the state, under the enhanced value or good will, if it is not closely confined to its true meaning. So long as it fairly may be assumed that the different parts of a line are about equal in value a division by mileage is justifiable. But it is recognized in the cases that if, for instance, a railroad company had terminals in one state equal in value to all the rest of the line through another, the latter state could not make use of the unity of the road to equalize the value of every mile. *That would be taxing property outside of the state under a pretense.*" (Our italics.)

The ratio provision of the present statute as stated by Mr. Justice Minturn in the opinion in the Maxwell case in the court below:

> * * * "doubtless had its origin, in an intimation contained in the opinion of Mr. Justice Swayze, in Beers *vs.* Edwards (*supra*) in commenting upon the act of 1909, wherein he declared, 'We do not mean to say that the legislature might not have adopted another basis for the computation of the entire tax. It might perhaps have enacted that the entire tax should be the amount to which the estate would have been subject if the decedent had been a resident of New Jersey, and all his property had been situated there'."

Carefully examining the foundation of the ratio provision it is found supported by an intimation—a "might perhaps" and an "if".

It was undoubtedly clearly apprehended by the learned justice writing the opinion in the case of Beers *v.* Edwards, that succession to land in New York depends upon the law of New York and cannot

be made subject to terms by this state and that since no tax could be imposed by reason of the New York real estate if the decedent had resided here that real estate cannot be included in estimating the tax upon the estate of resident or non-resident for the purpose of ascertaining the amount to be imposed on the New Jersey stocks but it is intimated that if the tax cannot be computed by reason of the New York real estate if the decedent is a resident, nevertheless it can be so used to ascertain the tax *if we imagine that the non-resident is a resident and all his real property in New York has moved across the North River.* The mathematics of the ratio provision is unquestionably correct and it was the mathematical aspect of the ratio provision that must have been in mind in the suggestion for its enactment but the possibility that the resident decedent could succeed to property beyond our jurisdiction was overlooked. The assertion is ventured that no ratio provision can be devised which will meet constitutional requirements under a statute according exemptions and imposing progressive rates of taxation.

The problem involved in the ratio provision has been solved in the New York statute by a very simple provision:

> " Whenever the property of a resident decedent, or the property of a non-resident decedent within this state, transferred by will is not specifically bequeathed or devised, such property shall, for the purposes of this article, be deemed to be transferred proportionately to and divided *pro rata* among all the general legatees and devisees named in said decedent's will, including all transfers under a residuary clause of such will."
>
> (Par. 3, Section 220.)

POINT VI.

Conclusions.

A writ of mandamus is the proper and only remedy in this instance and should be allowed.

The statute is invalid because of the failure of the "ratio provision" to extend to the case of the resident decedent owning property beyond the jurisdiction and should be so declared upon this appeal for that reason.

The statute is invalid furthermore because of the *illegal classification* made under the direction of the "ratio provision" upon the basis of property succeeded to beyond the jurisdiction and should be so declared upon the appeal for that reason.

The "ratio provision" is inseparable from the rest of the statute, the whole constituting a completely invalid scheme of taxation as to non-residents so far as progressive rates are imposable.

The "favored status" ascribed in the case of non-resident decedents is established upon a basis as arbitrary as the arbitrary distinction it is said to offset.

The imponderability and questionable value of such "favored status"

render it impossible of acceptance as a constituent or equivalent of the required equality under the laws.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

CHARLES L. ZABRISKIE, *et al.*, Executors of the last will and testament of Charles Frederick Zabriskie, deceased, *Prosecutors,*	*On Certiorari.*
vs.	
EDWARD I. EDWARDS, Comptroller of the Treasury of the State of New Jersey, *Defendant.*	

Brief for Prosecutors.

An order was entered in this cause affirming the assessment of a tax of $5,885.07 paid to the State of New Jersey on April 9th, 1915.

The order of affirmance made by Mr. Justice Swayze was based on a decision in *Maxwell* v. *Edwards,* now before this court.

The points herein to be considered have been discussed in the briefs in the Maxwell case, the Hillyer case and the Collins case, except the proposition as to excision or separability. They are restated merely for the purpose of emphasis.

The brief on behalf of the special counsel for the defendant seems to us on close analysis to be in effect a plea of "Confession and Avoidance." It admits the inequalities so definitely pointed out by the prosecutors in the attack upon the act in question, but says they are not "great"; they do exist, but are occasional only and not general. It says that while there would seem to be discrimination it is apparent only and not real.

The fact remains, however, that under the Ratio Provision now under attack the exemptions, by our Legislature undoubtedly intended to be made to the full extent, are definitely, positively, inevitably and universally prorated. Moreover the tax is definitely and certainly measured, so far as non-residents are concerned, by property possessed not the subject of taxation.

Taking the Maxwell case for instance as a concrete instance for consideration: the tax paid on the transfer of the New Jersey securities amounted to over $8,000, more than would have been the case had the decedent therein owned no property outside of New Jersey.

Nothing is great or small, save by comparison, but judged by the normal bank account of the average lawyer, that figure would seem fairly great, and the discrimination would seem most manifestly real, and as such discrimination must exist in every case of a non-resident to a greater or lesser extent depending upon the amount of property owned beyond the confines of New Jersey, it is clearly not occasional but inevitable.

THE OPINION IN MAXWELL *V.* EDWARDS, WE RESPECTFULLY SUBMIT, BEGS THE WHOLE QUESTION.

That opinion recognizes clearly that the legislative power may not be exerted "in an arbitrary or capricious manner, or in disregard of fundamental rights." It says, moreover, that the legislative intent was to provide a mathematical formula, which in practical application should so operate as to *practically equalize* in administration the tax imposed by the same legislation upon the estates of resident decedents.

The very concrete and definite total of over $8,000 referred to in the Maxwell case would seem to compel the necessary inference that there was something radically wrong in the "practical equalization obtained by the mathematical formula." Clearly the figures are right, —necessarily something is wrong, and a further examination of the mathematical formula is accordingly essential.

The opinion further continuing quotes from the opinion of Mr. Justice Swayze in *Beers* v. *Edwards*, 84 N. J. L. 32, saying,—

> "It (the Legislature) might perhaps have enacted that the entire tax should be the amount to which the estate would have been subject, if the decedent had been a resident of New Jersey, and all his property had been situated here."

By that dicta it was unquestionably not intended to sanction a method of taxation which had not then been tried, or to approve an act which prorated exemptions and levied a tax measured with reference to property over which the State had no power, claim or jurisdiction.

An argument is made in the opinion by Justice Minturn to the effect that the parties in interest in the Maxwell case should not object to being taxed some $8,000 more than they would pay on the same transfer, if the decedent had resided in New Jersey, because, forsooth, Jones and Robinson, owning bonds and commercial paper in New Jersey and living in Arkansas, were not taxed at all. We feel sure that the logic of the situation would not appeal forcibly to the man whose "bank account was gored."

In other words, the fact that arbitrary and discriminative omissions are made does not render a surplus tax paid by a non-resident,

having no such omitted property, any the less arbitrary and discriminative. Perhaps our Legislature has the discretion and power to omit anything it wishes, but it may not be urged that that omission justifies an excessive imposition elsewhere.

The opinion further states that "all that the constitution requires is an aim and intention on the part of the Legislature in framing the tax law, to approximate to the ideal of absolute equality, as closely as the nature of the subject, and the necessities of practical administration will permit."

And it refers again to "equality and uniformity."

THE RATIO PROVISION OPERATES INHERENTLY, NECESSARILY AND UNIVERSALLY TO LAY A BURDEN NOT IN PROPORTION TO BENEFIT SECURED AND PROPERTY SUCCEEDED TO, BUT SOLELY IN PROPORTION TO BENEFITS NOT SECURED AND PROPERTY NOT SUCCEEDED TO.

In the case in hand the testator left property in New Jersey valued at $427,187.50, and as the total estate was appraised at $600,126.65 the pencil of the comptroller figured a percentage of 71.197 and levied a tax, as we have said, of $5,885.07.

Had the testator, perchance, owned $400,000 worth of real estate in California, or only $10,000 worth, an entirely different percentage would be figured and another amount of tax levied, yet in each event our State purports to tax merely the transfer of the shares in New Jersey, and as taxation and protection are presumed to be reciprocal, it is of course providing protection

merely to that extent. If this is not arbitrary one is led to wonder what is arbitrary.

It is the sheerest subterfuge and sophistry to say that nothing but the New Jersey succession is taxed and that the property beyond our jurisdiction is merely used as a yard stick or medium of measurement. If the constitutionality of this Ratio Provision can be sustained what possible limit can be placed to the extent to which our Legislature can go in reaching out for a media of measurement?

It has always been the proud boast of our law that it looked not to form or pretence but to substance and stood always ready to draw aside the veil of illusion to permit the penetration of the light of justice.

To say that real estate or personal property in California may be used by our taxing authorities to compel a non-resident owner of New Jersey securities to pay a transfer tax $8,000 greater than that paid by a resident owner is to defy logic, common sense and justice. Moreover to say that a widow of a non-resident, leaving $5,000 worth of real estate, out of New Jersey, and $5,000 of New Jersey securities, must pay a tax of $25, but that the widow of a New Jersey resident similarly circumstanced as to possessions shall pay nothing; in other words the prorating of the exemption seems far from "absolute equality" demanded by our decision, and we are surely not willing to concede that the nature of the subject or practical administration present any difficulties justifying this inequality and injustice.

THE RATIO PROVISION VIOLATES PROPER CLASSIFICATION.

Concededly wealth is a valid basis for classification, but it must be wealth subject to the operation of the statute imposing the tax. Clearly in the present instance the classification is not the wealth on which our tax may operate but that over which our State has no jurisdiction or control.

If a Federal statute should attempt to levy a transfer tax on all of the citizens of the United States and so work out the scheme as to give to each State a proportional interest where the tax was levied on property in such State, it might distribute as between New York and New Jersey where the citizens own property in only two states *pro rata* as to the property in each, and such an attempt would be reasonably consistent and valid and would come within the schemes of taxation sustained by various United States Supreme Court decisions referred to in the opinion of Justice Minturn and in the brief of the defendant.

This is the situation where mileage of telegraph lines or railroads in one State is divided into the total mileage, but such a situation is far removed from that which is brought out by our Ratio Provision.

In a word, can it be contended that classification, according to succession in other jurisdictions than that of the taxing State, is reasonable, logical or consistent? We are led naturally to the inquiry as to what is the rational relation which the succession of property in New York sustains to the right of transfer in New Jersey. If the tax on the right to succeed to property in New Jersey was measured by the property which some other individual might own in some

other jurisdiction the abortiveness of the effort would become immediately more apparent, but the principle involved would be identical in each case, that is to say, it is no more arbitrary or no more unreasonable to increase the amount paid on the transfer of the New Jersey securities by $8,000 in the Maxwell case merely because there is a considerable succession out of this jurisdiction, than it would be to increase it by twice that amount because a brother of the testator left a still larger inheritance.

Our Legislature has said that the value of property in New York owned by a non-resident controls the amount of tax to be paid upon succession to property within this jurisdiction.

We hope that this will not be accepted by this court as "the ideal of absolute equality, as closely as the nature of the subject, and the necessities of practical administration will permit."

A New Jersey resident may have two million dollars worth of real estate in California, but that fact is not taken into consideration in figuring the number of dollars to be paid on the rights to succeed to his stockholdings in the New Jersey corporation, but if a non-resident has an equal amount of real estate in California and the same amount of stock in New Jersey, his estate is mulcted many dollars more for the right of transfer.

Does our State grant more grace in one case than in the other?

In determining what amount of tax should be paid on the transfer of New Jersey securities our authorities have no right whatever, so far as reason, logic or principle is concerned, to take into account the amount received by devisees or distributees from property situated in another State or country.

The necessary and inevitable effect of such an attempt is to tax the devisee indirectly in a manner contrary to the principle on which the legacy and succession tax is based. If our jurisdiction conferred any privilege whatsoever with reference to the property of a non-resident beyond the confines of our jurisdiction, a tax, such as our present Ratio Provision now provides for, might be valid, but in that case only.

As has been said elsewhere, the present practice can only be defined as a taxing of succession to property within the State, according to the value of succession to property outside the State, and as has been said in *Mugler* v. *Kansas,* 123 U. S. 623, 661, our courts "are at liberty—indeed are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the Legislature has transcended the limit of its authority."

If this were a straight property tax and our jurisdiction should claim the right to assess physical property of the United States Steel Corporation and said in determining the rate of this tax, we will measure the value of your property in this State by dividing it into your holdings in Pittsburgh and work out a fluctuating fraction, it is hardly conceivable that a serious effort could be made to sustain the scheme. The principle involved is identical with that under consideration. The argument of the defendant is in effect that we must permit form to control substance.

What possible real or substantial distinction can be suggested to vary a transfer tax on shares of stock as between resident and non-resident? Arbitrary selection cannot be justified by calling it classification.

The right given, the transfer assessed, is identically the same in cases of residents or non-residents, and when we find a difference of thousands of dollars in the amount paid on the same transfer because of difference in residence we are driven to the conclusion that it comes close to an "arbitrary spoliation of property and a denial of equal protection and security."

Neither in the opinion below nor in the brief of the defendant has any reason anywhere been suggested why greater burdens should be laid upon a non-resident in one case than in the other.

The right to inherit or the right to a transfar is identical whether a man resides in New York or New Jersey, and hence a condition of inheritance or transfer must be graded to the value of that inheritance or transfer. To increase or decrease that value under the claim of measuring it by a transfer elsewhere in one case and not in the other can only be the result of confusion somewhere.

The ownership by a non-resident of property in some other jurisdiction has no reasonable relationship whatever with the object proposed and attempted to be attained by the scheme in question.

The Court said in *Billings* v. *Ill.*, 188 U. S. 97, "that the taxing power of a State could not be exercised upon persons grouped according to their complexions," yet that would seem much more logical and consistent than to exercise the right upon persons grouped according to property owned beyond the confines of the taxing district.

The legislation in question is unique and *sui generis* and the questions involved in this litigation and necessary to its decision have not been

decided by any of the authorities referred to in the defendant's brief.

THE ENTIRE ACT OF 1914, CHAPTER 57, P. L. 1914, PAGE 91, MUST FAIL.

The so-called Ratio Provision first appears in the Laws of 1909, page 236, Chapter 159, and again Chapter 228 of the Laws of 1909, page 325, at page 332. This act met approval in *Carr* v. *Edwards.* It was amended, however, extensively by Chapter 57 of the Laws of 1914, P. L. 1914, page 91. Section 1 changed the scheme of taxation radically, introducing for the first time the taxation of transfers to lineals and providing an exemption to the extent of $5,000 to them, and amending but re-enacting Section 12, containing at the heel the Ratio Provision, page 96.

As has been clearly shown the Legislature did not presumably give the matter the mature deliberation the enactment deserved and accordingly wrought out a scheme which prorated the exemptions and discriminated arbitrarily in the tax made on the transfer as against non-residents.

We respectfully contend that no excision can be made which will leave valid the Act of 1914 so far as it attempts to tax lineals.

The 1914 amendment re-enacted the Ratio Provision, which it might legally have done, but when it added the provision for Initial Exemptions and Progressive Rates and retained the provision for considering the property of a non-resident beyond this jurisdiction for the purpose of obtaining the amount of the tax, it instituted a scheme which of necessity worked out arbitrary inequality and unjust differentiations.

Surely it cannot be said that our Legislature would desire to tax the transfer of stock to lin-

eals in the case of residence but to exempt lineals in the case of non-residence. There was one comprehensive scheme of taxation involved in the Act of 1914. The Ratio Provision, the Initial Exemption and Progressive Rates are so materially and inextricably intertwined and interwoven that the elimination of one must mean the downfall of the other.

Section 27, providing that the unconstitutionality of one section shall not affect any other section, has no effect on the subject under consideration, for the unconstitutional part of the statute is of such a nature in this case as to affect the whole of the 1914 re-enactment.

This subject of separability and excision has been dealt with at length in this State in several cases.

Johnson v. *State,* 30 Vr. 535; 59 N. J. L. 535, at 539.

Eastwood v. *Russell,* 81 N. J. L. 672.

New Brunswick v. *Fitzgerald,* 19 Vr. 459.

Fagan v. *Payne,* 46 Vr. 851.

These cases deal with what can be saved and what cannot be saved, and they are, we contend on the whole authority for the proposition that inasmuch as the unconstitutionality of the act now under attack arises by virtue of a complicated mathematical formula, which finds one factor in the first section and the other factor in the twelfth section, that the entire act, so far as purports to work out a scheme to tax lineals must fail. The vice of the act and the impossibility of a judicial separation can be made apparent in a single illustration. If A, a resident of New Jersey, leaves $10,000 worth of stock to his widow, and a million dollars worth of property out of this jurisdiction, that transfer is taxed as follows: First a deduction of $5,000

from the $10,000, and the balance of $5,000 taxed at 2%, for the property out of this State is entirely eliminated from consideration, but B, a non-resident, leaves his widow the same $10,000 worth of the same stock, and a million dollars worth of property out of this jurisdiction. In adding together the total amount of property in and out of this State, for the purpose of getting the fluctuating fraction provided for by the Ratio Provision, we reach a figure which takes 2%, according to the act, on any amount from $5,000 to $50,000; 2½% from $50,000 to $150,000; 3% from $150,000 to $250,000, and 4% on all amounts in excess of $250,000. Of course these Progressive Rates are considered because property out of this jurisdiction and over which the State has no control is included, and it has inevitably the effect of fixing a very much larger sum to be paid on the transfer of shares by B's widow than was paid by the widow of A.

We respectfully contend that there is no way in which the Ratio Provision and the amendment provided for in the first section of the Act of 1914 can be retained in the same act without producing this result.

It is respectfully submitted that the entire scheme of taxation attempted to be accomplished by the act of 1914, Chapter 57, must fail.

Respectfully submitted,

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