INDEX.

Writ of Certiorari.

Allowed December 31, 1915.

New Jersey Supreme Court.

NEW JERSEY, *ss*:

The State of New Jersey to Edward I. Ed-
[L. S.] wards, Comptroller of the Treasury of the State of New Jersey:

We being willing for certain reasons to be certified of a certain return, appraisement, assessment or fixing of a transfer or inheritance tax upon the transfer of property left by the late James McDonald or a tax on the property passing under his will to beneficiaries thereof, which appraisement, assessment or fixing of tax was made on or about the 15th day of December, 1915:

WE DO HEREBY COMMAND that you send under your hand and seal to our Justices of our Supreme Court of Judicature, at Trenton, on the 24th day of January, 1916, the said return, appraisement, assessment or fixing of 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.

Writ of Certiorari.

WITNESS the Honorable WILLIAM S. GUMMERE, Chief Justice of our Supreme Court, at Trenton, the 4th day of January, 1916.

WILLIAM C. GEBHARDT,
Clerk.

COULT & SMITH,
Attorneys.

(Endorsement)

Allocatur December 31, 1915.

SAMUEL KALISCH,
J. S. C.

Return.

Return.

Filed January 24, 1916.

New Jersey Supreme Court.

LAWRENCE MAXWELL and FULTON TRUST COMPANY OF NEW YORK, Executors of the Last Will and Testament of James McDonald, deceased, *Prosecutors,* *vs.* EDWARD I. EDWARDS, Comptroller of the Treasury of the State of New Jersey and EDWARD E. GROSSCUP, State Treasurer, *Defendants.*	*On Certiorari.* *Return to Writ.*

I, Edward I. Edwards, pursuant to the command of the 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 James McDonald, deceased, as within I am commanded.

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

Return.

24,151

TAX ON TRANSFER OF SHARES OF STOCK IN NEW JERSEY CORPORATIONS STANDING IN THE NAME OF A NON-RESIDENT DECEDENT.

Estate of James McDonald,
Late of Washington, D. C.

Executors Lawrence Maxwell and Fulton Trust Company of New York.

Post-office Address care of DeWitt, Lockman and DeWitt, 88 Nassau St., N. Y. C.

Date of Death of Decedent, January 13, 1915.

SHARES OF STOCK IN NEW JERSEY CORPORATIONS.

Number of Shares. Pfd.	Number of Shares. Com.	Name of Company.	Market Value.	Total.
Cap.				
5	... ...	Borne-Scrymser Company,	$255.00	$1,275.00
6	... ...	Colonial Oil Company,	100.00	600.00
2478	... ...	Standard Oil Company,	400.00	991,200.00
302	... ...	Union Tank Line Company,	85.00	25,670.00
...	... 250	National Lead Company,	46.00	11,500.00
...	750 ...	National Lead Company,	107.50	80,625.00
21	... ...	National Fuel Gas Company,	195.00	4,095.00
				$1,114,965.00
		N. J. stocks specifically bequeathed to widow & stranger,		328,914.04
				$786,050.96
Capital stock.				
600		Standard Oil Company,	$400.00	$240,000.00
1—213617/983383		Borne-Scrymser Company,	255.00	310.38
1—512417/983383		Colonial Oil Company,	100.00	152.10
73—208841/983383		Union Tank Line Company,	85.00	6,223.05
				$246,685.53

Tax assessed on above specifically bequeathed to widow:

$50,000.00	1%,	$500.00	
100,000.00	1½%,	1,500.00	
96,685.53	2%,	1,933.71	
		Tax.—	$3,933.71
200	Standard Oil Company,	$400.00	$80,000.00
	Borne-Scrymser Company, Colonial Oil Company, Union Tank Line Company,		2,228.51
			$82,228.51

Return.

Tax assessed on above stocks specifically bequeathed to stranger:	$82,228.51	.05	Tax.—	$4,111.42
Interests taxable:				
Legacies, etc., to beneficiaries in 5% class,	$356,761.26	5%,	$17,838.06	
Int. of widow in estate other than N. J. stocks specifically bequeathed,	$294,712.99			
Stat. exemption,	5,000.00			
	$289,712.99			
	$3,314.47	2%,	66.29	
	286,398.52	3%,	8,591.95	
Residuary estate taxed in this proceeding as passing to the son and 2 grandchildren,	$2,718,131.79			
Stat. exemption,	15,000.00			
	$2,703,131.79			
	$135,000.00	1%,	1,350.00	
	300,000.00	1½%,	4,500.00	
	300,000.00	2%,	6,000.00	
	1,968,131.79	3%,	59,043.95	
			$97,390.25	
Gross,	$3,969,333.25		.2159	
Less N. J. stock spec. bequeathed,	328,914.04		Tax.—	$21,026.55
Appraised Value of Estate,	$3,640,419.21	$786,050.96	(.2159	
			Total tax.—	$29,071.68
Deductions,	279,813.17			
Net Estate,	$3,369,606.04			
Legacies, etc.,	651,474.25			
Residue,	$2,718,131.79			
Total Appraised Value of Shares in New Jersey Corporations,				$1,114,965.00
Tax payable if decendent had lived in New Jersey and all the property had been located in this State,				$ 105,435.38
Percentage of whole estate invested in New Jersey stocks, not spec. bequeathed,				.2159
Tax due New Jersey,				$ 29,071.68

Return.

In the Matter of Estate of
James McDonald, *Deceased.*

State of New York,
County of New York, } *ss.*

Henry W. Reighley being duly sworn deposes and says that he is the 2nd Vice President of the Fulton Trust Company of New York.

That Lawrence Maxwell and the said Fulton Trust Company of New York are the duly qualified and acting executors of the estate of James McDonald, who died testate on the 13th day of January, 1915, at Washington in the District of Columbia, and that on said date he was a resident of Washington in the District of Columbia.

That DeWitt, Lockman & DeWitt of No. 88 Nassau Street, Borough of Manhattan, City and State of New York, are the attorneys for said executors of said estate.

The total amount of estate wherever situated of which decendent died, seized and possessed at actual value at time of death is:

Real Estate	$ 4,250.00
Personal Estate	3,965,083.25
Total estate as per details of Schedule A attached hereto and part hereof	3,969,333.25

The total amount of property real and personal within the jurisdiction of New Jersey owned by the decedent

at actual value at date of death of decedent is:

Real Estate	None
Personal Estate	1,114,965.00

Total estate in New Jersey as per details of Schedule B attached hereto and part hereof other than which the decedent at the time of death possessed no property within the jurisdiction of New Jersey	1,114,965.00

The amount of debts owed by the decedent at the time of death, mortgages on real estate excluded, was as per details of Schedule C attached hereto and part hereof 20,213.17

The expenses of funeral and estimated expenses of administration, as per Schedule D attached hereto and part hereof 250,600.00

The names of beneficaries and relationship of each to decedent are as follows:

Names	Relationship to decedent.	Survived decedent.
Mrs. Nellie Carpenter, (Born Mch. 22, 1856)	Niece	Yes
Mrs. C. H. Falloon, (Born May 23, 1839)	Mother-in-law	Yes
Mrs. Sarah E. Fraser, (Born Nov. 7, 1839)	Cousin by marriage	Yes
Mrs. Helen B. Rule, (Born Nov. 27, 1850)	Sister-in-law	Yes
Mr. Robert Sanders, (Born Jan. 24, 1826)	Brother-in-law	Yes

Return.

	Mrs. Flora Lourie	Grand-niece	Yes
	Mrs. May Affled	No relation	Yes
	Mrs. Mamie Edward	Second cousin	Yes
	Miss Helen Fraser	No relation	Yes
	Miss May Fraser	No relation	Yes
	Miss Jessie Fraser	No relation	Yes
10	Miss Clara Bowen	No relation	Yes
	Miss Lillie Bowen	No relation	Yes
	Mrs. Hugh Gibson	No relation	Yes
	Mrs. James Holmes	No relation	Yes
	Mrs. Mary Weitzel	No relation	Yes
	Mrs. Alex Murison	No relation	Yes
	Mrs. Cora E. Rower	No relation	Yes
	Mr. J. McD. Holtziner	No relation	Yes
	Mr. Wm. R. Palmer	No relation	Died Dec. 3, 1914
20	Protestant Widows and Old Men's Home in Cincinnati, O.	————	Yes
	Dilkusha Wrench, (Born Dec. 30, 1899)	No relation	Yes
	John Wrench, (Born Apr. 21, 1901)	No relation	Yes
	James Jeram Briggs, (Born Mch. 30, 1902)	No relation	Yes
	Christina Watson	No relation	Yes
30	Mrs. Johnson	No relation	Yes
	Jessie Kittredge	No relation	Yes
	J. Walter Jones	No relation	Yes
	Charlotte Jane Isabelle McDonald	Wife	Yes
	Arthur B. Campbell, (Born June 8, 1887)	Stepson	Yes
	James McDonald, Jr. (Born May 8, 1890)	Son	Yes
40	James McDonald, 3d, (Born Sept. 10, 1913)	Grandson	Yes

Return.

Robert Alexander McDonald,
(Born May 12, 1915) Grandson Yes
Beulah McDonald,
(Born Oct. 19, 1890) Daughter-in-law Yes

Sworn to before me this 15th day of November, 1915.

(Signed) HENRY W. REIGHLEY.

(Signed) E. H. CALLANAN, JR.,
Notary Public Kings County.

No. 175 Certificate filed in New York County No. 65 Kings County, Register No. 7031. New York County registered No. 7078. Commission expires March 30, 1917.

(Court Clerk's Certificate Attached.)

(A) I James McDonald a citizen of the United States of America at present residing at 57 Cadogan Square London England—temporarily—make this as and declare it to be my last Will and Testament. All previous Wills are hereby revoked.

(B) I request that all my debts at the time of my death and all the expenses attending my death and funeral be paid as promptly as possible and that my wife and all others who are dependent on me and are provided for in this Will, be supplied with such funds as may be necessary for them pending the carrying out of the provisions hereinafter stated applying to them.

(C) I bequeth to the following named persons —during their lives—the Annuities stated, to be paid to them at such times and in such amounts as they may desire;

To Mrs. Nellie Carpenter My Niece Three thousand dollars ($3000x)

Return.

" Mrs. C. H. Falloon " Mother-in-law Twenty four hundred dollars ($2400x)
" Mrs Sarah E. Fraser " Cousin by Marriage Twelve hundred dollars ($1200x)
" Mrs Helen B. Rule " Sister-in-Law Nine hundred dollars ($900x)
" Mr. Robert Sanders " Brother-in-law Twelve hundred dollars ($1200x)

(D) I bequeath to the following named persons the amounts stated, to be paid to them as soon as legal formalities and financial arrangements will permit.

To Mrs Flora Lourie My Grand Niece Twenty thousand dollars ($20000x)
" Mrs May Affeld Adopted Child of my Sister Ten thousand dollars ($10000x)
" Mrs Mamie Edward My Cousin-(second) Ten thousand dollars ($10000x)
" Miss Helen Fraser of Columbus Ohio Five thousand dollars ($5000x)
" Miss May Fraser " do Five thousand dollars ($5000x)
" Miss Jessie Fraser " do Five thousand dollars ($5000x)
" Miss Clara Bowen " Pierre S. Dakota Ten thousand dollars ($10000x)
" Miss Lillie Bowen " do Ten thousand dollars $10000x)
" Mrs Hugh Gibson " Cincinnati, O. Three thousand dollars ($3000x)
" Mrs James Holmes " do Three thousand dollars ($3000x)
" Mrs Mary Weitzel " do Three thousand dollars ($3000x)
" Mrs Alex Murison " Chicago Ill Three thousand dollars ($3000x)

Return.

" Mrs Cora E. Rower " Wayne Pa. Ten thousand dollars ($10000x)

" Mr. J McD Holtzinger " do Ten thousand dollars ($10000x)

" Mr Wm R Palmer " Chicago Ill. Three thousand dollars ($3000x)

" the Protestant Widows and Old Mens Home in Cincinnati, O. Ten thousand dollars ($10000x)

(E) I bequeath to Alis T. Wrench my Step Daughter in trust for her two children Dilkusha and John Wrench and her Nephew James Jeram Briggs the sum of Sixty thousand dollars ($60000x) being twenty thousand dollars ($20000x) for each of the three. She may pay out any part or all of both interest and prinicipal that may be necessary for their proper support and education and when they arrive at legal age she may either pay over to them the amount then due or continue to them as much as may be sufficient for their support until they reach the age of thirty years when she must pay over to them the amounts then due to them. If any of the three should die in the meantime leaving no issue—the shares of the deceased shall be divided share and share alike between the survivors

(F) I bequeath to the following named Servants —provided they are still in my service at the time of my death:

To Christina Watson Housekeeper One thousand pounds sterling (£1000—)

" Mrs Johnson Cook One thousand pounds sterling (£1000—)

Return.

" Jessie Kittredge Housemaid Six hundred pounds sterling (£600—)

" J. Walter Jones Butler Eight hundred pounds sterling (£800—)

I also cancel Jones indebtedness to me of £400

(G) I bequeath to my Wife Charlotte Jane Isabelle—if she survives me Six hundred shares (600) of the stock of the Standard Oil Co. of New Jersey and a pro rata (600/983383) of the stocks of all the companies formerly subsidiaries of the said Standard Oil Co. of New Jersey Stocks of which I am the owner at the time of my death. This is in addition to the one hundred and fifty thousand dollars ($150000x) due to her from me under our ante-nuptial agreement.

If she shall have died before me and I have not otherwise provided by will or codicil one third (⅓) of this bequest shall go to her Son Arthur B. Campbell, one third (⅓) to her sister Mrs Bernard Meuser—or issue—and one third (⅓) to my Niece Nellie Carpenter her issue or direct descendants. In the event of any of these three having died leaving no issue or direct descendants the share or shares of the deceased shall go to the survivor or survivors, or the issue or direct descendents of such survivor or survivors.

(H) I bequeath to my wife—Charlotte Jane Isabelle—in trust for her Son Arthur B. Campbell two hundred (200) shares of the stock of the Standard Oil Co. of New Jersey and a pro rata (200/983383) of the stocks of all the Companies formerly subsidiary to the said Standard Oil Co of New Jersey of which I am owner of stocks at the time of my death.

Return.

She may pay over to him any part or all of both interest and principal as she may deem desirable—until he reaches the age of thirty years when she must pay over to him the entire amount then remaining in the fund.

(I) I bequeath to my son James McDonald Jr an Annuity of ten thousand dollars $10000x until he reaches the age of twenty six (26) years—After that age until he reaches the age of thirty (30) years the Annuity shall be twelve thousand dollars ($12000x) From the age of thirty (30) years during his life or until the estate is divided as hereinafter provided the Annuity shall be fifteen thousand dollars ($15000). James shall also have an annual allowance of twenty five hundred dollars ($2500) for each child his wife may bear him until the child reaches the age of fifteen years (15) after that the allowance shall be three thousand dollars ($3000) until the child reaches the age of twenty one (21) years.

(J) I bequeath to James my library now contained in my present residence on condition that he keeps it intact for his eldest son after his own death. The executors shall pay the expenses of packing and transport to such place as James may designate I also bequeath to James the jewelry now in my possession which was worn by his Mother as family jewels. These jewels may be worn by his wife during her life time. After her death the jewelry shall go to her eldest son or his issue if he shall have died leaving issue. If the eldest son shall have died leaving no issue the jewels shall go to the next eldest

son or his issue or failing such to the third eldest or issue my desire being that the jewelry continues to be worn by a McDonald so long as a direct descendant of mine is alive. If no son of James or issue of a son is living at the time of the death of his wife the jewelry shall go to the eldest living daughter. I also bequeath to James all the pictures and other effects—now contained in my present residence—which are in any way connected with himself, his Mother's family—or my own—the McDonald—family except a portrait of myself by Nowell which is the property of my wife, Charlotte J. Isabelle.

(K) I hereby authorize the executors to invest in any business of which they approve and in the management of which James must take an active part any sum not exceeding One hundred thousand dollars ($100000x) All profits resulting from the investment shall go entirely to James but the principal shall remain part of the estate until the estate is divided in accordance with the provisions hereinbefore stated and may be recalled by the executors if they deem it desirable to do so before the division takes place. I also hereby authorize my executors to have built for James a residence at such time and place as he may designate at a cost of not exceeding thirty thousand dollars ($30000x)

(L) There being a mortgage of eight thousand pounds (£8000.) on my residence 57 Cadogan Square London Eng and as I do not desire to increase my investment in England if the present holder of the Mortgage will not consent to extend the time for a period not ex-

ceeding two years or if the Mortgage cannot be transferred to some other party on the same terms and for a period not exceeding two years—the property shall be sold as soon as this can be done without too great a sacrifice. If however the present holder of the mortgage or a successor on the same terms shall extend the time of the mortgage for a term not exceeding two years (2) my wife may occupy it for any part or all of that period the executors paying all interest, rates, taxes, ground rent and insurance during her occupancy. At the expiration of the two years or earlier if my wife should cease to occupy it, the property shall be sold the proceeds to be part of the estate. The pictures, furniture —ornaments and all the other effects contained in the house—excepting such as may still remain which I hereinbefore bequeathed to James, and my portrait by Nowell the property of my wife—and all other properties and effects which are the personal effects of my wife—shall be divided equally between my wife and James in such manner as they may agree on between themselves.

(M) Each child of James, by his wife, shall after reaching the age of twenty one (21) years receive an Annuity of four thousand dollars ($4000x) until the oldest surviving one shall reach the age of thirty (30) years when if James is still living the estate shall be divided as follows: One half (½) shall go to James the remaining one half (½) shall be divided between the children share and share alike. If any of the children shall have died before reaching the age of thirty (30) years leaving a wife and child or children the share

Return.

of such child shall go to the wife and child or children in such manner as the executors may deem best. The share of the child who has reached the age of thirty years shall be made over to him at once but the shares of those who have not reached that age shall be held in trust by the executors and shall be made over to them as they reach the said age. The share or shares of any child on children who may have died before reaching said age leaving a wife and issue may be divided between the wife and issue at such time and in such manner as the executors may deem best. This provision applies in the event of the deceased child being a woman in which case the word husband shall be substituted for that of wife.

(N) If James should die leaving a wife and issue the widow shall receive from the Estate an annual allowance of fifteen thousand dollars ($15000x) until the first child of James shall reach the age of thirty (30) years when if still living she shall receive one third (⅓) of the estate the remaining two thirds (⅔) shall be divided among the issue in the manner set forth in paragraph M.

(O) If James should die leaving a widow but no children or issue of children, the Widow shall receive one third of the estate. and the remaining two thirds (⅔) shall be divided equally between my Niece Nellie Carpenter or her direct descendants—the direct descendants of my present wife—the direct descendants of my first wife (Carre Rule) and the Protestant Widows and Old Men's Home in Cincinnati O.

Return.

(P.) If James should die leaving neither widow nor issue nor direct descendants of issue the entire estate shall be equally divided between the beneficiaries named and in the manner set forth in Paragraph O.

(Q) If James should die leaving a Widow she shall have during her life the use free of rent of any residence that may have been built for James under the provision set forth in Paragraph K.

(R) I hereby appoint Lawrence Maxwell of Cincinnati, O. and the Fulton Trust Co 149 Broadway New York to be the first executors of this Will and Testament. They shall have as full and complete powers as regards the management of the estate as I myself would have if living—it being understood however that they shall carry out all the provisions set forth in this Will and any Codicil or Codicils I may hereafter make to it. They shall have power to nominate a successor to either of them who may desire to retire from the Executorship or who may from any cause be unable to fulfil the duties of executor. This authority shall extend to all their successors. In the event that—from some unforeseen reason only one of the executors is available to attend to any matter requiring immediate attention such executor shall have all the power and authority that could be exercised by the two acting together. If a successor to a retiring director has not been nominated prior to the retiring executor having ceased to act —the remaining executor shall in consultation with my son James—if he is then living—nominate the successor. If James is not then

Return.

living the surviving executor shall with the approval of the court having jurisdiction nominate the successor. It is natural and desirable that the Fulton Trust Company should be the custodian of the assets of the estate but all transactions of any nature outside of those demanded by the provisions this Will and any Codicils shall have the approval of the other if another exists at the time. As long as Lawrence Maxwell continues to be an executor he shall have full charge of all legal matters pertaining to the executorship. The executors shall have the power to have this Will probated in any court they may select— if in the meantime I have not acquired a residence in the United States. The executors shall receive such remuneration as is customary in such cases and shall not be required to furnish any bond or security.

(S) I desire that this Will shall not be made public if this can be legally avoided

Witness my hand and Seal this twenty sixth Day of June 1913

James McDonald (J Mc D) (SEAL)

Witnesses

We the undersigned bear witness that James McDonald is well known to us personally, that he has declared to us that this document is his last Will and Testament, that we have seen him sign and seal it, and that we fully believe him to be in such condition both physically and mentally as to enable him to make a Will with due care and consideration. We have further heard him declare that he is a citizen of the United States of America at present residing in London England

but having the intention of returning to and again taking up his residence in the United States when circumstances will permit.

F. E. Powell.
Rockwood
Walton-on-Thames

James S. Hack
"Conway"
Hallswelle Road,
Golder's Green, N. W.

I, James McDonald a citizen of the United States of America at present temporarily residing at Number 57 Cadogan Square London England do make publish and declare this to be a Codicil to my last Will and Testament bearing date the 26th day of June in the year One thousand nine hundred and thirteen in manner and form following that is to say

First:—I do hereby revoke and annul the annuity of Three thousand Dollars given and bequeathed to my niece Mrs. Nellie Carpenter by paragraph C. of my said will and in place and stead thereof I give and bequeath unto my said niece Mrs. Nellie Carpenter an annuity of Three thousand six hundred Dollars during her natural life

Second:—I do hereby revoke and annul the annuity of Two thousand four hundred Dollars a year given and bequeathed to my mother-in-law Mrs. C. H. Falloon by paragraph C. of my said will for and during her natural life and in place and stead thereof I give and bequeath unto my said mother-in-law Mrs. C. H. Falloon an annuity of Three thousand Dollars during her natural life

Third:—I hereby revoke and annul the paragraph of my said will designated "I" and in the place and stead thereof I do hereby give and be-

queath to my son James McDonald an annuity of Fifteen thousand Dollars until he reaches the age of twenty-six years after that age until he reaches the age of thirty years the annuity shall be Eighteen thousand Dollars from the age of thirty years during his life or until the estate is divided as provided in said will the annuity shall be Twenty thousand Dollars James shall also have an additional annuity of Twenty-five hundred Dollars for each child his wife may bear him and living at my decease until the child reaches the age of fifteen years after that the said additional annuity shall be Three thousand Dollars until the child reaches the age of twenty-one years

Fourth:—I hereby revoke and annul the latter part of the paragraph of my said will designated "J" which reads as follows: "I also bequeath to James all the pictures and other effects now contained in my present residence which are in any way connected with himself his mother's family or my own the McDonald family except a portrait of my self by Nowell which is the property of my wife Charlotte J. Isabelle" and I also revoke and annul the latter part of the paragraph of my said will designated "L" which reads as follows: "the pictures furniture ornaments and all other effects contained in the house excepting such as may still remain which I hereinbefore bequeathed to James and my portrait by Nowell the property of my wife and all other properties and effects which are the personal effects of my wife shall be divided equally between my wife and James in such manner as they may agree on between themselves" and in place and stead thereof I hereby provide as follows: All my household furniture useful and ornamental china engravings paintings statutary bronzes and all other

works of art ornament or curiosity of which I was possessed previous to my marriage to my present wife I give and bequeath unto my son James McDonald and all household furniture useful and ornamental china engravings paintings statuary bronzes and all other works of art ornament or curiosity which I have acquired since my marriage to my present wife I give and bequeath unto my wife Charlotte J. Isabelle McDonald

Fifth:—It is my will and I hereby direct that I be interred in the mausoleum situated in my plot in Brompton Cemetery London England and I hereby give and devise my said plot of ground in the said Brompton Cemetery with the mausoleum erected thereon unto my said son James to have and to hold the same unto him his heirs and assigns forever

And it is my will and I desire that the remains of my present wife be placed in the mausoleum in my said plot in said Brompton Cemetery if my said wife should so desire

Sixth:—I hereby revoke all and every part of the paragraph of my said will designated "K" and in place and stead thereof I hereby authorize and empower my said Executors to advance unto my said son James from my said estate a sum not to exceed Fifty thousand Dollars and I hereby give and bequeath the same unto my said son James for the purpose of erecting a house at such time and place as my said son James may designate

Lastly:—In all other respects I do hereby ratify and confirm my said will and hereby republish and declare the same except as herein and hereby modified to be my last will and testament

Return.

In Witness Whereof I have hereunto set my hand and affixed my seal this the fourteenth day of April in the year One thousand nine hundred and fourteen

James McDonald, (Seal)

Signed sealed published and declared by the testator James McDonald as and for a codicil to his last will and testament in the presence of the undersigned who at his request in his presence and in the presence of each other have hereunto subscribed their names as witnesses.

That the said James McDonald is well known to us personally and that we fully believe him to be in such condition both physically and mentally as to enable him to make a will with due care and consideration. We further heard him declare that he is a citizen of the United States of America at present temporarily residing in London England but having the intention of returning to and taking up his residence in the United States in the near future.

Arthur J Morris 602 West 137th St. N Y. City.
John A. Mack 650 West 163'' St N Y City

SCHEDULE A.

Estate of James McDonald, Deceased

Personal Property Wherever Situated of Which Said Decedent Died Possessed.

(Schedules of Bonds, Stocks, Jewelry, Household Furniture, Cash, Claims, Life Insurance.)

Total $3,965,083.25

Real Property

Real property in the State of Idaho.. 4,250.00

Total $3,969,333.25

Return.

SCHEDULE B

Shares.		Par Value.		Appraised Value.	
5	Borne Scrymser Co., capital stock Certf. No. B100	@ 100	500.	@ 255	1,275
6	Colonial Oil Co. Certf. No. B120	@ 100	600.	@ 100	600
2,478	Standard Oil Co. of New Jersey Certf. No. 43873	@ 100	247,800	@ 400	991,200
302	Union Tank Line Co. Certf. No. B2054	@ 100	30,200	@ 85	25,670
250	National Lead Co.—Common Certf. No. 27682 for 100 shares " " 27683 " 100 " " " A21635 " 50 "	@ 100	25,000	@ 46	11,500
750	National Lead Co.—Preferred Certf. No. 5192 for 100 shares " " 5201 " 100 " " " B17249 " 20 " " " 7584 " 100 " " " A20543 " 50 " " " 7987 " 100 " " " A21450 " 50 " " " 8945 " 100 " " " 8946 " 100 " " " B24938 " 30 "	@ 100	75,000	@ 107½	80,625
21	National Fuel Gas Co. Certf. No. 675	@ 100	2,100	@ 195	4,095
					1,114,965

SCHEDULE C

Detail of Debts other than Mortgages on Real Estate.

(Schedule omitted) $20,213.17

SCHEDULE D

Expenses of Funeral and Estimated Expenses of Administration.

Jos. Gawler's Sons, Funeral Expenses.	$ 600.00
Estimated expenses of administration..	100,000.00
Estimated commissions of Executors..	150,000.00
	$250,600.00

Stipulation as to Payment.

(Filed Jan. ——, 1916.)

New Jersey Supreme Court.

LAWRENCE MAXWELL and FULTON TRUST COMPANY OF NEW YORK, Executors of the Last Will and Testament of James McDonald, deceased, *Prosecutors,* *vs.* EDWARD I. EDWARDS, Comptroller of the Treasury of the State of New Jersey, and EDWARD E. GROSSCUP, State Treasurer, *Defendants.*	*Stipulation.*

It is hereby stipulated between the respective parties:

1. That the prosecutors shall forthwith pay through the defendant, Edward I. Edwards, Comptroller of the Treasury of the State of New Jersey, to the defendant, Edward E. Grosscup, State Treasurer, the amount of the tax assessed against the estate of James McDonald and which is under review in this action.

2. That said payment shall be made and received without prejudice to the rights of the prosecutors in the event that it is determined that the tax should be set aside or reduced.

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

COULT & SMITH,
Atty's. for Prosecutors.

Rule.

Entered Feb. 19, 1916.

New Jersey Supreme Court.

LAWRENCE MAXWELL and FULTON TRUST COMPANY OF NEW YORK, Executors of the Last Will and Testament of James McDonald, deceased, *Prosecutors,* *vs.* EDWARD I. EDWARDS, Comptroller of the Treasury of the State of New Jersey, *et al.,* *Defendants.*	*On Certiorari.* *Rule.*

It appearing that the attorneys for the prosecutors and the Attorney General, on behalf of the defendants, have entered into a stipulation dated February 7th, 1916, as to facts to be used on the hearing and argument on the review of the validity of the tax under consideration in this action:

It is ordered that said stipulation entered into on the 7th day of February, 1916, as aforesaid, be made part of the record of this action and be used as evidence on the hearing and determination thereof.

Entered on motion of

COULT & SMITH,
Attorneys for Prosecutors.

Rule.

Let the foregoing Rule be entered in the minutes.

SAMUEL KALISCH,
J. S. C.

I hereby consent to the entry of the foregoing rule.

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

Agreed Statement of Facts.

Filed Feb. 19, 1916.

New Jersey Supreme Court.

LAWRENCE MAXWELL and FULTON TRUST COMPANY OF NEW YORK, Executors of the Last Will and Testament of James McDonald, deceased, *Prosecutors,* *vs.* EDWARD I. EDWARDS, Comptroller of the Treasury of the State of New Jersey, *et al.*, *Defendants.*	*On Certiorari.*

The following statement of facts is agreed to by the attorneys for the prosecutors and by the Attorney General on behalf of the defendants in the above entitled action, to be used at the hearing upon the return of the writ of certiorari granted hereon:

I

That the statement in the affidavit of Henry W. Reighley and in the schedules attached thereto, annexed to the return of the writ in this case, shall, for the purposes of this action, be taken as true.

II

That James McDonald died at the City of Washington, District of Columbia, on January 13, 1915, and was at and just prior to his death resident in and domiciled at the City of Washington aforesaid and was a citizen of the United States and of said District.

III

That a true copy of the last will and testament and codicil thereto of the said James McDonald was attached to the return of the writ in this action and was duly admitted to probate in the Supreme Court of the District of Columbia; that the executors named therein, Lawrence Maxwell and Fulton Trust Company of New York, have duly qualified as such and are now acting.

IV

That no property of any kind, character or description was left by said decedent within the State of New Jersey other than the following certificates of stock:

No. of Shares	Name of Company
5	Borne-Scrymser Company
6	Colonial Oil Company
2478	Standard Oil Company
302	Union Tank Line Co.
250 (Com.)	National Lead Company
750 (Pref.)	National Lead Company
21	National Fuel Gas Company

That said certificates of stock were not physically within the limits of the State of New Jersey at the time of the death of the said James McDonald.

V

That the Comptroller of the Treasury of the State of New Jersey made a demand upon the prosecutors for the payment of the tax assessed under review in this action, before the commencement thereof.

VI

That Charlotte Jane Isabelle McDonald is and was at the time of the death of James McDonald resident and domiciled in the District of Columbia and was a citizen of the United States and of said District; that James McDonald, Jr., son of said decedent, and his two children, James McDonald, 3d, and Robert Alexander McDonald, were all at the time of the death of the said James McDonald and ever since have been resident and domiciled in Hailey, State of Idaho, and were and are citizens of the United States and of said State.

VII

That Lawrence Maxwell, one of the executors, at the time of the death of the said James McDonald, resided and has ever since resided in the State of Ohio, and that he is domiciled in said State and is a citizen thereof and of the United States. That Fulton Trust Company of New York, the other executor, a corporation duly organized and existing under the laws of the State of New York, was such at the time of the death of the said James McDonald and has been ever since that time.

VIII

That none of the beneficiaries named in the will of the said James McDonald were residents of the State of New Jersey at the time of the death of the said James McDonald.

IX

The method by which the transfer inheritance tax was levied and assessed against the estate of James McDonald, deceased, late of Washington, D. C., and the amount thereof arrived at, is as follows:

First, the appraised value of the entire estate, wherever situate, was ascertained and fixed at $3,969,333.25. From this amount was deducted $328,914.04, being the appraised value of the New Jersey stocks specifically bequeathed to the widow and stranger, leaving $3,640,419.21, from which figure was deducted $270,813.17, being the amount allowed for debts, administration expenses, etc., leaving a net estate of $3,369,606.04; from this net estate was deducted legacies bequeathed under the will, together with legacies to beneficiaries in the 5% class and interest of widow in estate other than New Jersey stocks specifically bequeathed, amounting to $651,474.25, leaving a residuary estate of $2,718,131.79.

The appraised value of the New Jersey stocks specifically bequeathed to the widow was ascertained to be $246,685.53, and the rate of taxation assessed thereon is 1 per cent., 1½ per cent. and 2 per cent., making the tax due this State on this specific bequest to the widow $3,933.71.

The appraised value of the New Jersey stock specifically bequeathed to the stranger was ascertained at $82,228.51, and the rate of taxation on the value of this bequest is 5 per cent., making the amount of tax due $4,111.42. The appraised

value of the New Jersey stocks owned by the decedent at the time of death was $1,114,965.00; from this appraised value was deducted the appraised value of the New Jersey stocks specifically bequeathed to the widow and stranger, amounting to $328,914.04, leaving the net appraised value of the New Jersey property, which formed a portion of the general assets of the estate, at $786,050.96.

The method employed in ascertaining the tax due this State on the transfer of the shares of stock of the New Jersey corporations not specifically bequeathed, is as follows:

The amount of legacies, etc., passing to beneficiaries taxed at the rate of 5 per cent. was determined at $356,761.26, making the tax due thereon at the rate of 5 per cent., $17,838.06. The interest of the widow in the estate, other than shares of New Jersey stocks specifically bequeathed, was determined to be $294,712.99, and the statutory exemption of $5,000.00 was deducted and the tax at the rate of 2 per cent. and 3 per cent. was $8,658.24. The residuary estate was taxed as passing to the son and two grandchildren and determined to be $2,718,131.79, and the statutory exemption of $5,000.00 to each, totaling $15,000.00, was deducted, and the balance taxed at the rate of 1 per cent., 1½ per cent., 2 per cent. and 3 per cent., making the tax on the residuary estate $70,893.95.

The total amount of tax on the interest of the collateral heirs and the amount passing to the widow, together with the residuary estate passing to the son and grandchildren, as set forth above, total $97,390.25.

The percentage or proportion of the New Jersey stocks (not specifically bequeathed) which total

$786,050.96, bears to the entire estate (less specific bequests of New Jersey stocks) which total $3,640,419.21, was determined to be .2159, thus:

$3,640,419.21) $786,050.96 (.2159.

This percentage or proportion of $97,390.25, which is the tax that would have been due if the decedent had died a resident of this State and all his property had been located here, equals $21,026.55.

The total amount of tax as set forth above, which included the tax on the New Jersey stocks specifically bequeathed to the widow and stranger, and the New Jersey stock which forms a portion of the general assets of the estate, totals $29,071.68.

X

That the Standard Oil Company is a New Jersey corporation incorporated under the name of the Standard Oil Company of New Jersey on August 5, 1882, under "An Act concerning corporations," (Revision approved April 7, 1875), and its name changed to Standard Oil Company on March 19, 1892.

That the Borne-Scrymser Company is a New Jersey corporation incorporated March 13, 1893, under "An Act concerning corporations" (Revision approved April 7, 1875).

That the Colonial Oil Company is a New Jersey corporation incorporated March 5, 1901, under "An Act concerning corporations" (Revision of 1896).

That National Lead Company is a New Jersey corporation incorporated December 8, 1891, under "An Act concerning corporations" (Revision approved April 7, 1875).

Agreed Statement of Facts.

That National Fuel Gas Company is a New Jersey corporation incorporated December 8, 1902, under "An Act concerning corporations" (Revision of 1896).

That Union Tank Line Company is a New Jersey corporation incorporated July 14, 1891, under "An Act concerning corporations" (Revision approved April 7, 1875).

COULT & SMITH,
Att'ys for Prosecutors.

Dated February 7th, 1916.

JOHN W. WESCOTT,
Att'y for Defendants.

Reasons.

Filed Feb. 2, 1916.

New Jersey Supreme Court.

LAWRENCE MAXWELL and FULTON TRUST COMPANY OF NEW YORK, Executors of the Last Will and Testament of James McDonald, deceased, *Prosecutors,*		*On Certiorari.*
vs.		*Reasons.*
EDWARD I. EDWARDS, Comptroller of the Treasury of the State of New Jersey, *et al.*, *Defendants.*		

Lawrence Maxwell and Fulton Trust Company, Executors of the Last Will and Testament of James McDonald, deceased, by Coult & Smith, their attorneys, come and pray that the assessment of an inheritance transfer or transfer tax upon the stock in New Jersey corporations owned by said decedent at the time of his death, which tax was assessed on or about the 15th day of December, 1915, may be set aside, reversed and for nothing holden, or may be reassessed according to law as the determination and nature of this action shall require, for the following reasons:

1. Because the transfer tax under review in this action on the transfer of the stock in New Jersey corporations forming part of the estate

Reasons.

of James McDonald, late a non-resident of New Jersey, is assessed at a higher amount than would be assessed if said stock had belonged to a New Jersey decedent and a transfer tax assessed thereon at the death of said New Jersey decedent.

2. Because the transfer tax under review in this action on the transfer of stock in New Jersey corporations forming part of the estate of James McDonald, 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, or resident and non-resident decedents, by devise, bequest, descent, distribution by 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 James McDonald and his estate, his executors, the beneficiaries under his will and his residuary legatees, all citizens and residents of the United States and 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 prosecutors claim the protection thereof.

Reasons.

3. Because the transfer tax referred to in Reason 2 under review in this action on the transfer of stock in New Jersey corporations forming part of the estate of James McDonald, late a non-resident of New Jersey and a resident and citizen of the District of Columbia, is assessed pursuant to the third or last paragraph of Section 12 of the said acts referred to in Reason No. 2, and said paragraph of said Section 12 provides for the assessing of a tax as against the transfer of the aforesaid stock and is inoperative because the assessment of a tax under the said Section 12 requires the enforcement of a law which abridges the privileges and immunities which were of James McDonald and now of his estate and his executors and the beneficiaries under his will and his residuary legatees, all residents and citizens of the United States and not of the State of New Jersey, in violation of the Fourteenth Amendment of the Federal Constitution.

4. Because the transfer tax under review in this action and referred to in Reason 2 is assessed pursuant to the third or last paragraph of Section 12 of the acts therein referred to upon the transfer of said stock within the jurisdiction of the State of New Jersey, and the said assessment and imposition of said tax denies to James McDonald, his estate, his executors and the legatees under his will, all residents and citizens of the United States and non-residents of the State of New Jersey, the equal protection of the laws of the State of New Jersey and particularly such acts and the assessment thereunder contravenes the Fourteenth Amendment of the Federal Constitution, and the prosecutors claim the protection thereof.

Reasons.

5. Because the entire acts referred to in Reason No. 2 are unconstitutional and void and the tax thereunder should be set aside and for nothing holden because said acts contravene Article IV, Section 2, Paragraph 1 of the Federal Constitution by denying to the prosecutors and the other persons mentioned in Reason No. 2 privileges and immunities enjoyed by citizens of the State of New Jersey, and the prosecutors claim the protection of said constitutional provision.

6. Because the entire acts referred to in Reason No. 2 are unconstitutional and void and the tax thereunder should be set aside and for nothing holden, because they contravene the Fourteenth Amendment of the Federal Constitution by abridging the privileges and immunities of the prosecutors and other persons referred to in Reason No. 2 and deny to them the equal protection of the laws of the State of New Jersey and particularly the acts referred to, and the prosecutors claim the protection of said constitutional provision.

7. Because the assessment of said tax referred to in Reason No. 2 under the acts therein referred to operate differently in the case of non-resident citizens of the United States than upon resident citizens of the State of New Jersey upon a transfer to persons of the same class, where the legacy is specific than where the legacy is general or residuary, and therefore said acts are inoperative and void for the same reasons set out in Reasons 2, 3 and 4.

8. Because the assessment of said tax referred to in Reason No. 2 under the acts therein referred to and under Chapter 151 of the Public Laws of 1914 and amended by Chapter 392 of

Reasons.

the laws of 1915 in the case of non-resident citizens of the United States operates differently than upon resident citizens of the State of New Jersey and non-resident citizens of the United States who are specific legatees, and therefore said statutes are inoperative and void for the same reasons set out in Reasons 2, 3 and 4.

9. Because as against the prosecutors and the other persons referred to in Reason No. 2 the assessment of said tax referred to in said Reason No. 2 under the acts therein referred to and under Chapter 151 of the Laws of 1914 and under Chapter 392 of the Laws of 1915 in a case where there are non-resident residuary legatees is assessed in a different manner and at a higher rate than on the transfer of stocks bequeathed to specific legatees or general or residuary legatees of the same class referred to in Section 1 of the Act of 1909 therein referred to, as amended by Chapter 151 of the Laws of 1914, and amended by Chapter 392 of the Laws of 1915, where the decedent was a resident of the State of New Jersey, which said method of assessment is in violation of the constitutional provisions referred to in Reasons 2, 3 and 4.

10. Because the assessment of said tax referred to in the foregoing reasons and the acts therein referred to violate the provisions of Sections 1977 and 1978 of the Revised Statutes of the United States (1 Federal Statutes, Annotated, pages 791-2).

11. 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

Reasons.

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.

12. 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.

13. 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.

Reasons.

14. 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 12 of the Constitution of the State of New Jersey in that said law provides that an existing law or part thereof shall be made or deemed a part of the act and provides that an existing law and part thereof shall be applicable and does not insert such provision in said act.

15. Because there is no succession by virtue of the laws of the State of New Jersey on the transfer of the stock in New Jersey corporations held by a non-resident at the time of his death which is taxable pursuant to 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, and to so hold would violate the constitutional provisions hereinbefore referred to.

16. Because the stock hereinbefore referred to or the right of succession thereto, owned, held and descending as aforesaid, is not embraced within the property or transfers made taxable in the acts referred to in the foregoing reasons.

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, if construed to impose a tax such as has been levied, is unconstitutional, as it is a property tax and violates Article IV, Section 9 of the New Jersey Constitution which provides that property shall be assessed for taxes under general laws by uniform rules according to its true value.

Reasons.

18. 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, under which the assessment of the tax under review purports to have been made, is unconstitutional in that it violates the essential equality of taxation which requires that taxes be imposed under a rule of uniformity.

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, under which the assessment of the tax under review purports to have been made, is unconstitutional and void in that it attempts to subject to taxation property, rights and the succession thereto and transfer thereof, which cannot be subject to taxation by the State of New Jersey.

20. Because the said tax and the assessment thereunder is in divers other respects illegal, erroneous and contrary to law and should be set aside and for nothing holden.

21. 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.

Reasons.

22. 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 of the Amendments to the Federal Constitution because it will permit the State of New Jersey through its agencies to authorize an unreasonable search in violation of such constitutional provision.

COULT & SMITH,
Attorneys for Prosecutors.

Additional Reasons.

23. Because the said Comptroller did not correctly compute the said tax in accordance with the provisions of the statute in such case made and provided.

24. Because the said Comptroller did not correctly compute the said tax in accordance with the provisions of the statute in such case made and provided, in that said Comptroller assessed the tax as if the accelerated rates of taxation set forth by Sec. 1, Chapter 228 of the Laws of 1909, as amended by Chapter 151 of the Laws of 1914, page 267, referred to the entire amount of the legacy transferred under the will instead of the amount subject to the previous rate of taxation.

25. Because the said Comptroller did not correctly compute the said tax in accordance with the provisions of the statute in such case made and provided, in that the said Comptroller in assessing said tax did not apply the accelerated rates to the legacy of New Jersey assets passing to the beneficiary.

26. Because the said Comptroller did not correctly compute the said tax in accordance with the provisions of the statute in such case made and provided, in that said Comptroller did not allow an exemption of five thousand dollars, as provided by Sec. 1 of Chapter 228 of the Laws of 1909, as amended by Chapter 151 of the Laws of 1914, page 267, on the legacy of the New Jersey assets passing to the beneficiary.

COULT & SMITH,
Attorneys for Prosecutors.

Additional Reasons.

I hereby consent to the filing of the within additional reasons as of time.

JOHN W. WESCOTT,
Attorney General.

Rule substituting Wm. T. Reed defendant in place of Edward E. Grosscup as State Treasurer entered by consent and filed Dec. 18, 1916.

Opinion.

Opinion.

(Filed Nov. 29, 1916.)

New Jersey Supreme Court.

June Term, 1916.

LAWRENCE MAXWELL, et al., executors, etc.,
Prosecutors,

vs.

EDWARD I. EDWARDS, Comptroller of the Treasury of the State of New Jersey, *et al.*,
Defendants.

Argued June Term, 1916.

Decided November Term, 1916.

Writ of Certiorari removing State Tax.

Coult & Smith, and Edward DeWitt, of New York, for Prosecutor.

John W. Wescott, Attorney General, and John R. Hardin, for the State.

Argued before Justices Swayze, Minturn and Kalisch.

Opinion.

The opinion of the Court was delivered by MINTURN, *J.*

The writ is intended to review an assessment of a transfer tax, imposed by the State Comptroller, upon certain personality in this State, of which James McDonald, a non-resident died possessed.

The property in question, consists of certain stocks in the Standard Oil Company, and in six other New Jersey corporations, valued in the aggregate at $1,114,965. The deceased died in the District of Columbia, leaving a last will and testament, and a codicil, which were duly admitted to probate, and letters testamentary granted thereon in that District to Lawrence Maxwell of Ohio, and the Fulton Trust Company of New York, a corporation organized under the laws of that State, who have qualified as executors. The beneficiaries named in the will were at the time of testator's death non-residents of this State. The total amount of the State tax imposed was $29,071.68, the legality of which assessment is the subject of this litigation.

The tax was imposed in pursuance of Chapter 228 of the laws of 1909, as amended by Chapter 151 of the laws of 1914. A subsequent amendment was passed in 1915, (P. L. 1915 p. 745), but was not effective or in operation at the time of the death of the testator, and therefore has no bearing upon this issue.

The act of 1909 was the original act dealing with the subject matter of this contest, and presents in its title a clear statement of the legislative intent, "An act to tax the transfer of property of resident and non-resident decedents, by devise, bequest, descent, distribution by statue, gift, deed, grant, bargain and sale in certain cases."

It is insisted that in imposing the tax the decisions of the New York Courts construing a statute substantially similar in verbiage to the act in question, should have been followed by the Comptroller. This contention, however, has been dealt with by this Court in *Hopper* v. *Edwards,* in an opinion by Mr. Justice Trenchard, and quite recently in *Torrence* v. *Edwards,* in an opinion by Mr. Justice Kalisch, both adjudications being adverse to the claim urged here. That question therefore, may be disposed of upon the doctrine of *stare decisis.*

The effect of the legislation under consideration has been determined by this Court, and the Court of Errors, in a series of cases in which its legality was attacked from various aspects, with the result of sustaining it as a legislative effort to impose a succession as contra distinguished from a property tax. It is further deducible from these decisions, that this legislative power, when not exerted in an arbitrary or capricious manner, or in disregard of fundamental rights, does not controvene any inhibition intended to secure equality of right, contained in the provisions of the Federal or State constitutions.

Neilson v. *Russell,* 76 L. 27.
Id. Court of Errors, p. 655.
Sawter v. *Shoenthal,* 54 Vr. 499.
Carr v. *Edwards,* 84 L. 667.
Beers v. *Edwards,* 84 L. 32.
Seuff v. *Edwards,* 85 I. 67.
Hopper v. *Edwards,* 96 Atl. 667.
Howell v. *Edwards, Id.* 186.

The inquiry presented by this controversy, is not any criticism of these fundamentals, but resolves itself entirely into a criticism of the legal effects of the amendment of 1914, in its effort to reach the

estates of non-resident decedents, by the method provided in section 20 of the act which is as follows: "A tax shall be assessed on the transfer of property 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, as 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 property within this State, bears to the entire estate where ever situated, provided that nothing in this clause contained shall apply to any specific bequest or devise of any property in this State."

The clear intent of this legislation it has been determined, is to provide a mathematical formula to the estate of a non-resident decedent, which in practical application will work out a tax not on the entire estate of the decedent, but upon that portion of it within the jurisdiction, so as to practically equalize in administration the tax imposed by the same legislation upon the estates of resident decedents.

That this object may be adequately and legally attained by this legislative method is evidenced by the authorities.

The method in question doubtless had its origin, in an intimation contained in the opinion of Mr. Justice Swayze, in *Beers* v. *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 here."

Referring to the same subject in the subsequent case of *Carr* v. *Edwards,* (*supra*) in the Court of Errors, he declared, "The object and the effect of section 12 was to equalize the rate of the transfer tax as between the estate of resident and non-resident decedents. The amount (of the tax) 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 the State."

This method of dealing with the estate of non-residents found within the State was earlier supported by the views of Mr. Justice Reed in *Tilford* v. *Dickinson,* 79 L. 302, in dealing with the legislative *modus operandi* imposed by the tax act of 1906. This method of taxation was also dealt with by Mr. Justice Kalisch, in this Court in *Howell* v. *Edwards* (*supra*) and its validity was there recognized and subsequently was the subject of consideration, and was practically applied by this court in the recent opinion by Mr. Justice Kalisch in *Torrence* v. *Edwards* (November Term, 1916). Pursuit of the subject further from the view point of legality and reasonableness under the constitutional inhibitions, of this legislative method of equalizing taxation, as between the estates of resident and non-resident decedents, might appear to be but an academic task in the light of these adjudications; but it may not be out of place to observe in passing, that the principle of this legislation has met with the approval of the highest courts in other jurisdictions, where the

question has been presented for judicial determination.

Adams Ex. Co. v. *Indiana,* 165 U. S. 252.
Adams Ex. Co. v. *Ohio,* 165 U. S. 195.
Adams Ex. Co. v. *Kentucky,* 166 U. S. 171.
St. Louis v. *W. Ry. Co.* v. *Arkansas,* 235 U. S. 350.

The general power of the State to enact legislation of this character, and it impregnability to attack on constitutional grounds, is amply emphasized and vindicated by Mr. Justice Pitney, in *St. Louis* v. *W. Ry. Co.* v. *Arkansas,* wherein he declares, "Nothing in the fourteenth amendment imposes any iron clad rule upon the States with respect to their internal taxation, or prevents them from imposing double taxation, or any other form of unequal taxation, so long as the inequality is not based upon arbitrary distinctions." There remains therefore, to consider only the concrete objection presented by the prosecutor, in the form of various reasons to this method of taxation; the contention being that in the case *sub judice* its application results in inequality to this particular estate.

It must not be over-looked in any calculation, that as our legislation now stands, the non-resident decedent is accorded a favored status, since he is exempted in the succession tax, from any imposition upon bonds and mortgages, commercial paper, bank deposits and debts, within this State, which taxable assets are subject to taxation as assets of a resident decedent, *Hopper* v. *Edwards, ubi supra.* Mention of this consideration is suggested, to evince the fact which at once must become apparent, that, instead of subjecting the non-residents estate to an arbitrary and discriminative tax, the legislation in question, if discriminatory at all, is obviously so only in favor of the non-resident.

That such legislation may eventuate differently in results in specific instances, when compared with the results attainable in the case of the resident decedent, presents no legal ground for its condemnation. The never ending aim of popular government, and the age long dream of the political economist, have been the evolution of a golden rule productive of equality of taxation. In this as in many other fields of human endeavor, it must be manifest, that the perfect, is in reality, the unattainable.

That the ratio rule applied in this case may not produce absolute equality in results, may be conceded; but it will answer its purposes in the complicated relationship of our State and Federal life, if it be a business-like, workable rule, manifestly the latest solution in the line of judicial and legislative thought upon one of the most abstruse problems of modern government.

It may well be, that the tax ratio in actual application in this instance, may as exemplified by the prosecutor's method of computation, produce a result different from that which will be obtained, under the method applicable to the estates of resident decedents; but as we have observed, that fact does not furnish the determining test as to the validity of this legislative scheme, nor does it prove the absence of the necessary constitutional element of equality, as that term has been defined by the adjudged cases. "It is," says the learned editor and commentator of the Cyclopedia of Law and Procedure, "a matter of common experience that absolute equality in the imposition of a tax is not attainable, nor is this the meaning of the constitutional provision. All that it 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. Hence the courts will not pronounce a *statute invalid,* on *this ground, unless* it *appears that it* was framed on a plan or principle *not* calculated to produce *equality and uniformity,* or that *its administration* will result in such flagrant injustices, as to evidence an entire disregard of the constitutional requirement."

37 Cyc 736 and cases cited.

Our examination of the computation of the tax made by the Comptroller, in this instance, satisfies us that it was made in accordance with the ratio provision of the act of 1914, and that it should for the reasons here presented be sustained.

The tax in question will therefore be affirmed.

Rule Affirming Tax.

(Entered Dec. 18, 1916.)

New Jersey Supreme Court.

June Term, 1916.

LAWRENCE MAXWELL, *et al.*, Executors &c. of James McDonald, deceased, *Prosecutors,* *vs.* EDWARD I. EDWARDS, Comptroller, etc., *et al.*, *Defendants.*	*On Certiorari.* *Rule.*

The court having inspected the return, appraisement and assessment of the transfer or inheritance tax upon the transfer of property left by the above named James McDonald, deceased, and the proceedings thereon, and having heard and considered the arguments of counsel for the respective parties,

IT IS ORDERED that the appraisement and assessment of the said transfer or inheritance tax be and it hereby is in all things affirmed, with costs to the defendants.

Rule actually entered December 18, 1916.

On motion of

JOHN W. WESCOTT,
Attorney General of New Jersey.

Notice and Grounds of Appeal.

(Filed Jan. 6, 1917.)

New Jersey Supreme Court.

LAWRENCE MAXWELL and FULTON TRUST COMPANY, of New York, Executors of the Last Will and Testament of James McDonald, deceased, *Prosecutors,*	*On Appeal to the New Jersey Court of Errors and Appeals.*
vs.	
EDWARD I. EDWARDS, Comptroller of the Treasury of the State of New Jersey, and WILLIAM T. READ, State Treasurer. *Defendants.*	*Notice and Grounds of Appeal.*

To JOHN W. WESCOTT, Attorney General.
Attorney for Defendants.

TAKE NOTICE that the prosecutors appeal from the whole of the judgment entered in this cause to the New Jersey Court of Errors and Appeals, on the following grounds and on the following reasons:

1. Because the transfer tax under review in this action on the transfer of the stock in New Jersey corporations forming part of the estate of James McDonald, late a non-resident of New Jersey, is assessed at a higher amount than would be assessed if said stock had belonged to

a New Jersey decedent and a transfer tax assessed thereon at the death of said New Jersey decedent.

2. Because the transfer tax under review in this action on the transfer of stock in New Jersey corporations forming part of the estate of James McDonald, 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 by 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 James McDonald and his estate, his executors, the beneficiaries under his will and his residuary legatees, all citizens and residents of the United States and 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 IV, Section 2, Paragraph 1 of the Federal Constitution, and the appellants claim the protection thereof.

3. Because the transfer tax referred to in Reason 2 under review in this action on the trans-

fer of stock in New Jersey corporations forming part of the estate of James McDonald, late a non-resident of New Jersey and a resident and citizen of the District of Columbia, is assessed pursuant to the third or last paragraph of Section 12 of the said acts referred to in Reason No. 2, and said paragraph of said Section 12 provides for the assessing of a tax as against the transfer of the aforesaid stock and is inoperative because the assessment of a tax under the said Section 12 requires the enforcement of a law which abridges the privileges and immunities which were of James McDonald and now of his estate and his executors and the beneficiaries under his will and his residuary legatees, all residents and citizens of the United States and not of the State of New Jersey, in violation of the Fourteenth Amendment of the Federal Constitution.

4. Because the transfer tax under review in this action and referred to in Reason 2 is assessed pursuant to the third or last paragraph of Section 12 of the acts therein referred to upon the transfer of said stock within the jurisdiction of the State of New Jersey, and the said assessment and imposition of said tax denies to James McDonald, his estate, his executors and the legatees under his will, all residents and citizens of the United States and non-residents of the State of New Jersey, the equal protection of the laws of the State of New Jersey and particularly such acts and the assessment thereunder contravenes the Fourteenth Amendment of the Federal Constitution, and the appellants claim the protection thereof.

5. Because the entire acts referred to in Reason No. 2 are unconstitutional and void and the tax thereunder should be set aside and for nothing holden because said acts contravene Article

IV, Section 2, Paragraph 1 of the Federal Constitution by denying to the appellants and the other persons mentioned in Reason No. 2 privileges and immunities enjoyed by citizens of the State of New Jersey, and the appellants claim the protection of said constitutional provision.

6. Because the entire acts referred to in Reason No. 2 are unconstitutional and void and the tax thereunder should be set aside and for nothing holden, because they contravene the Fourteenth Amendment of the Federal Constitution by abridging the privileges and immunities of the appellants and other persons referred to in Reason No. 2 and deny to them the equal protection of the laws of the State of New Jersey and particularly the acts referred to, and the appellants claim the protection of said constitutional provision.

7. Because the assessment of said tax referred to in Reason No. 2 under the acts therein referred to operate differently in the case of non-resident citizens of the United States and upon resident citizens of the State of New Jersey upon a transfer to persons of the same class, where the legacy is specific than where the legacy is general or residuary, and therefore said acts are inoperative and void for the same reasons set out in Reasons 2, 3 and 4.

8. Because the assessment of said tax referred to in Reason No. 2 under the acts therein referred to and under Chapter 151 of the Public Laws of 1914 and amended by Chapter 392 of the laws of 1915 in the case of non-resident citizens of the United States operates differently than upon resident citizens of the State of New Jersey and non-resident citizens of the United States who are specific legatees, and therefore

said statutes are inoperative and void for the same grounds set out in Reasons 2, 3 and 4.

9. Because as against the appellants and the other persons referred to in Reason No. 2 the assessment of said tax referred to in said Reason No. 2 under the acts therein referred to and under Chapter 151 of the Laws of 1914 and under Chapter 392 of the Laws of 1915 in a case where there are non-resident residuary legatees is assessed in a different manner and at a higher rate than on the transfer of stocks bequeathed to specific legatees or general or residuary legatees of the same class referred to in Section 1 of the Act of 1909 therein referred to, as amended by Chapter 151 of the Laws of 1914, and amended by Chapter 392 of the Laws of 1915, where the decedent was a resident of the State of New Jersey, which said method of assessment is in violation of the constitutional provisions referred to in Reasons 2, 3 and 4.

10. Because the assessment of said tax referred to in the foregoing grounds and the acts therein referred to violate the provisions of Sections 1977 and 1978 of the Revised Statutes of the United States (1 Federal Statutes, Annotated, pages 791-2).

11. 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.

12. 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.

13. 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.

14. 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 12 of the Constitution of the State of New Jersey in that said law provides that an existing law or part thereof shall be made or deemed a part of the act and

provides that an existing law and part thereof shall be applicable and does not insert such provision in said act.

15. Because there is no succession by virtue of the laws of the State of New Jersey on the transfer of the stock in New Jersey corporations held by a non-resident at the time of his death which is taxable pursuant to 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, and to so hold would violate the constitutional provisions hereinbefore referred to.

16. Because the stock hereinbefore referred to or the right of succession thereto, owned, held and descending as aforesaid, is not embraced within the property or transfers made taxable in the acts referred to in the foregoing grounds.

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, if construed to impose a tax such as has been levied, is unconstitutional, as it is a property tax and violates Article IV, Section 9 of the New Jersey Constitution which provides that property shall be assessed for taxes under general laws by uniform rules according to its true value.

18. 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, under which the assessment of the tax under review purports to have been made, is unconstitutional in that it violates the essential equality of taxation which requires that taxes be imposed under a rule of uniformity.

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, under which the assessment of the tax under review purports to have been made, is unconstitutional and void in that it attempts to subject to taxation property, rights and the succession thereto and transfer thereof, which cannot be subject to taxation by the State of New Jersey.

20. Because said tax and the assessment thereunder is in divers other respects illegal, erroneous and contrary to law and should be set aside and for nothing holden.

21. 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.

22. 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 of the Amendments to the Federal Constitution because it will permit the State of New Jersey through its agencies to authorize an unreasonable search in violation of such constitutional provision.

23. Because the said Comptroller did not correctly compute the said tax in accordance with the provisions of the statute in such case made and provided.

24. Because the said Comptroller did not correctly compute the said tax in accordance with the provision of the statute in such case made and provided, in that said Comptroller assessed the tax as if the accelerated rates of taxation

set forth by Sec. 1, Chapter 228 of the Laws of 1909, as amended by Chapter 151 of the Laws of 1914, page 267, referred to the entire amount of the legacy transferred under the will instead of the amount subject to the previous rate of taxation.

25. Because the said Comptroller did not correctly compute the said tax in accordance with the provisions of the statute in such case made and provided, in that the said Comptroller in assessing said tax did not apply the accelerated rates to the legacy of New Jersey assets passing to the beneficiary.

26. Because the said Comptroller did not correctly compute the said tax in accordance with the provisions of the statute in such case made and provided, in that said Comptroller did not allow an exemption of five thousand dollars, as provided by Sec. 1, of Chapter 228 of the Laws of 1909, as amended by Chapter 151 of the Laws of 1914, page 267, on the legacy of the New Jersey assets passing to the beneficiary.

27. Because the Supreme Court by rule entered on December 18, 1916, ordered the appraisement and assessment of the said transfer or inheritance tax to be in all things affirmed with costs to the defendants, whereas said court should have set aside said tax.

COULT & SMITH,
Attorneys for Prosecutors.

Filed January 23, 1917.

THOMAS F. MARTIN,
Clerk,

Due and legal service of the within Notice and Grounds of Appeal is hereby acknowledged.

JOHN W. WESCOTT,
Attorney General.

Appendix.

The opinion in the case of TORRENC v. EDWARDS is presented here because it is cited in disposing of one of the ground of appeal and is not yet reported.

New Jersey Supreme Court.

(June Term, 1916.)

ANNA B. TORRENCE, Executrix, etc.,
Prosecutor,
vs.
EDWARD I. EDWARDS,
Defendant.
} *On Certiorari.*

(Submitted June Term, 1916.)
Decided 1916.

Before Justices Swayze, Minturn and Kalisch.

For the prosecutrix, Stephen H. Little.

For the defendant, Theodore Backes and Herbert Boggs.

The opinion of the court was delivered by KALISCH, *J.:*

The matter in controversy in this case relates to the legality of the method of computation adopted by the defendant in ascertaining and levying an assessment under the inheritance tax act.

The construction of that part of section 4 of the inheritance tax act (P. L. 1914, p. 269) dealing with exemptions and the imposition of a grad-

uated transfer tax upon decedents' estates is involved. The decedent, a widow, died September 3, 1915, leaving a last will by which instrument she bequeathed and devised her entire estate to her daughter, the prosecutrix.

There is no controversy regarding the value of the estate, as appraised by the Comptroller.

The value of the estate, both personal and real was appraised at	$248,152.16
Debts, expenses, etc.	9,035.30
Net for distribution	$239,116.86
Exempt interests	5,000.00
Taxable interests	$234,116.86

The tax assessed was $3,732.34 and was computed as follows:

Exempt	$ 5,000.00	
1% on	45,000.00	$ 450.00
1½% on	100,000.00	1,500.00
2% on	89,116.86	1,782.34
	$234,116.86	$3,732.34

The prosecutrix claims that the tax should have been assessed as follows:

1% on	$ 50,000.00	$ 500.00
1½% on	150,000.00	2,250.00
2% on	34,116.86	682.34
	$239,116.86	$3,432.34

It is obvious that the rule of computation contended for by the prosecutrix differs materially from the rule in that respect adopted by the defendant. By comparing the results arrived at by the two methods of computation of the tax, it appears that the result of the defendant's com-

putation exceeds by three hundred dollars the amount which the prosecutrix contends is legally assessable under the statute.

For the prosecutrix it was argued that the act of 1914 was copied from the New York statute on the subject and hence that it will be assumed that the New York statute was taken by our legislature with the construction put upon it by the courts of that state.

That under the decisions of the courts of the State of New York a method of computation such as was adopted in the present case by the defendant was held to be erroneous, whereas the method of computation, as contended for the prosecutrix was declared to be the proper rule.

In this connection it becomes important to mention that the provision in the inheritance tax act of 1910 of the State of New York relating to the graduating of taxes, was amended in 1911.

A comparison of the provision of the graduated tax act of New York of 1910 with the provision of section four of our act of 1914 will show a marked dissimilarity in language.

It was the act of 1910 which was construed in the case, *in re Jourdan's Estate* (1910) 70 Misc. Rep. 159; 128 N. Y. Supp. 728, 206 N. Y. 6531 99 N. E. 1109.

The construction given to the act of 1910 by the courts of the State of New York, is significant in that it was founded upon the use of the language employed in the act graduating the tax, for example, such as: "Upon all amounts in excess of the said twenty-five thousand dollars and up to and including the sum of one hundred thousand dollars."

It was on the use of the words "and including" in the act of 1910 and which are not contained in the New Jersey statute, that the New York courts

rested the construction contended for by the prosecutrix.

It is true that in 1911 the New York statute was amended and the words "and including" omitted from the provisions referred to and that the same question that was raised in the Jourdan case, *supra,* was again raised under the act of 1911 in re Herman Schwartz, where it was held by Surrogate Fowler that though there was a change in the language of the statute the decision of the Court of Appeals in the Jourdan case was controlling. This decision was affirmed by the Appellate Division, without opinion but not unanimously. *In re Schwartz,* 141 N. Y. Supp. 349; *S. C.* on appeal, 209 N. Y. 537; 102 N. E. 1113.

It is apparent that the omission of the words "and including" from the New York statute of 1911 makes the resemblance between the provisions of the New York and New Jersey statutes relating to the graduating tax very close.

While we recognize the force of the rule laid down in *Neilson* v. *Russell,* 76 N. J. L. 655, *Clay* v. *Edwards,* 84 N. J. L. 221 and *Hopper* v. *Edwards,* 96 Atl. Rep. 667, that where the legislature enacts a provision taken from a statute of another state in which the language of the act has received a settled construction, it is presumed to have intended that such provision should be understood and applied in accordance with that construction, we do not think that this rule is applicable with full force here since it is clear that to adopt the construction of the New York courts requires a twisting of the natural sense of the language of our act from its plain import.

Besides all this there is the fact that the state of California had a statute in 1905 to which the New Jersey statute bears a close resemblance, and, therefore, it would be an equally fair presumption

that the provision in our statute relating to the graduated tax was patterned after the California statute as that it was taken from the New York statute. And as there is a strong resemblance between the provision of the New York statute of 1911 relating to the graduated tax to the one in the California statute of 1905, it may be argued with great force that the New York provision was copied from the one in California, and that the construction given by the California courts to the statute should have been followed. From an examination of the California cases it appears that the same construction was put on the provision in its statute as was exemplified by the defendant in his computation based on the New Jersey statute. See *in re Bull's Estate,* 153 Cal. 715; 96 Pac. 366 (1908); *In re Trimkin's Estate,* 109 Pac. Rep. 608 (Cal. 1910). Furthermore we think the language of the provision of the statute, under discussion is too plain to make it necessary to seek the interpretation placed upon a like provision by the courts of a sister state, where the act is supposed to have had its origin.

If we entertained a doubt as to the meaning of the language of the act, as expressed by the legislature, it would be incumbent upon us in dealing with a statute imposing a tax, to resolve that doubt in favor of the taxpayer. But we are not disturbed by any doubt. The New Jersey statute applicable to the facts of the present case provides that the transfer of the property shall be taxed at the rate of one per centum on any amount in excess of $5,000 up to $50,000. The clear meaning of this is that $45,000 shall be subject to a one per centum tax; then 1½% per centum on amount in excess of $50,000 up to $150,000. Now it is clear that the amount in excess of $50,000 up to $150,000 is $100,000 there-

fore, $100,000 is subject to the 1½ per centum tax; then 2 per centum on any amount in excess of $150,000 up to $250,000. Again it is as clear as language and mathematics can make it that the amount in excess of $150,000 up to $250,000 is $100,000 and is subject to the two per centum tax; then follows the general clause "and three per centum on any amount in excess of $250,000."

It is quite obvious that if the theory of the prosecutrix should prevail, the three per centum clause would not be applicable until the amount was in excess of $455,000 which is clearly against the express declaration of the statute.

The writ will be dismissed and the assessment affirmed.

New Jersey Court of Errors and Appeals

LAWRENCE MAXWELL and FULTON TRUST COMPANY OF NEW YORK, Executors of the Last Will and Testament of James McDonald, deceased, *Appellants-Prosecutors,* *vs.* EDWARD I. EDWARDS, Comptroller of the Treasury of the State of New Jersey, and WILLIAM T. READ, State Treasurer, *Respondents-Defendants.*	*On Appeal from Supreme Court.* *On Certiorari to Review Inheritance Tax.*

Brief of Coult & Smith for Appellants.

This is an appeal from the Supreme Court, which heard the case below on certiorari allowed to review the assessment of a transfer inheritance tax assessed against the estate of James McDonald on the transfer of stock in the Standard Oil Company (New Jersey) and other companies, valued at $1,114,965.

James McDonald was a citizen of the United States, and a citizen and resident of the District of Columbia. He died January 13, 1915, leaving a will by which there passes to his widow and to strangers, as to relationship to him, by specific bequest, a part of the New Jersey stocks. The remainder of the New Jersey stocks passes by general bequest under his will to the beneficiaries thereunder.

The beneficiaries are the testator's wife, who takes a specific interest in the estate, specific and general legatees not related to the deceased, and a son and two grandchildren who take the residue of the estate.

The tax is assessed pursuant to Chapter 228, P. L. 1909, page 325, as amended by Chapter 151, P. L. 1914, page 267, which law amends Sections 1 and 12 of the Act of 1909. Section 12 has been amended twice since the passage of Chapter 151, P. L. 1914, page 267, first by Chapter 392, P. L. 1915, page 745, which act was approved and took effect April 23, 1915, subsequent to decedent's death; and, second, since the commencement of this case by Chapter 213, P. L. 1916, page 431, which act was approved March 18, 1916, and which took effect on July 4, 1916.

The last paragraph of Sec. 12 is identical in the 1914 and 1915 acts, so that, although the latter act went into effect after the decedent's death, the questions of construction and validity are the same.

Mr. McDonald's will is somewhat complicated, but a construction of its involved features is unnecessary because the prosecutors have accepted as correct for the purposes of this tax the construction of the will adopted by the Comptroller.

The division of the assets left by decedent, pursuant to his will, as taxed by the Comptroller is as follows:

Deduction for debts and expenses....		$270,813.17
New Jersey stocks specifically bequeathed to widow	$246,685.53	
New Jersey stocks specifically bequeathed to strangers	82,228.51	328,914.04
Legacies other than New Jersey stocks to beneficiaries in 5% class.....	$356,761.26	
Interest of widow in estate other than in New Jersey stocks specifically bequeathed to her.	294,712.99	651,474.25
Residuary estate passing to one child, James McDonald, Jr., and two grandchildren, James McDonald, 3d, and Robert Alexander McDonald		2,718,131.79
Total estate		$3,969,333.25

The Comptroller figured the tax on the $1,114,-965 in New Jersey stocks passing under the will, enumerated under Schedule B, on page 23 of the State of the Case, and under paragraph 4 of the Agreed State of Facts, at page 28, at the sum of $29,071.68. The Comptroller figured the tax by the method set forth in the last paragraph of Section 12 of P. L. 1909, page 325, as amended by P. L. 1914, page 267, at page 273,

excepting the specific legacies as therein directed, which section 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 decendent, 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 method of computation which the Comptroller followed is specifically described in paragraph 9 of the Agreed State of Facts (State of Case, page 30), and it will be unnecessary to repeat it.

THE PROPER METHOD TO ASSESS THE TAX IN THIS CASE, ASSUMING THAT THE FIRST SECTION OF THE ACT IS SUSTAINED, IS TO DEDUCT THE SPECIFIC LEGACIES AND THEN ASCERTAIN THE PROPORTION OF THE NEW JERSEY ESTATE TO THE ENTIRE ESTATE IN ORDER TO THEORETICALLY PAY THAT ASCERTAINED PROPORTION OF EACH LEGACY IN NEW JERSEY ASSETS AND THEN ASSESS THE NEW JERSEY TAX ON THE PROPORTION OF EACH LEGACY THUS ASCERTAINED.

Assuming that a tax is to be sustained in cases of non-resident decedents where the transfer is

for the benefit of others than those in the five per cent. class, the method of assessing the tax on the *specific legacies* of New Jersey stock as made by the Comptroller is correct with the exception of the objection thereto which is raised by our second point. As the exemption has been allowed on the general legacy in the Comptroller's calculation, and as this specific legacy has been assessed commencing at the primary rate, where the legatee receives both a specific and a general legacy, we shall follow the same procedure and set out what we contend to be the proper method of assessing the tax. We have also claimed the benefit of our contention under Point II.

The assessment on the specific legacy in New Jersey stocks bequeathed to the widow and which is set forth in the Comptroller's return (State of the Case, page 4) should be:

New Jersey stocks specifically bequeathed to widow	$246,685.53		
$ 50,000.00 @	1%	$ 500.00	
150,000.00 @	1½%	2,250.00	
46,685.53 @	2%	933.71	
			$3,683.71
The assessment on the specific legacies in New Jersey stocks to stranger, as set forth in the Comptroller's return (State of the Case, page 5) is correct, and there must be included in the whole tax a tax on the legacy of $82,228.51 at 5 per cent., or.....			4,111.42

The tax on the balance of the estate instead of being assessed according to the calculation set out in the Comptroller's return (State of the Case, page 5) should be assessed on the principle that a portion of each legacy passing under the will is paid out of the New Jersey stock, the portion being the proportion of the entire estate less New Jersey stock specifically bequeathed to the New Jersey stocks after deducting those New Jersey stocks which are specifically bequeathed.

This portion or fraction is .2159232. We have carried out the decimal further than the Comptroller has done in order to make the figures prove.

This is the same fraction referred to in the Comptroller's return as .2159 and the sum therein stated of $786,050.96 is the amount of New Jersey stocks of $1,114,965 less the legacy of New Jersey stocks of the widow of $246,685.53 and the legacy of New Jersey stocks to stranger of $82,228.51, a total deduction of $328,914.04.

The assessment of the tax should therefore be as follows:

Tax on specific legacy in New Jersey stocks to widow			$ 3,683.71
Tax on specific legacy in New Jersey stocks to stranger			4,111.42
Debts and expenses out of which .2159232 should be paid with New Jersey securities, or	$270,813.17	$ 58,474.85	
Legacies to beneficiaries in the 5% class out of which .2159232 is paid from New Jersey stocks, or	356,761.26	77,033.03	
Tax thereon @ 5%			3,851.65
Legacy of widow in estate (other than New Jersey stocks specifically bequeathed) out of which .2159232 is paid from New Jersey stock, or	294,712.99 63,635.37	63,635.37	
Statutory exemption	$5,000.00		
Tax @ 2%	58,635.37	amounts to	1,172.70
Residuary estate taxed in this proceeding as passing to the son and two grandchildren (the exemptions and shares at the different rates are tripled owing to there being three beneficiaries sharing alike)	$2,718,131.79		
of which sum .2159232 is paid from New Jersey stocks, or		586,907.71	
Three shares of $50,000 or 150,000.000 @ 1%	1,500		
Three shares on balance, they being less than $150,000 each 421,844.65 @ 1½%	6,327.67		
Total.....$7,827.67			7,827.67
Total legacies, debts and expenses amount to and are being paid or satisfied with New Jersey stocks to the value of	3,640,419.21	786,050.96	

3 statutory Exemptions of $5000 ea Less $15000.

This computation is proved because $786,050.96 is .2159232 of $3,640,419.21.

The method of assessing the tax which the Comptroller has adopted is in accordance with the last paragraph of Section 12 of the act (*supra*), and the sharp point of difference between the Comptroller's method and the proper method of determining the tax is as follows:

Should the proportion of each legacy which is theoretically paid in New Jersey stock be ascertained and the tax then figured on the proportion of the legacy? Or, as the Comptroller maintains and has outlined, should the tax be figured on the entire estate as if a resident estate with all decedent's property, real and personal located here and then the tax apportioned in the proportion that the New Jersey estate bears to the entire estate?

The method which the Comptroller adopted was first outlined in this State by an amendment to the Act of 1894, which amendment was Chapter 159 of the Laws of 1909, page 236, wherein Sec. 11 of the Act of 1894 was amended, and the last section contained therein is a provision for assessing the tax in a manner similar to the present section.

At the time of the passage of this amendment, the only tax assessable under the Inheritance Tax Act was a collateral inheritance tax of 5%. There was no graduated rate, nor were there classes of beneficiaries differently taxed. The method which was adopted in the act for this reason worked out a proper proportionate ratio, although not a scientific one.

The reason for using a ratio in determining the tax in cases of non-resident estates is that each beneficiary may bear his proportionate

share of the New Jerey tax and that the State of New Jersey will receive from the share of each beneficiary the proportion of the tax which the State of New Jersey should receive.

The necessity for an apportionment is shown by the case of *Tilford* v. *Dickinson,* 79 N. J. L., 302. In this case the decedent died before the passage of Chapter 159 of the Public Laws of 1909, page 236, the first act providing for this proportionate method of assessing the tax in non-resident cases, and the executors attempted to satisfy taxable legacies out of non-taxable securities. The Supreme Court in this case designated the proper, and we may say the legal way to determine and assess the tax as to non-resident estates, and had the Legislature had before it this decision and followed it, there would have been no necessity of this litigation. The necessity of apportionment and the method to be adopted is stated by the Court (page 307) as follows:

> "Speaking of intestate estates, I am inclined to think that apart from the statute, the logical rule to be adopted where property is situated as in this class, is the rule provided for by our own statute. The theory upon which it rests is that each distributee has an undivided interest in all the assets of an estate, and that no particular portion of such assets passes to any particular distributee. Therefore, when it is ascertained what portion of the whole estate goes to all of the collateral distributees as a class, it will be presumed *that such proportion of the New Jersey property goes to such class of collaterals as the property in New Jersey bears to the property in New York*— it being assumed that equal proportions of the property in both states will be devoted to the payment of collateral distributees."

Justice Reed in his opinion in that case properly stated the end to be attained in assessing the tax, viz., that "it will be presumed that such proportion of the New Jersey property goes to such class of collaterals as the property in New Jersey bears to the property in New York." (He should have said to the "entire estate" instead of "property in New York.")

The reason for inserting this section is given by Justice Swayze in the case of *Carr* v. *Edwards,* 84 N. J. L. 667, where, speaking for this Court, at page 670, he says:

> "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."

The result of the statutory method of apportionment, as the Court will readily see, is that non-resident estates and the legatees and distributees thereof are taxed more than resident estates and legatees thereunder.

We therefore find that by reason of the passage of the Act of 1914 establishing a graduated tax and establishing classified taxes as to beneficiaries, taxing one class at a greater rate than another, the serviceability, for the taxing of non-resident estates, of the proportion contained in the last paragraph of Section 12 is rendered useless, because the proportion of the entire estate to the New Jersey estate is not proportionate with the proportion of the entire tax (assessed as if the deceased had died a resident of New Jersey and all his property were located here) to the New Jersey tax, assuming, of course, that the New Jersey tax on a non-resident must be at the same rate as on a resident. Clearly the act intends that they both be taxed at the same rate.

The result of the statutory method of assessment is to increase the rate of tax on non-resident estates by reason of first assessing the tax on a larger estate which runs into higher rates. (*Infra,* p. 18.)

We must, therefore, in each case take the proportion of each legacy which the entire estate bears to the New Jersey estate and assess separately the tax on that proportion of each legacy which it is assumed will be paid in New Jersey securities.

As has been before stated, the difference is that we first determine the proportion of the legacy which is paid in New Jersey securities and then assess the tax at the New Jersey rate instead of assessing the tax at the New Jersey rate upon the whole estate as if that of a resident, and then taking the proportion of the tax which the entire estate bears to the New Jersey estate.

The tax is not assessed on estates of any particular size, and the graduated rates do not apply to the size of the estate, assessed on the legacy and the graduated rates apply to the legacy of New Jersey stock.

The New York Method of Computation.

The method which we submit as the proper one to be adopted is that adopted in principle in New York State as shown by the decision in the case of *In re Porter's Estate,* 67 Misc. Rep., 1912, 4 N. Y. Supp., 676. By Chapter 310 of the Laws of 1908 of the State of New York, Section 220 of the Transfer Tax Law of that State was amended by adding a new provision. This new provision is as follows:

> "2-a. Whenever the property of a resident decedent, or the property of a non-resi-

> dent decedent within this state, transferred by will, is not specifically bequeathed or devised, such property shall, for the purposes of this act, 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."

The question raised in the case of *In Re Porter's Estate* is similar to that raised in *Tilford* v. *Dickinson, supra.* Part of the estate was taxable in the five per cent. class and part not. The trustee in the division passed the New York securities to the shares of the non-taxable beneficiaries. The Court held that the New York assets should be transferred proportionately among all the legatees' interests in the estate, in the proportion which the New York securities bear to the entire estate. The Court also held that the expense of administration and debts of the entire estate should be divided pro rata between the New York estate and the entire estate, citing *In Re Matter of Grosvenor,* 193 N. Y., 652, affirmed 86 N. E., 1124.

STATEMENT OF POINTS.

POINT I.

The assessment of the tax against transfer in cases of non-residents' estates, pursuant to the specific manner directed by the last paragraph of Section 12 of the taxing act, is invalid as being in contravention of the Federal Constitution and Federal Statutes.

First.

It denies to citizens of other States the privileges and immunities granted to citizens of this State, in violation of Paragraph 1, Sec. 2, of Art. IV of the Federal Constitution, which reads as follows:

> "1. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

Second.

It denies to the prosecutors, the deceased and the beneficiaries under his will, full and equal benefit of the laws for the security of property, and subjects them to penalties, taxes, licenses or excations different from those granted to or imposed upon citizens of the State of New Jersey, in violation of Sec. 1977 of the U. S., Revised Statutes, 1 Fed. St. Ann. 791, which provides as follows:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, an dto the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punish-

ments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Third.

It denies to the prosecutors, the deceased and the beneficiaries under his will and citizens of the United States the rights which are enjoyed by white citizens of the State of New Jersey to inherit, hold and convey personal property, in violation of Section 1978 of the Revised Statutes of the United States, 1 Fed. St. Ann, 792, which provides as follows:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

Fourth.

It abridges the privileges and immunities of the prosecutors, the deceased and the beneficiaries under his will who all are citizens of the United States, and denies to them the equal protection of the laws of New Jersey, in contravention of the Fourteenth Amendment of the Federal Constitution, which provides as follows:

> "All persons born or naturalized in the Unitel States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of 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."

The reasons that these provisions are violated are as follows:

(a) *Under the computation provided for by the statute the transfer of property of non-resident decedents is taxed at a higher rate than that of a resident decedent for the same amount of property passing.*

(b) *The tax is assessed on personal and real estate not located within the State and over which the State of New Jersey does not exercise any right of taxation.*

(c) *The tax violates the essential quality of taxation which requires that taxes be imposed upon a rule of uniformity.*

POINT II.

THE WRONG PORTIONS OF THE ESTATE, OR PORTIONS OF PROPERTY PASSING, WERE USED IN APPLYING THE GRADUATED RATES.

In assessing the tax at the graduated rate under the Amendment of 1914 (Chapter 151 P. L., 1914, page 267), instead of assessing the first forty-five thousand dollars, after allowing the exemption of five thousand dollars, at the primary rate, and the next one hundred thousand dollars at the next higher rate, and the next one hundred thousand dollars at the next higher rate, and the balance at the highest rate, we submit that the proper construction of the taxing act is that a deduction should first be made from the individual legacy passing of five thousand dollars, then the tax figured at the primary rate on the sum of fifty thousand dollars, then at the next higher rate on the sum of one hundred and

fifty thousand dollars, then at the next higher rate on the sum of two hundred and fifty thousand dollars, and the balance figured at the highest rate.

POINT III.

AN EXEMPTION OF FIVE THOUSAND DOLLARS, ALLOWED BY THE STATUTE, SHOULD BE DEDUCTED FROM THE PROPORTION OF THE PROPERTY PASSING TO EACH BENEFICIARY WHICH IS TAXABLE, IN THE CASE OF A NON-RESIDENT, AND NOT DEDUCTED FROM THE ENTIRE LEGACY PASSING UNDER THE WILL OF A NON-RESIDENT WITHOUT REGARD AS TO WHAT PART OF THE LEGACY IS PROPERTY THE TRANSFER OF WHICH IS TAXABLE IN THIS STATE.

POINT IV.

THE TRANSFER TAX ACT, IN SO FAR AS THE CASE OF NON-RESIDENT DECEDENTS IS CONCERNED, IS UNCONSTITUTIONAL UNDER THE NEW JERSEY STATE CONSTITUTION.

It violates Art. IV, Sec. 7, Par. 3, by impairing the obligation of contracts.

It violates Art. IV, Sec. 7, Par. 4, by reason of its title being improper, not being an amendment of the Corporation Act, and by reason of its trying to make the Corporation Act part of the taxing act.

It violates Art. IV, Sec. 7, Par. 9, by reason of being a special act applying only to non-residents in taxing under the authority to which we

maintain the State is limited in the transfer of corporation stock.

It violates Art. IV, Sec. 7, Par. 12, by reason of its being an assessment for taxes not under general law, or by uniform rule, or according to true value.

POINT I.

THE METHOD OF ASSESSING THE TAX IS IN VIOLATION OF THE FEDERAL CONSTITUTION AND STATUTES.

The tax assessed by the Comptroller is greater by $8,424.53 than the tax which would be assessed in the case of a resident decedent with a like amount of property passing to the same beneficiaries, and the primary reason for the difference in the amount of tax between the method adopted by the Comptroller and the method claimed by the appellants is that the ratio of the proportion of the entire estate, including real and personal estate wherever situated, to the taxable property within this State is not the same as the proportion of the entire tax figured on the property wherever situated is to the tax assessed by the Comptroller.

The reason that these properties are not of the same ratio is that where a tax is assessed upon the entire estate wherever situated, it is, of course, assessed on a great deal larger amount of property and on larger legacies, which necessitates the tax being computed at the higher rates.

Take for example this simplest case and compare the Comptroller's method and the method of assessing the tax on the part of the legacy

which is theoretically paid in New Jersey securities, being the per cent. of the entire estate to the New Jersey estate.

The case we shall take is that of a non-resident leaving $1,000,000 to a child, 10% of which legacy is in New Jersey securities.

The two methods are as follows:

Comptroller's Method—			Other Method—		
$ 5,000.		Exempt	$ 5,000.		Exempt
45,000.	1%	$ 450.	45,000.	1%	$ 450.
100,000.	1½%	1,500.	50,000.	1½%	750.
100,000.	2%	2,000.			
750,000.	3%	22,500.	$100,000.		
Total tax		$26,450.			
Tax on N. J. assets, 10% or		2,645.		Tax	$1,200.

The average per cent. on which the tax is assessed by the Comptroller is easily ascertained by dividing the $100,000 into the amount of the tax, thus making the average percentage of the tax .02645, or approximately two and two-thirds per cent. Thus in a case where the assessment is computed under the Comptroller's method in this particular estate the average percentage of tax is two and two-thirds per cent. of the amount of property passing.

Under our method, which is the one which applies to residents, the rate of tax obtained by dividing the $100,000 into the tax of $1,200 is one and two-tenths per cent. Therefore, in the case of a resident the tax is assessed on an equal amount of property passing at one and two-tenths per cent. The difference in the rates is .01445, or approximately one and one-half per cent. We thus demonstrate that taxing under the Comptroller's method results in a higher rate of tax and in this patricular case cited a substantial amount, approximately one and one-half per cent. greater.

For the purpose of illustrating in as simple a way as possible the effect of the application of the last paragraph of Section 12 of the Taxing Act in assessing the tax in the present case and to avoid unnecessary detail of figures, let us speak in round numbers and assume that the entire estate of James McDonald, wherever situated, was valued at $4,000,000, and of this amount $500,000 went to strangers in a class taxable at 5%, $500,000 went to his wife, and $3,000,000 to the three residuary legatees, viz., his son and two grandchildren, the last three taking in equal proportions, and that the New Jersey stocks amounted to $1,000,000. This being the case, the Comptroller, following the plan adopted in the present case, would figure the tax as follows:

Legacies to Beneficiaries in the 5% class	$ 500,000.	5%		$ 25,000.
Legacy to Widow $500,000. Exempt	5,000.			
	45,000.	1%	$ 450.	
	100,000.	1½%	1,500.	
	100,000.	2%	2,000.	
	250,000.	3%	7,500.	11,450.
Residuary Estate taxed in this proceeding as passing to son and two grandchildren	$3,000,000.			
Three statutory exemptions	15,000.			
Net Taxable Legacy	$2,985,000.			
	135,000.	1%	1,350	
	300,000.	1½%	4,500.	
	300,000.	2%	6,000.	
	2,250,000.	3%	65,500.	77,350.
Total Tax				$113,800.
4,000,000) 1,000,000 (.25				
Total appraised value of shares in New Jersey corporations			$1,000,000.	
Tax payable if decedent had lived in New Jersey and all the property had been located in this State				$113,800.
Percentage of his estate invested in New Jersey stocks 25%				
Tax due New Jersey				$ 28,450.

If the decedent died a resident of New Jersey and left $1,000,000 in New Jersey stocks as his total estate and divided his estate among beneficiaries in the 5% class, his widow and his son and grandchildren, at the same ratio as in the hypothetical case which we have given, the legacies would be one-fourth of what they are in the case just described. The tax would then be assessed by the Comptroller against the New Jersey resident as follows:

Legacies to Beneficiaries in the 5% class		$125,000.	5%	$ 6,250.
Legacy to Widow	$125,000			
Exempt		5,000.		
		45,000.	1%	$ 450.
		75,000.	1½%	1,125. 1,575.
Residuary Estate passing to son and two grandchildren	$750,000.			
Three Statutory Exemptions	15,000.			
Net Legacy passing	$735,000.			
		135,000.	1%	1,350.
		300,000.	1½%	4,500.
		300,000.	2%	6,000.
				11,850.
			Total Tax	$19,675.

It will thus be seen that under the method used by the Comptroller the New Jersey tax would be $28,450
The tax on the same amount of New Jersey property passing, left by a resident, as outlined above, would be 19,675
Excess amount charged against a non-resident estate would be ..... $ 8,775

This discrimination between estates of residents and non-residents is real and not fancied, great and not small, substantial and not trivial, general and not occasional, and we believe always results in a greater tax against a non-resident than in a resident estate where an equal amount passes and is taxed, except in cases where the entire estate is so small that the graduated rate does not apply.

There may be some freak case due to the amount of decedent's debts, specific bequests, or peculiar provisions of the will, which would be an exception, but we doubt if such a case has ever occurred in practice.

Practically every case handled by the Comptroller will show that where the graduated rate is applied to the determination of non-resident estates there is a variance in the amount of the tax assessed by the Comptroller's method from the amount that would be assessed under the method we have suggested. This variance will run from a few dollars in estates ranging from $50,000 to $100,000 to over $25,000 in the very large non-resident estates taxed in this State.

In our comments on the opinion below we have discussed the fact that this inequality of assessment is substantial and affects those in the same class differently. (*Infra*, p. 25.)

Having established that there is a discrimination in favor of resident estates and against non-resident estates, let us examine into the constitutional right of the State to exact a tax on such a basis.

The jurisdiction of this State to impose a tax in the case of a non-resident decedent is limited

to the securities which are transferred under the laws of this State.

Dixon v. *Russell,* 79 N. J. L., 490, at p. 492.

Hopper v. *Edwards,* 96 Atl. Rep., 667.

Neilson v. *Russell,* 76 N. J. L., 655.

Blackstone v. *Miller,* 188 U. S. 189 (47 Law Ed. 439).

The right to make an assessment of taxes against a non-resident or his estate is a proceeding in rem and can not go beyond the property over which this State has jurisdiction.

Detmold v. *Engel, Receiver,* 34 N. J. L., 425, at page 427 and see cases there cited.

Connell v. *Crosby,* 210 Ill. 380, 71 N. E. 350, at p. 353.

City of New York v. *MacLean,* 63 N. E., 380, 383.

Dewey v. *Des Moines,* 173 U. S., 193; 43 L. Ed. 665.

McCullough, v. *Maryland,* 4 Wheat., 316; 4 L. Ed. 579.

The Taxing Act specifically limits the tax to the transfer of the New Jersey stock.

Not only is the jurisdiction of this State limited to the securities which are transferred under the laws of this State, but the section of the act which creates the tax clearly so limits the tax.

Let us read in part Section 1, P. L., 1914, at page 267—reading only the parts which apply to the present case.

"1. A tax shall be and is hereby imposed upon the *transfer of any property,* real or personal, of the value of $500 or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corpora-

tions, except as hereinafter provided, in the following cases:

"2. When the transfer is by will or intestate law of * * *shares of stock of corporations of this State* * * and the decedent was a non-resident of the State at the time of his death.

* * * *

"All taxes imposed by this act shall be at the rate of five per centum upon the clear market value of *such property,* except as hereinafter provided. * * *

* * * *

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"*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 $5,000, up to $50,000; one and one-half per centum on any amount in excess of $50,000 up to $150,000; two per centum on any amount in excess of $150,000 up to $250,000; and three per centum on any amount in excess of $250.000."

Attention is called to the fact that the tax is specifically imposed on the transfer of the stock.

We might read the taxing section of the act by continuing from paragraph, only referring to the important parts, as follows:

A tax is imposed upon the transfer by will of stock of corporations of this State (when) decedent was a non-resident. Such property transferred to any child shall be taxed at the rate of one per centum on any amount in excess of five thousand up to fifty thousand, etc.

The tax is not assessed on estate of any particular size and the graduated rates do not ap-

ply to the size of the estate. The tax is assessed on the legacy and imposed on the transfer of the estate, but the graduated rates apply to the legacy of the New Jersey stock.

The tax is assessed and levied on the universal succession of the New Jersey stock from the deceased to his personal representatives and not the singular succession of the legatee. The singular succession merely determines the rate and amount of the tax.

Carr v. *Edwards,* 84 N. J. L., 667.

Justice Swayze in that case says, at page 669:

> "The only special right given by the New Jersey law in case of a non-resident decedent is the right of an executor or administrator to succeed to the property having its situs in New Jersey. Unless, therefore, the legislature meant by the act of 1909 to tax this right—the transfer by grace of our law of the property having its situs here from the decedent to his representative—its enactment was futile as far as the estates of non-residents are concerned. We cannot attribute such futility to a legislative act."

The provision of the last paragraph of section 12 of the taxing act requires the imposition of a tax contrary to the restriction of the Federal Constitution and Statutes and is therefore invalid.

We have cited (at page 16) the provisions of the U. S. Constitution and the Federal Statutes which we submit are violated under the paragraph in question.

It is not only bad as arbitrary class legislation, but is a discrimination between residents and non-residents and a denying to the non-residents of the equal protection of our laws.

The method of assessment objected to denies to James McDonald, his executors and the beneficiaries under his will, all non-resident citizens, an immunity enjoyed by resident decedents and their legatees and distributes, viz: the transfer of stock or other property which is subject to the jurisdiction of the State of New Jersey at a rate not greater than that set forth in Section 1 of the Taxing Act, which is the rate that applies to resident decedents.

The right to take, hold and dispose of property and the right to be exempted from higher taxes and impositions are privileges and immunities recognized by Sec. 2 of Article IV of the Federal Constitution hereinbefore quoted, the section applying to property rights and including the immunity of enjoyment of estates in succession.

The early leading case in the United States Supreme Court laying down this principle is

> *Paul* v. *Virginia,* 8 Wall., 168, 19 Law Ed. 357.

Justice Field, in his opinion, says, in referring to Article IV, Sec. 2, par. 1, of the Federal Constitution: (p. 360)

> "It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with the 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."

The word "privileges" has been held in our Supreme Court to apply to exemption from taxation.

> *State* v. *Betts,* 24 N. J. L. (4 Zab.), 555 at p. 557.

See also *L. & N. R. R.* v. *Gaines,* 3 Fed. Rep., 266 at p. 278.

In *Tatem* v. *Wright,* 23 N. J. L., 429, Justice Elmer, in dealing with the question of the right to tax foreign insurance companies, says: (p. 444)

> "That the privileges and immunities of the citizen, embraced in this clause of the constitution, comprehend an exemption from higher taxes or impositions than are paid by other citizens of the State, may be safely assumed. It was so held in the case of Corfield v. Coryell, 4 Wash. C. Rep., 371."

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.

In *Ward* v. *Maryland* (*supra*) the United States Supreme Court held unconstitutional a statute of the State of Maryland prohibiting the sale within certain districts of the State of certain articles by persons not resident in the State without first obtaining a license and paying therefor, the Court declaring that the statute violated the 2nd section of Article IV of the Constitution. The Court, speaking through Justice Gifford, said at page 452 L. Ed.:

> "Reasonable regulations for the collection of such taxes may be passed by the states whether the property taxed belongs to residents or non-residents; and, in the absence of any congressional legislation upon the same subject, no doubt is entertained that such regulations, *if not in any way discriminating against the citizens of other states,* may be upheld as valid;"

And in speaking of the application of the words "privileges and immunities," contained in the Constitution, the Court says at page 452 L. Ed.:

> "Attempt will not be made to define the words 'privileges and immunities,' or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce,

> trade or business without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the State; *and to be exempt from any higher taxes or excise than are imposed by the State upon its own citizens.* Cooley, Constitutional Limitations, 16; Brown *v.* Maryland, 12 Wheat., 449."

In *Blake* v. *McClung,* 172 U. S., 239; 43 L. Ed. 432, the Supreme Court of the United States had before it under consideration a statute of the State of Tennessee which provided that foreign corporations might obtain the right to do business in the State of Tennessee provided they filed a copy of their charter, etc., and provided that the corporation so filing its charter should be deemed and taken to be a corporation of the State of Tennessee and should be subject to the jurisdiction of the courts of that State and might sue and be sued thereon in the mode or manner that is or may be by law directed in the case of a corporation created or organized under the laws of the State.

The statute then provided

> "Nevertheless, creditors who may be residents of this State shall have a priority in the distribution of assets, or subjection of the same, or any part thereof, to the payment of debts over all simple contract creditors, being residents of any other country or countries, etc."

In a suit to wind up a British corporation duly chartered under this law by the State of Tennessee, citizens of the State of Ohio, who were creditors of the corporation, intervened, and from the denial of their right to equal distribution in the assets of the company in Tennessee with the residents of Tennessee, took an ap-

peal to the Supreme Court of the United States. The Court, in speaking of Art. IV. of the Constitution, refers to the desirability of not attempting to specifically define the words "privileges and immunities" referred to in that article, but at page 249 states specifically that one of the rights protected is *right to take, hold and possess all property, either real or personal, and an exemption from higher taxes or impositions than are paid by other citizens of the State,* and giving as the reason for the adoption of the words "privileges and immunities" as the expression of the preamble to the corresponding provision of the old Articles of Confederation, "the better to secure and perpetuate mutual friendship and intercourse among the people of the different States of the Union." The Court approves the decision of Justice Washington in *Corfield* v. *Coryell,* (*infra*) and quotes the decision of *Paul* v. *Virginia* (*supra*), herein referred to and also quotes the Slaughter House cases, 16 Wall., 36, at p. 77, referring to Article IV, as follows: (21 L. Ed. 409)

> "Nor did it profess to control the power of the State governments over the rights of its own citizens. Its sole purpose was to declare to the several States that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction."

The Court then says that these principles have not been modified by any subsequent decision of this Court.

The principle in *Blake* v. *McClung* seems to be approved in this State, *Erie Railway Co.* v. *State,* 31 N. J. L., 531, see p. 543, holding a

State cannot tax a foreign corporation on a principle different from that in which it can tax a domestic corporation.

In *Corfield* v. *Coryell,* 6 Fed., Cases 546, which is approved in *Blake* v. *McClung* (*supra*), the Court was dealing with an act which restricted the right of non-residents to take oysters from the tidewaters of the State of New Jersey. The act was sustained on the ground that it was a regulation of the use of the common property of the citizens of the State, the property taken being common property of the State.

In dealing with the constitutional question, the Court said, at page 551:

> "The next question is, whether this act infringes that section of the constitution which declares that 'the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.' * * We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several States which compose this Union, from the time of their becoming free, independent and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one State to pass

through, or to reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the State; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the State; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added, the elective franchise, as regulated and established by the laws or constitution of the State in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each State, in every other State, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) 'the better to secure and perpetuate mutual friendship and intercourse among the people of the different States of the Union.''

Corfield v. *Coryell* was approved in *Tatem* v. *Wright,* 23 N. J. L., 429, at page 444.

The act under consideration in *Corfield* v. *Coryell,* was before the courts of our State in *Haney* v. *Compton,* 36 N. J. L., (7 Vr.) 507, where our Court refers to the discussion of Justice Washington in *Corfield* v. *Coryell* (*supra*) at page 510, and in referring to this opinion Justice Van Syckel, in his opinion in the lower court, at page 511, says:

"Judge Washington limits this expression to those privileges and immunities which

> are in their nature fundamental, and belong of right to the citizens of all free governments, such as protection by the government, the enjoyment of life and liberty, the right to buy, hold and dispose of property, to pass through and reside in the State, and to be exempt from impositions higher than those paid by other citizens of the State. This view is accepted by Chancellor Kent Vol. 2 of his Commentaries, page 71."

In *Magill* v. *Brown,* 16 Fed., Cases 408, the Court, at page 428, in construing a will, reviews the history of Art. IV, and stated its purpose and says:

> "Among the privileges of the citizens of every State, is that of exemption from the law of alienage, though not born in the State; and every body of private persons united or incorporated have the franchise and immunity of enjoying estates in succession in this State. These are exemptions from the rigor of the common law, which the citizens of other States may enjoy in this, as fully as the citizens of this State can. We can therefore make no distinction between these bequests and those to societies located in the State; the disability of alienage cannot be applied to the citizens, societies or corporations of other States, and they may enjoy property as it can be enjoyed of right by those which are within the State."

See also *State of Missouri* v. *Julow,* 29 L. R. A., 257, at page 259.

The question of the application of an inheritance tax to non-residents and not to residents where both are of the same class has been carefully reviewed in the Supreme Court of California.

In that State an inheritance tax act was passed in 1893 amended 1897. The act read as follows: (in amended form)

> "After the passage of this act, all property which shall pass by will * * * other than to or for the use of his or her father, mother, husband, wife, lawful issue, brother, sister *and nieces or nephews, when a resident of this State* * * * shall be and is subject to a tax of five dollars on every one hundred dollars of the market value of such property, etc."

It will thus be seen that what the State of California by that act attempted to do was to tax non-resident nephews and nieces and exempt resident nephews and nieces. This provision was attacked in the case of *In Re Estate of Leland Stanford,* 54 Pac., 259, 126 Cal., 112, 45 L. R. A., 788. A dissenting opinion, attacking this act on the ground that it contravened the 2nd section of Article IV of the Federal Constitution, was filed by Harrison, *J.,* wherein he sets forth clearly the reasons for the invalidity of the act as follows:

> "Of the nephews and nieces who are appellants herein, seven are residents and citizens of other States, and it is contended on their behalf that the provisions in the statute, as amended in 1897, which purports to exclude them from the exemption given to resident nephews and nieces, contravenes the provisions of Sec. 2, Art. 4, of the Constitution of the United States, which declares 'The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States,' and is therefore invalid. The charge imposed upon the inheritance by the statute under consideration is in the nature of an excise tax (*Re* Wilmerding, 117 Cal., 281), but, by what-

ever name it is designated, the power to impose the charge is referable to the power of taxation, and the above provision of the constitution guarantees to the citizens of each State an immunity in any other State from the burdens of taxation upon their persons or property or occupations which that State does not impose upon the persons or property or occupations of its own citizens. Mr. Cooley says (Const. Lim., p. 490), that this provision 'secures in each State to the citizens of all other States * * * the right to be exempt, in property and person, from taxes or burdens which the property or persons of citizens of the same State are not subject to.' In Ward *v.* Maryland, 12 Wall., 418, 20 L. Ed. 449, it was held that a statute imposing a higher license tax for the sale of goods within the State of the non-resident than was imposed upon the resident of the State was in violation of this section, and invalid. In defining the words 'privileges and immunities,' as used in the Constitution, the court said: 'Beyond doubt, those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into another State of the Union for the purpose of engaging in lawful commerce, trade or business without molestation, to acquire personal property, to take and hold real estate, to maintain actions in the courts of the State, and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens.' In Oliver *v.* Washington Mills, 11 Allen, 268, it was held that a statute of Massachusetts which required corporations to reserve from each of their dividends one-fifteenth part of whatever was payable to holders of stock resid-

ing out of the State, and to pay it into the State treasury, was violative of this provision of the constitution, the court saying: 'It is obvious that the power of a State to impose different and greater burdens or impositions on the property of citizens of other States than on the same property belonging to its own subjects would directly conflict with this constitutional provision. By exempting its own citizens from a tax or excise to which citizens of other States were subject, the former would enjoy an immunity of which the latter would be deprived.' See also Corfield *v.* Coryell, 4 Washington C. C., 381; Campbell *v.* Morris, 3 Harr. & M'H., 554; Crandall *v.* State, 10 Conn., 344; Wiley *v.* Parmer, 14 Ala., 627. Section 1978 of the Revised Statutes of the United States provides: 'All citizens of the United States shall have the same right in every state and territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.' If, however, the State imposes upon the citizens of another State a tax upon their right of inheritance which it does not impose upon its own citizens, they do not have the 'same right' to inherit property as is enjoyed by the citizens of that State. It must be held, therefore, that it is not within the power of the State, while exempting its own citizens from a tax upon their inheritances, to impose such tax upon the inheritances falling to citizens of other States.''

The Stanford case was followed by the case of *In Re Estate of Mahoney,* 133 Cal., 180, 65 Pac., 389, 85 Am. St. Rep., 155.

In this case the amendment to the taxing act was held unconstitutional as being a violation of the provisions of Sec 2 of Art. IV of the

Federal Constitution, the amendment being the addition of the words "when a resident of this State" as applied to nephews and nieces.

The Mahoney case was followed by *In Re Johnson,* 73 Pac. Rep., 424 (California), in which case the whole question has been gone into very carefully, and the Court held that the Mahoney case was decided on an erroneous principle of constitutional interpretation because, instead of declaring the amendment to the taxing act unconstitutional, *it was the duty of the Court to bring within the exemption accorded to resident nephews and nieces the non-resident nephews and nieces, the constitutional provision being to the effect that the exemption to citizens of the State must be extended to citizens of the other States.*

The opinion in the case *In Re Johnson* (*supra*) is exhaustive and the distinction between declaring an act void as being contrary to the Federal Constitution and declaring a non-resident entitled to the same immunities as a resident, is well stated. The application of it to the present case is to require the Comptroller to assess the tax against the non-resident estate in the same manner as against the resident estate, viz., on the portion of the legacy passing which is paid out of New Jersey assets or the proceeds therefrom. This application we have disputed under another point as the act taxing on the graduated scale is the later act and when added to the other legislation renders the 12th paragraph unconstitutional.

We respectfully urge a careful consideration of the Johnson case.

The discrimination pointed out by appellants is in violation of Par. 1, Sec. 2, of Article IV of the Federal Constitution and the Civil Right Acts passed thereunder, as infringing upon the privileges and immunities of non-resident citizens and also in violation of the Fourteenth Amendment, in that the method applied of assessing the tax violates the essential quality of taxation which requires that taxes be imposed upon a rule of uniformity.

We have heretofore submitted an example of an estate similar to the one under review, showing an inequality in favor of the resident estate over the non-resident estate. We shall also show by an example which applies to the case before the Court an inequality in cases of specific legacies of either resident or non-resident decedents over general legacies of non-resident decedents, which inequality does not exist in cases of residents between specific legacies and general legacies.

The classifications adopted by the present taxing act as amended in 1914 are of two general kinds—first, by relationship, and, second, by the amount of property passing. Under the first classification, husbands, wives, children or their issue are taxed on a graduated scale at the lowest rate. Fathers, mothers, brothers, sisters, etc., are taxed at a higher graduated rate. Collaterals and strangers are taxed at the flat rate of five per cent. Both of these methods of classification are proper, and if left by the taxing act to operate alone the tax would not be objectionable.

Magoun v. *Illinois Tr. & Sav. Inst.*, 170 U. S., 283, 42 L. Ed. 1037.

By requiring the tax to be computed pursuant to the last paragraph of Sec 12 of the act, members of the same class are not treated alike.

A son who receives a specific legacy in New Jersey securities is taxed at a lesser rate than a son who receives an equal amount under a general legacy.

In the case before the Court the widow, who takes a specific legacy in New Jersey stocks, pays less on that legacy than the son for an equal amount of property. To illustrate this inequality, let us take the case of a non-resident decedent who died leaving an estate of five million dollars, one million dollars in Standard Oil Company (New Jersey) stocks being specifically bequeathed to the widow, and the only other taxable part of the estate, consisting of one million dollars in stock of the Standard Oil Company (New Jersey), going to a son, the residuary legatee, who takes the entire estate other than the one million bequest in Standard Oil stock to the widow. In so far as New Jersey assets are concerned, both the son and the widow take an equal amount. The widow's tax as computed by the Comptroller would be:

Exempt	$ 5,000.00	
1% on	45,000.00	$ 450.00
1½% on	100,000.00	1,500.00
2% on	100,000.00	2,000.00
3% on	750,000.00	22,500.00
Widow's Tax.....		$26,450.00

The son's tax would be computed by the Comptroller as follows:

Entire estate, other than specific bequests	$4,000,000.00	
Exempt	5,000.00	
1% on	45,000.00	$ 450.00
1½% on	100,000.00	1,500.00
2% on	100,000.00	2,000.00
3% on	3,750,000.00	112,500.00
Total tax if decedent were a resident and all his property situated here..		$116,450.00
Proportion of New Jersey property to entire estate, except specific bequests, 25% N. J. Tax	$ 29,112.50	
Widow's tax (*supra*)....	26,450.00	
Difference in favor of Widow		$ 2,662.50

More examples might be shown. As a matter of fact, under no circumstances, figuring under the method directed in the last paragraph of section 12, would the tax in the case of a non-resident estate be less than that of a resident for the same amount of property passing, and in all cases where the graduated tax is applied we believe it would be more.

The legal rule under the Fourteenth Amendment with regard to equal protection of the laws may be stated as follows:

The constitution requires that the law shall have the attribute of equality of operation and that the constituents of each class be affected alike, viz: that the law operates equally and uniformly upon all persons similarly circumstanced.

This is the principle laid down in *Magoun* v. *Illinois Trust and Savings Bank,* 170 U. S., 283, 42 L. Ed. Ann. 1037. This case upholds the legacy and inheritance tax law of the State of Illinois and dealt with an act providing for a graduated rate according to the size of the legacy, and a rate that varied in accordance with the relationship of the beneficiary.

The Court reviewed carefully the earlier cases with reference to equality under the Fourteenth Amendment and in commenting upon these cases says:

Page 293, 42 Law Ed. 1042:

> "The clause of the Fourteenth Amendment especially evoked is that which prohibits a state denying to any citizen the equal protection of the laws. What satisfies 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 each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances.' Kentucky Railroad Tax Cases, 115 U. S., 321 (29; 414). It does not prohibit legislation which is limited, either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed. Hayes *v.* Missouri, 120 U. S., 68 (30; 578)."

Page 294; U. S.; page 1043 L. Ed.

> "In other words, the state may distinguish, select and classify objects of legislation, and, necessarily this power must have a wide range of discretion. It is not with-

out limitation, of course. 'Clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition,' said Mr. Justice Bradley in Bell's Gap R. Co. *v.* Pennsylvania, 134 U. S., 232-240 (33; 892-896).

"And Mr. Justice Brewer in Gulf, Colorado & Santa Fe Ry. Co. *v.* Ellis, 165 U. S., 150 (41; 666) after a careful consideration of many cases said: 'It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.' "

Page 296: or 1043 L. Ed.

"And if the constituents of each class are affected alike, the rule of equality prescribed by the cases is satisfied. In other words, the law operates 'equally and uniformly upon all persons in similar circumstances.' "

Page 300: or 1045 L. Ed.

"That rule does not require, as we have seen, exact equality of taxation. 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 condition is not arbitrary because it is determined by that value; it is not unequal

in operation because it does not levy the same percentage on every dollar; does not fail to treat 'all alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed.' "

In New Jersey we have considered the subject of proper classification.

In Re Van Horne, 74 N. J. E., 600.

In this case Vice-Chancellor Garrison, in speaking of the effect of the Fourteenth Amendment of the Federal Constitution upon an act which exempted certain theatres from a provision prohibiting children under sixteen years of age from attending, said (at page 601):

" 'Equal protection of the laws' must certainly mean equal security or burden, under the laws, to every one similarly situated.

"A statute to escape condemnation as infringing the rights guaranteed by this amendment, must bear alike upon all individuals and classes and districts that are similary situated, in a similar manner, and with uniformity; otherwise, there would be unjust discrimination, which this constitutional mandate prohibits.

"The purpose of the constitutional amendment must have been to prevent that which was arbitrary or capricious, and to require uniformity and equality under like conditions."

Meehan v. *Board of Excise Commissioners of Jersey City,* 64 Atl. Rep., 689.

The Supreme Court in this case dealt with the classification for the purpose of liquor licenses, and in dealing with the question as to what classification violated the Fourteenth Amendment, said at page 690:

"This clause of the federal constitution relates to those rights of the citizen which

may be called fundamental. Those which belong of right to all citizens of a free government, and which have at all times been enjoyed by the citizens of the several states. Ward *v.* Md., 12 Wall. (U. S.) 430, 20 L. Ed. 449; Slaughter House Cases, 16 Wall. (U. S.) 36, 21 L. Ed. 394; Powell *v.* Com. of Penn., 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253."

Middleton v. *Middleton,* 54 N. J. E., 692.

In this case Vice-Chancellor Pitney reviewed an act permitting a limited divorce where the act applied to certain persons holding conscientious scruples against absolute divorce and gave special property rights to them following a divorce. In holding the act unconstitutional as violating the Fourteenth Amendment the Court says, quoting Cooley's Const. Limitations, at page 696:

"Accepted authorities, in treating of constitutional limitations, have laid it down that 'a statute would not be constitutional * * * which would select individuals from a class * * * and subject them to peculiar rules or impose upon them special obligations or burdens from which others in the same class are exempt.' Cons. Lim. (5th Ed.) 391, and the case of Ho Ah Kow *v.* Nunan, 5 Sawy. 552, 562, sustains this doctrine."

In addition to those cases cited in *Magoun* v. *Illinois Trust and Savings Bank, supra,* we call to the Court's attention some of the cases in jurisdictions, both State and Federal, which may be cited to show that the act under review, as applied to non-residents, denies the equal protection of laws.

Gulf C. etc. Co. v. *Ellis,* 165 U. S. 150; 41 L. Ed. 666.

The Court in this case held that a statute imposing an attorney's fee in addition to costs upon railway corporations omitting to pay certain claims within a certain time, which applied to no other corporations or individuals, was unconstitutional as denying the equal protection of laws.

Cotting v. *Godard,* 183 U. S. 79; 46 L. Ed. 92.

This case reviewed an act limiting the amount of charges to be made by certain stock yard corporations without limiting the charge to be made by other similar corporations doing a similar amount of business The Court in this case says, at pages 111: L. Ed., p. 109.

> "But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification of industries and occupations, we must, nevertheless, always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other. There can be no pretense that a stock yard which receives 99 head of cattle per day a year is not doing precisely the same business as one receiving 101 head of cattle per day each year. It is the same business in all its essential elements, and the only difference is that one does more business than the other. But the receipt of an extra two head of cattle per day does not change the character of the business. If once the door is opened to the affirmance of the proposition that a state may regulate one who does much business, while not regulating another who does the same

but less business, then all significance in the guaranty of the equal protection of the laws is lost, and the door is opened to that inequality of legislation which Mr. Justice Catron referred to in the quotation above made. This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business, and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would. We think, therefore, that the principle of the decision of the Supreme Court of Kansas in State *v.* Haun, 61 Kan. 146, 47 L. R. A. 369, 59 Pac. 340, is not only sound, but is controlling in this case, and that the statute must be held unconstitutional as in conflict with the equal protection clause of the Fourteenth Amendment."

State of Missouri v. *Julow* (1895), 29 L. R. A. 257.

In this case a statute restricting the right to discharge laborers because of membership in a labor union was held unconstitutional on the ground that it was a special law. The Court says on this point:

"Here a non-trade union man or a non-labor union man could be discharged without ceremony, without let or hindrance, whenever the employer so desired, with or without reason therefor, while in the case of a trade union or labor union man, he could not be discharged if such discharge rested on the ground of his being a member of such an organization."

A number of cases on classification were cited by the counsel for the State in the court below, and we shall refer to and give our view upon them in anticipation of their being cited here.

The case of *Board of Education* v. *Illinois,* 203 U. S. 553, 51 L. Ed. 314, affirming *In Re Speed's Estate,* 216 Ill. 23, 74 N. E. 809, of defendants' brief is distinguishable on two grounds, one that the constitutional provisions which we appeal to do not apply to corporations, and the other that the separate classification for resident and foreign corporations is proper.

Citizens' Telephone Co. v. *Fuller,* 229 U. S. 322, 57 L. Ed. 1206, was a case where the telephone companies making a profit of less than $500 a year were exempt from a tax levied in lieu of the ordinary property tax. Clearly the legislature had the right to grant this exception. Residents and non-residents were treated alike.

In *Beers* v. *Glynn,* 211 U. S. 477, 53 L. Ed. 290, where a New York non-resident owner of personalty paid a tax on it only if he happened also to own New York realty, the fault was not with the provisions of the act for the levying of the tax but in the machinery of collection. If there were no New York realty the Court held there was nothing from which to collect the tax.

In the case of *District of Columbia* v. *Brooke,* 214 U. S. 138, 53 L. Ed. 941, the act was the regulation of the collection of an assessment and not the consideration of the ~~method~~ amount or rate of assessment.

We might rest our case on the citation of *Central R. R. Co.* v. *State Board of Assessors,* 48 N. J. L. 146, 337, where Justice Depue lays

down the statement that "every system of taxation consists of two parts—the one relating to the assessment (the designation of the persons or things which shall be the subjects of taxation, and the apportionment of taxation among such persons or things in the ratio prescribed by law); the other the collection of taxes by the enforced payment thereof." The latter provisions are the ones which the Federal Constitution shall not interfere with, but our case comes under the head of designation of the persons or things subject to taxation and the apportionment of the burden. It relates to the imposition of the tax and not to the collection.

In reference to the claim that the State has the right to use different methods of collection against non-resident estates, we certainly have no objection against a different method of collection of the tax being provided by the State in the case of non-residents, provided the levy is the same in the case of non-residents as in the case of residents for the same amount of property and the same character of person. Surely the legislature can provide for different methods of collection for non-residents than for residents and may treat them differently in this manner.

Plumber v. *Coler,* 178 U. S. 115, 44 L. Ed. 998. Reference is made to the fact that the State may lawfully measure or fix the tax by referring to the value of the property passign, although some of the property passing is not subject to a *property tax* by the State. This, of course, was the case of a resident, and the transfer of United States bonds was taxed, and it merely sustained the right to tax the transfer, although the State itself could not impose a tax on the bonds themselves. There is nothing in point in this case.

Travelers Insurance Company v. *Connecticut*, 185 U. S. 364., 46 L. Ed. 949. As to this case it is argued that it is held in this case proper under the Federal Constitution to separate and classify stockholders of a corporation as between resident and non-resident estates, there can be no reasonable objection to the grouping together of successors of property within this State of non-resident decedents and resident decedents. The Travelers Insurance Company case is easily distinguished. There the tax was the annual tax upon property in the State and was based upon the value of the property in the State and was based upon the value of the property, viz, the market value of the stock. The rate for non-residents was fixed at 15 mills, the value, of course, fluctuating in accordance with the demand for the stock. The tax paid by the non-residents went to the State for the support of the State government. The resident tax went to the municipality wherein the stockholder lived, and the rate fixed was the annual tax rate of his municipality. The rate varied throughout the State, running up to 21 mills, so that in fixing at 15 mills, the average of the local tax rates, the legislature was not discriminating against non-residents. Objection was also made because residents were allowed to deduct, in the ascertainment of the value of the security, the value of the real estate within the State. This was merely incidental and was done for the purpose of preventing the municipality from collecting a double tax, as they had already received the tax on the real estate within the State as the tax on the non-resident stockholders went for the support of the State and not the local municipality, there was no occasion for the exemption in cases of non-resident stock. There was no attempt in the Travelers Insurance Company case to assess property of the non-

residents not situate within the State, as there is in the case before the court. The basis of assessment did not have as a part of it the value of the non-resident taxpayers' property situate without the State.

The unequal taxation here demonstrated is not such taxation as has been vindicated by the Federal courts.

The opinion of the Supreme Court, without commenting on the question as to inequality here presented, dismissed the question of discrimination and inequality upon the opinion of Justice Pitney in the case of *St. Louis S. W. R. Co.* v. *Arkansas,* 235 U. S. 350; 59 L. Ed. 265, by stating:

> "The general power of the State to enact legislation of this character, and its impregnability to attack on constitutional grounds, is amply emphasized and vindicated by Mr. Justice Pitney in St. Louis S. W. R. Co. *v.* Arkansas, wherein he declares, 'Nothing in the Fourteenth Amendment imposes any iron-clad rule upon the States with respect to their internal taxation, or prevents them from imposing double taxation, or any other form of unequal taxation, so long as the inequality is not based upon arbitrary distinctions.'"

Justice Pitney in his opinion refers, at page 365, L. Ed. p. 273, to the case of *Southern Railway Co.* v. *Greene,* 216 U. S. 400; 54 L. Ed. 536. This was a case which reviewed a tax upon the right of foreign corporations to do business in the State of Alabama. The tax was not assessed on resident corporations. In holding the tax invalid as a violation of the Fourteenth Amend-

ment, the Court, at pages 412 and 413, 54 L. Ed. p. 540, says:

> "The inhibition of the amendment that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation."

Further on, at page 417, L. Ed. 54, he says:

> "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 imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification." Citing cases.

The proposition hereinafter discussed with regard to Article IV of the Federal Constitution not protecting the estates of deceased persons from discrimination, does not apply as an argument as against the legislation here under review being unconstitutional under the Fourteenth Amendment, as the classification of personal representatives of non-resident decedents and their beneficiaries separately from personal representatives and beneficiaries of resident decedents is not a classification but on arbitrary selection.

The opinion of the Supreme Court (and the State in its contentions) makes much capital of the fact that non-resident estates are accorded a favored *situs* because they are exempt from any imposition upon the transfer of bonds and

mortgages, commercial paper, bank deposits, and debts, which are assets, the transfer of which the legislature has made subject to taxation in the estates of resident decedents, and not in the case of non-resident decedents. This fact is not an argument because it is within the province of the legislature to tax the transfer of such part of the non-resident estate the *situs* of which is within this State as it sees fit, provided the non-resident estate is not discriminated against in favor of residents, and no capital can be made of the fact that the State has not seen fit to exercise the limit of its power in taxing transfers of non-resident estates.

It is clear why property of the character referred to has not been taxed. The difficulty and uncertainty of collection is undoubtedly the main reason. *This question is entirely one for the legislature, and an argument based thereon has no place before the court.* This manner of favoring non-resident estates is of no benefit to non-resident estates holding only New Jersey stocks. The favorable discrimination benefits only those who have the exempt class of assets. There is the same discrimination as between residents and non-residents as before.

We submit that the conclusion of the court below in its opinion based on the rule cited in 37 Cyc. 736 is an erroneous deduction from a properly stated rule, and we quote the rule to substantiate our claim:

> "It is a matter of common experience that absolute equality in the imposition of a tax is not attainable. Nor is this the meaning of the constitutional provision. All that it 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 sub-

> ject and the necessities of practical administration will permit. Hence the courts will not pronounce a statute invalid on this ground unless it appears that it was framed on a plan or principle not calculated to produce equality and uniformity, or that its administration will result in such flagrant injustice as to evidence an entire disregard of the constitutional requirement."

We believe that we have demonstrated thoroughly that the legislation here presented, which discriminates, has not been framed as closely to absolute equality as the nature of the subject and the necessities of administration will permit, and that the frame and plan of the statute is based on a principle which is not calculated to produce equality or uniformity, and that the administration of Section 12 of the Taxing Act does result in flagrant injustice and evidences a disregard of the constitutional requirement. Neither the court below nor counsel for the State has demonstrated any reason why the method of assessing the tax against estates of non-residents which we have urged would not conform to all the requirements of the aforementioned rule. If our plan does conform to this requirement, does not that of itself demonstrate that the rule is not complied with in the method adopted by the legislature by Section 12 of the Taxing Act.

A discrimination, as we have shown, wherein the non-resident is assessed at a higher rate of per cent. is not a minor fault such as was commented upon in *Magoun* v. *Illinois Trust and Savings Inst.* (*supra*) and other cases. It is one where a higher rate of tax is imposed without specifically so stating in so many words. The higher rate is imposed by reason of stating a formula which results in a higher rate.

By the use of the method of assessment against non-resident estates prescribed by Section 12 of the Taxing Act, either the rate of tax is increased in non-resident estates or the transfer of property over which this State has no jurisdiction is taxed. The right to do either is clearly unconstitutional.

The denial of the right to tax property out of the State is sustained in *Carr* v. *Edwards* (*supra*) and in *Louisiville Ferry Co.* v. *Kentucky,* 188 U. S. 385, there cited.

The Supreme Court of this State has held that a classification with reference to the licensing of non-resident and resident peddlers, whereby the non-resident paid a higher tax than the resident, was unreasonable.

Morgan v. *Orange,* 50 N. J. L. (21 Vr.) 389.

The Legislature may for the purpose of ascertaining the property within the State take into consideration property of non-residents within and without the State, but it may not go beyond that purpose and include the foreign property in the property to be taxed.

To sustain the method set out in Section 12 of the Taxing Act the Supreme Court in its opinion refers to the following cases:

Adams Express Co. v. *Ohio,* 165 U. S. 195.

Adams Express Co. v. *Indiana,* 165 U. S. 255.

Adams Express Company v. *Kentucky,* 166 U. S. 171.

St. Louis S. W. R. Co. v. *Arkansas,* 235 U. S. 350.

The case of *Adams Express Co.* v. *Ohio* reviewed a tax against the Adams Express Com-

pany, a non-resident of the State of Ohio, assessed by that State. The purpose of the law was to tax the property in the State of Ohio. The statute expressly provided for the filing of a return by the company taxed, which should show in detail the number of shares of its capital stock, the fair market value, the entire real and personal property of the company and where located, the value thereof as assessed by taxation, its gross receipts from whatever source and the business done in the State of Ohio, giving the receipts of each office in the State and the length of line of its rail and water routes over which the company did business within and without the State. This report went to a board created by the statute who were to assess the tax under the following rule:

> "In determining the value of the property of said companies in this State, to be taxed within the State and assessed as herein provided, said board shall be guided by the value of said property as determined by the value of the entire capital stock of said companies and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the State of Ohio, in the proportion which the same bears to the entire property of said companies, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid."

The apportionment of the assessment was to be among the several counties in which the company did business, in the proportion that the gross receipts in each county bore to the gross receipts in the State. The amount assessed for each county was certified to the county auditor and placed by him upon the duplicate to be assessed and the tax thereunder collected the same

as taxes were assessed and collected on other personal property, the rate of taxation to be the same as that on other property in the local taxing district. The valuation of the real estate, situated in the State, so given, was required to be deducted from the total valuation as fixed by the board.

It will thus be seen that the plan of the act was to provide for the equal taxation of property within the State. Justice Fuller, in his opinion, at page 227, says:

> "There is here no attempt to tax property having a situs outside of the State, but only to place a just value on that within. Presumptively all the property of the corporation or company is held and used for the purposes of its business, and the value of its capital stock and bonds is the value of only that property so held and used."

This case cited by the court is more of an authority in favor of the method of assessing the tax proposed by the appellants than that which has been sustained by the court below.

The distinction between the case cited and the case before the court is that the apportionment in the case cited is of the assets before the assessment of the tax, and in the case before the court the assessment of the tax is on the entire property within and without the State and the tax is apportioned thereafter.

Adams Express Company v. *Indiana* (*supra*) was a case similar to *Adams Express Company* v. *Ohio*. The tax under review was one assessed under an act which provided for the apportionment of the value of the stock of corporations within and without the State in order to fix a tax upon the intangible property within the State. To determine the amount upon which the company was to pay the tax, the statute provided

that after fixing the value of the stock the proportion of that value was taken which the gross receipts in the State bore to the entire receipts of the company, and from this percentage was deducted the assessed value of all taxable property which had been assessed in the State, and the balance was the amount of the assessment on which the tax was levied. In so far as railroad, express, telephone and telegraph companies were concerned, the proportion of the entire line of the company to the line in the State was taken to divide the value of the stock within the State. The percentage representing the value within the State was then divided among the taxing districts in the percentage of the length of the line in the taxing district to the length of line in the State and from that amount was deducted the property which was otherwise taxed in the district, and the balance was the amount of the assessment of the company in the particular taxing district. The tax was objected to because the method differed from that of taxing individual residents. The court held that the tax against residents was upon intangible as well as tangible property and the method adopted by the act was only a different method of ascertaining the same thing.

This case, like the Ohio case, is not a precedent to sustain the tax here under review. The whole scheme of the act was to ascertain what was within the State and when this was ascertained the rate was the same for residents as for non-residents. While no doubt in the carrying out of this tax some were taxed more on the same amount of property by reason of this proportion having a different effect, still this was only incidental, as the method specifically provided for ascertaining what the prop-

erty within the State was, and when this was ascertained the rate of taxation was the same.

The explanation which we have made with reference to the Ohio and Kentucky cases is directly applicable to the case of *St. Louis S. W. R. Co.* v. *Arkansas,* in which Justice Pitney wrote the opinion. The tax was on the privilege, in so far as foreign corporations were concerned, of doing intrastate business. Returns somewhat similar to those stated in the other cases were required to be filed and the tax commission determined the proportion of the outstanding capital stock when represented by the property and business of the corporation within the State. In disposing of the question of the charge that it was unequal or double taxation, the learned Justice says, at page 365: 59 L. Ed. p. 273.

> "No attempt is made to show that the classification of corporations adopted in Act No. 112 is not a reasonable one; or that in any respect corporations of the class to which plaintiff in error belongs are discriminated against in favor of domestic corporations, as was the case in Southern R. Co. *v.* Greene, 216 U. S. 400; 54 L. Ed. 536; 30 Sup. Ct. Rep, 287; 19 Ann. Cas. 1247."

These cases demonstrate that there is nothing wrong in the legislature's requiring, in the case of a transfer tax, the submission of a statement of the entire assets of the estate in order to ascertain what proportion of the New Jersey assets should be applied to each legacy.

Neither this Court nor the Supreme Court previous to the opinion in this case has passed upon the constitutional questions raised against the method of assessing the tax against non-resident estates pursuant to Section 12 of the Taxing Act.

The Supreme Court, in its decision, says:

> "Pursuit of the subject further from the viewpoint of legality and reasonableness under the constitutional inhibitions, of this legislative method of equalization taxation, as between the estates of resident and non-resident decedents, might appear to be but an academic task in the light of these adjudications;" commenting on the following cases:
>
> *Tilford* v. *Dickinson,* 79 N. J. L. 302.
>
> *Beers* v. *Edwards,* 84 N. J. L. 32.
>
> *Carr* v. *Edwards,* 84 N. J. L. 667.
>
> *Howell* v. *Edwards,* 88 N. J. L. 134 (Sup. Ct.). 96 Atl. Rep. 186.
>
> *Torrance* v *Edwards,* 99 Atl. 136.

The Tilford, Beers and Carr cases were all decided before the amendments of 1914, providing for a graduated rate, was passed.

The Tilford case arose before the passage of the Amendment of 1909, so there was at the time that case arose no provision of law as to apportionment in non-resident estates. The case was one in which the executors attempted to satisfy taxable legacies out of non-taxable securities. The necessity of apportionment and the method to be adopted is stated by the Court (page 307):

> "Speaking of intestate estates, I am inclined to think that apart from the statute, the logical rule to be adopted where property is situated as in this class, is the rule provided for by our statute. The theory upon which it rests is that each distributee has an undivided interest in all the assets of an

> estate, and that no particular portion of such assets passes to any particular distributee. Therefore, when it is ascertained what portion of the whole estate goes to all of the collateral distributees as a class, it will be presumed *that such proportion of the New Jersey property goes to such class of collaterals as the property in New Jersey bears to the property in New York*—it being assumed that equal proportions of the property in both states will be devoted to the payment of collateral distributees."

Justice Reed in his opinion in that case properly stated the end to be attained in assessing the tax, viz, that "it will be presumed that such proportion of the New Jersey property goes to such class of collaterals as the property in New Jersey bears to the property in New York." Meaning, undoubtedly, in referring to property in New York, the entire estate.

Beers v. *Edwards* is a Supreme Court case. It was decided in 1913 before Sec. 12 of the 1909 Act had been amended so as to include in the estimate of the entire estate of a non-resident decedent his real estate situated without the State. The question actually decided in that case was that of construction of the words of the act, and by the construction adopted by the court the question of the inclusion of foreign real estate in the fixing of the entire tax was disposed of; and as the amendment of 1914, providing for a graduated rate, had not as yet been passed, the result of the use of the method provided for in Section 12 was not different from the result which would be obtained by using the method which we advance.

Justice Swayze, after calling attention to the particular construction of the words of the act, holds that if the decedent had been a resident of

the State no tax could have been constitutionally imposed on the transfer of his 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, citing cases.

At the close of his opinion, he makes a comment which was unnecessary for the decision of the case. Undoubtedly in making that comment he did not have before him the question of the inequality resulting from the adoption of the method provided for in Sec. 12 of the Taxing Act.

Undoubtedly what Justice Swayze had in mind was that in ascertaining the proportion of the entire estate to the New Jersey estate the legislature might take the foreign real estate into account in ascertaining the entire estate for the purpose of ascertaining the proportion of the entire estate which consisted of New Jersey property. He did not have before him the question as to whether the tax should first be figured and then proportioned or whether the proportion of each legacy paid in New Jersey property should be ascertained and then the tax figured thereon.

Carr v. *Edwards* is a decision of this court and no mention is made therein of the Beers case. Justice Swayze, in speaking for this court in *Carr* v. *Edwards,* says, at page 670, with reference to the method of fixing the tax in cases of non-resident estates under Section 12 of the Taxing Act:

> "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."

As we have previously demonstrated, the actual result of this method is to increase the rate in cases of non-residents. In this case Justice Swayze makes a distinction between what is taxed and the method of determining the tax, and we submit that when the method of determining the tax encroaches upon the provision of the act providing for the rate of the tax and that, in fact, it has been shown that they are inconsistent, the method providing for the determination of the tax must fall.

Howell v. *Edwards* (*supra*), referred to by the court, is a case dealing with the tax assessed against a resident. None of the questions here raised were presented in that case. The court there considered the question of arbitrary and unequal classification and arbitrary and unequal exemptions similar to those which the U. S. Supreme Court had under consideration in the case of *Magoun* v. *Illinois Trust and Savings Bank* (*supra*). We thoroughly agree with the decision in *Howell* v. *Edwards* and in the case which it follows, upon the points there discussed.

In sustaining the classifications in *Howell* v. *Edwards,* the court brings out that there are at least two classifications, first, the classification as to relationship, and, second, the classification as to rate.

The State undoubtedly has the right to make these classifications, but we wish to make clear to the court that in the present case the State has not attempted to make a classification between residents and non-residents with regard to the imposing of the tax. The distinguishing between residents and non-residents is purely on the question of the method of assessing the tax, and we submit that the method of assessing the tax does not follow the express terms of the sta-

tute with regard to the imposing of the tax, and therefore it is inconsistent with it.

It was proper, of course, for the court below to follow *Torrance* v. *Edwards* (*supra*) and our appeal in this case upon the point there decided is for the purpose of having this court pass upon the question. That point is discussed under our Point II.

The requirement of Section 12 of the Taxing Act of the inclusion of foreign real estate in assessing the tax on non-resident estates renders the act invalid as an unconstitutional inequality and as an imposition of a tax upon property over which the State has no jurisdiction.

There are two reasons why this specific feature renders the apportionment provision unconstitutional.

1. It discriminates between resident and non-resident estates and is unequal taxation in this particular in that real estate of a resident which is situated without the State is not included in determining the tax.

2. It is in effect assessing a tax upon the transfer of foreign real estate of a non-resident decedent over which it has no jurisdiction.

The first reason speaks for and proves itself. How unfair it is to increase the rate, as we have demonstrated, by adding foreign real estate where foreign real estate of a resident is not considered.

Let us take an illustration where a resident and a non-resident hold exactly similar property, viz, $100,000 in foreign real estate and $100,000 in New Jersey stocks, and the property in each case is inherited by one son.

The tax in the case of the resident would be figured by the comptroller on the New Jersey stock only and as follows:

$ 5,000			Exempt
45,000	@	1%	$ 450.00
50,000	@	1½%	750.00
Total $100,000			Taxed at $1,200.00

The tax in the case of the non-resident would be figured on both the real and personal property and would be as follows:

$ 5,000			Exempt
45,000	@	1%	$ 450.00
100,000	@	1½%	1,500.00
50,000	@	2%	1,000.00
Total $200,000			Taxed at $2,950.00

The proportion of the entire estate to New Jersey stocks being 50%, the tax would be one-half of $2,950.00 or $1,475.00, or $275.00 more than in the case of a resident on the same amount of property passing.

The average percentage of tax in the case of the non-resident estate is	.01475
and of the resident estate	.01200
and the increased rate of per cent. of the non-resident estate amounts to	.00275

Innumerable instances might be cited, but the foregoing demonstrates it as well as any.

The inclusion of foreign real estate in the determination of the tax is a taxation of foreign real estate and is unconstitutional. This is the second ground cited. The argument we have submitted as to personal property of non-resident decedents which has no situs within the State is

even more applicable as an argument against the inclusion of foreign real estate.

Justice Swayze lays down the principle and cites the supporting case in *Beers* v. *Edwards, supra,* as follows:

> "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 estimat- the entire tax upon the estate for the purpose of ascertaining the amount to be imposed on the New Jersey stocks."

The total amount of foreign real estate included in the assessment under review is only $4,250. The inclusion of his real estate the coun-

sel for the State figures, increases the tax seventy-five cents.

We have raised this point because, while it makes hardly any difference in the present case, it is raised in and affects other cases represented by us which are awaiting presentation to the court if necessary, and we therefore desire to have the point specifically raised and decided in this case.

The Federal Constitution protects the right to transmit property on death against discrimination between resident and non-resident decedents.

The defense on behalf of the State lays its greatest stress on the contention that the right to have property transmitted on death is not protected by the Federal Constitution because the person from whom the property is transferred is dead and cannot appeal to its provisions.

To support this proposition, counsel states that it is the right or privilege of the beneficiaries to succeed to and receive the property of the decedent, pursuant to the permission granted by the State, that is taxed and as the act in express terms, or express principles, does not distinguish between resident and non-resident beneficiaries, the Federal Constitution's provisions are not infringed.

This point is not directed to the appellant's claim of the benefit of the Federal Constitution on the ground that the act taxes property without the State and over which this State has no jurisdiction. Undoubtedly the executors and the beneficiaries may claim the protection of this provision on their own behalf as well as on behalf of the decedent.

We shall address our argument to the question of discrimination and denial of equal privileges and immunities.

The cases cited in the court below to the effect that the transfer inheritance, succession or legacy tax was on the right to succeed and not the right to transmit were not cases which turned on that contention. They were cases distinguishing between property and transfer taxes and the words were used to show that the tax was not a property tax, and were not necessary for the decision of the case. Many cases might be cited which refer to the right to transmit as well as the right to succeed.

We do not have to go out of our own State for this. Justice Kalisch, in *Howell* v. *Edwards,* 96 Atl. Rep. 186, which is the latest case in this court dealing generally with the constitutionality of the act, quotes Justice Garrison in Neilson *v.* Russell, as follows:

> " 'Examination will show that the consensus of judicial opinion is that the impost we are considering is not a tax upon property, but is a premium or privilege upon the devolution of property—in fine, a succession tax—and that, as such, it rests fundamentally upon the sovereign right of a State to withhold, and hence to limit, the right of testamentary disposition or of intestate succession.' "

The opinion in the case of *Attorney General* v. *Stone* (Mass.), 95 N. E. 395, at page 397, properly states the proposition as follows:

> "This is an excise tax, imposed not only upon the right of the owner of property to transmit it after his death, but also upon the privilege of his beneficiaries to succeed to the property thus dealt with." (Citing cases.)

The United States Supreme Court, in its opinion in *United States* v. *Perkins,* 163 U. S. 625, at page 628, 41 L. Ed. 288, says:

> "In this view, the so-called inheritance tax of the State of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases; a declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use; in other words, that the right to dispose of his property by will shall remain, but subject to a condition that the State has a right to impose. Certainly, if it be true that the right of testamentary disposition is purely statutory, the State has a right to require a contribution to the public treasury before the bequest shall take effect. Thus the tax is not upon the property, in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the State that it becomes the property of the legatee."

We might again quote Justice Field in *Paul* v. *Virginia,* 19 L. Ed. p. 360, in referring to Art. IV, Sec. 2, Par. 1, of the Federal Constitution, where he says:

> "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 pur-

> suit 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."

Surely one of the privileges which our Constitution intended to protect against discrimination between residents and non-residents was that of transmission of property on death.

The right to transmit property on death is a property right and this right affects the value of the property to the deceased in his lifetime.

If the legislature might discriminate between resident and non-resident decedents and limit the non-resident in his right to dispose of property within the State on his death or appropriate part or all, surely it would not be worth as much to him as to a resident.

Certainly the guarantee of an equal right to the pursuit of happiness protects the non-resident husband as against the resident husband in the equal right to have his property transmitted on his death to his wife or his children.

If the State's contention is well founded, then there is no Federal Constitutional provision insuring equality as between resident and non-resident decedents, who are citizens of the United States, in the right of equal application of the laws of descent and transmission of property on death.

The provision of Article IV that we appeal to is the only one in the Federal Constitution that can protect this right.

This Court may well hesitate before confirming to the legislature any such arbitrary power. Its exercises would shake the very foundation of this government.

It is nearly as important in keeping the Union together as the commerce clause of the Federal Constitution. The denial of its protection would permit the State Legislature by law to appropriate on death the property within its jurisdiction of a non-resident citizen and not so provide as to its own residents.

That our argument is sound may be demonstrated by the fact that the right of the State to tax on death the descent or distribution of property within the State to an alien, where the property of citizens of the State is not so taxed, has been upheld where not in contravention with the treaties of the United States with other countries.

Mager v. *Grima*, 8 Howard 490; 12 L. Ed. 1169.

It was held in violation of a United States treaty in the case of *Succession of Rixner*, 48 La. Ann. 552. See report of this case in 32 L. R. A. 177 and cases therein collected and stated in note.

Is this Court going to deny to non-resident citizens what is granted to aliens by treaty protection?

But the right has not been claimed by any of the States, other than California, and when claimed there has not been sustained. (See In re Johnson, 73 Pac. Rep. 424, *supra.*)

The most complete answer, however, to the claim made by the defendants is that the execu-

tors or administrators are non-resident citizens and the transfer, if on the right to receive or succeed, is a tax against their taking, and the executors or administrators of a non-resident are invariably non-residents, and surely so if their citizenship is determined by the domicile of the decedent.

It must be borne in mind that it is only the universal succession from the decedent to his executors or administrators that can be taxed in the case of a non-resident, as we have already argued.

Carr v. *Edwards,* 84 N. J. L. 667.

Justice Swayze in that case says, at page 669:

> "The only special right given by the New Jersey law in case of a non-resident decedent is the right of an executor or administrator to succeed to the property having its situs in New Jersey. Unless, therefore, the Legislature meant by the act of 1909 to tax this right—the transfer by grace of our law of the property having its situs here from the decedent to his representative—its enactment was futile as far as the estates of non-residents are concerned. We cannot attribute such futility to a legislative act."

The claim made by the State is vicious and highly technical and if sustained may yield great abuse.

Its claim does not take into consideration that the taxing act under review taxes the making of a conveyance by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death. Clearly the defendants must admit that the Federal Constitution should protect a non-resident decedent in his lifetime against a discrimination in this right.

Nor does the argument of the counsel for the defendants take into consideration the case where an irrevocable will is made upon consideration. Surely this is also a right protected by the Federal Constitution against discrimination.

POINT II.

THE WRONG PORTIONS OF THE LEGACIES, OR PORTIONS OF PROPERTY PASSING, WERE USED IN APPLYING THE GRADUATED RATES.

In assessing the tax at the graduated rate under the Amendment of 1914 (Chapter 151 P. L. 1914, page 267) instead of assessing the first forty-five thousand dollars, after allowing the exemption of five thousand dollars, at the primary rate, and the next one hundred thousand dollars at the next higher rate, and the next one hundred thousand dollars at the next higher rate, and the balance at the highest rate, we submit that the proper construction of the taxing act is that a deduction should first be made from the individual legacy passing of five thousand dollars, then the tax figured at the primary rate on the sum of fifty thousand dollars, then at the next higher rate on the sum of one hundred and fifty thousand dollars, then at the next higher rate on the sum of two hundred and fifty thousand dollars, and the balance figured at the highest rate.

The point here raised has been disposed of in so far as the Supreme Court is concerned in the case of *Torrance* v. *Edwards,* 99 Atl. Rep. 136 (Advance Sheet No. 3) and a copy of the opinion is appended to the state of the case.

In the opinion below in the case at bar the Court said, in disposing of this question:

> "It is insisted that in imposing the tax the decisions of the New York courts, construing a statute substantially similar in verbiage to the act in question, should have been followed by the comptroller. This contention, however, has been dealt with by this court in Hopper *v.* Edwards, 88 N. J. L. 471, 96 Atl. 667, in an opinion by Mr. Justice Trenchard, and quite recently in Torrance *v.* Edwards, 99 Atl. 136, in an opinion by Mr. Justice Kalisch; both adjudications being adverse to the claim urged here. That question, therefore, may be disposed of upon the doctrine of *stare decisis.*"

We are at a loss to determine how the court below arrives at the conclusion that the ruling in *Hopper* v. *Edwards* (*supra*) is adverse to that claim. That case substantially held that the construction of the courts of New York of a similar act, ours being only slightly changed therefrom, shall govern as to the construction of our act, saying, at page 476:

> "It is to be observed that the provision in question of our act of 1909 was taken from the New York act of 1892, and, upon well settled principles, it is presumed that the Legislature intended that such provision should be understood and applied in accordance with the construction previously placed thereon by the New York courts. Neilson *v.* Russell, *supra.*"

The effect of the Comptroller's method (referring to beneficiaries in the one per cent. class) is to tax five thousand dollars at one and one-half per cent., when it should be taxed at one per cent.; to tax fifty thousand dollars at two per cent. instead of at one and one-half per cent., and to tax two hundred and five thousand dollars at

three per cent. when it should be taxed at two per cent.

To illustrate the point raised, we will compare the figuring of the tax on a legacy of four hundred and fifty-five thousand dollars in the two classes, under the Comptroller's method and under the method here contended for.

The method adopted by the Comptroller affects legacies of forty-five thousand dollars and over. When the legacy is over four hundred and fifty-five thousand dollars the rate is three per cent. in the case of beneficiaries in the one per cent. class under the Comptroller's method of figuring and under the method of figuring here contended for, and in the case of beneficiaries in the two per cent. class it is the same. We have therefore given as an illustration the method of figuring dollars, first in the one per cent. class, being a legacy to a child, and, second, in the two per cent. class, being a legacy to a father.

Legacy of $455,000 passing to Child 1% class.

COMPTROLLER'S METHOD.

Rate.	Legacy.	Tax.
Exempt	$ 5,000	.....
1%	45,000	$ 450
1½%	100,000	1,500
2%	100,000	2,000
3%	205,000	6,150
Total	$455,000	$10,100

PROSECUTOR'S CLAIM.

Rate.	Legacy.	Tax.
Exempt	$ 5,000	.....
1%	50,000	$ 500
1½%	150,000	2,250
2%	250,000	5,000
3% on any balance	.....	.....
Total	$455,000	$ 7,750

Legacy of $455,000 passing to Father.
(2% Class.)

COMPTROLLER'S METHOD.

Rate.	Legacy.	Tax.
Exempt	$ 5,000	.....
2%	45,000	$ 900
2½%	100,000	2,500
3%	100,000	3,000
4% on balance	205,000	8,200
Total	$455,000	$14,600

PROSECUTOR'S CLAIM.

Rate.	Legacy.	Tax.
Exempt	$ 5,000	.....
2%	50,000	$ 1,000
2½%	150,000	3,750
3%	250,000	7,500
4% on any balance	.....	.....
Total	$455,000	$12,250

The New Jersey graduated tax section was adopted from the New York Act of 1911 (Chapter 732 of Laws of 1911, Sec. 221a).

The New Jersey Statute with reference to the graduated rate is P. L. 1914, pages 268-269.

A comparison of the wording of the New York Statute with the New Jersey Statute can be better made if we compare the pertinent parts of the section side by side:

NEW JERSEY ACT OF 1914.	NEW YORK ACT OF 1911.
"Property transferred to a father, * * * shall be taxed at the rate of	"Upon a transfer taxable under this article of property or any beneficial interest therein, of an amount in excess of the value of five thousand dollars to any father (etc.) * * * the tax on such transfer shall be at the rate of
Two per centum on any amount in excess of five thousand dollars, up to fifty thousand dollars;	One per centum on any amount in excess of five thousand dollars up to *the sum of* fifty thousand dollars.
Two 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 fifty thousand dollars up to *the sum of* two hundred and fifty thousand dollars.
Three 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 up to *the sum of* one million dollars.
Four per centum on all amounts in excess of two hundred and fifty thousand dollars."	Four per centum on any amount in excess of one million dollars."

A similar comparison could be made of the second class under each statute.

By this comparison it will be noticed that the only difference in the wording of the statutes is the use of the words "the sum of" in referring to the high sum of the class taxed at the given rate. "To the sum of fifty thousand dollars" is not different than "up to fifty thousand dollars." This difference cannot change the meaning, so we may assume that the acts are identical in meaning and should bear the same construction.

As our act was modeled after the New York Act, we must be held, upon a well settled principle, to have adopted the construction placed upon the New York Act previous to the passage of the New Jersey Act.

Clay v. *Edwards,* 84 N. J. L., (55 Vr.) 221.

Hopper v. *Edwards,* 96 Atl. Rep. 667 (1916).

Neilson v. *Russell,* 76 N. J. L. 655, at p. 656.

The matter in question first came before the New York courts in the case *In Re Jourdan's Estate* (1910), 70 Misc. Rep. 159, 128 N. Y. Supp. 728, construing the New York Act as amended by Chapter 706 of the Laws of 1910, Sec. 221.

> "No such tax shall be assessed upon property * * * transferred to a father * * * if the amount so transferred to such father * * * is the sum of five thousand dollars or less; but if the amount so transferred to a father * * * is over five thousand dollars the excess shall be taxable at the rate of one per centum."

providing for a graduated tax. The pertinent part of the section of the act with reference to the graduated tax is as follows:

> "Whenever any property, real or personal, or any beneficial interest therein which passes by any such transfer to or for the use of any person or corporation, shall exceed the amount of twenty-five thousand dollars over and above the exemptions hereinbefore provided the rate of taxation shall be as follows:
>
> "Upon all amounts in excess of the said twenty-five thousand dollars and up to and including the sum of one hundred thousand dollars, twice the primary rates;

"Upon all amounts in excess of the said one hundred thousand dollars and up to and including the sum of five hundred thousand dollars, three times the primary rates;

"Upon all amounts in excess of the said five hundred thousand dollars and up to and including the sum of one million dollars, four times the primary rates;

"Upon all amounts in excess of the said one million dollars, five times the primary rates."

The claims made in the Jourdan case were as follows:

COMPTROLLER'S CLAIM.

$ 5,000.00	exempt	0.00
25,000.00	at 1%	250.00
75,000.00	at 2%	1,500.00
400,000.00	at 3%	12,000.00
500,000.00	at 4%	20,000.00
1,141,000.48	at 5%	57,050.02
$2,146,000.48	Tax	$90,800.02

EXECUTOR'S CLAIM.

$ 5,000.00	exempt	0.00
25,000.00	at 1%	250.00
100,000.00	at 2%	2,000.00
500,000.00	at 3%	15,000.00
1,000,000.00	at 4%	40,000.00
516,000.48	at 5%	25,800.02
$2,146,000.48	Tax	$83,050.02

The Surrogate of Kings County sustained the contention of the executrix in the case hereinbefore referred to. Upon appeal therefrom, the Appellate Division of the Second Department by a divided court, three to two, held (151 Appellate Division 8) 135 N. Y. S. 172 in the pre-

vailing opinion by Judge Woodward that the Surrogate was in error and that his order be reversed. A dissenting opinion, concurred in by Judge Carr, was filed by Presiding Justice Jenks, favoring the affirmance of the order of the Surrogate, establishing the executrix's claim. On appeal to the New York Court of Appeals, the Court decreed the order of the Appellate Division be reversed and the decree of the Surrogate affirmed on the dissenting opinion of Presiding Justice Jenks, 206 N. Y. 653, 99 N. E. 1109.

In his opinion Justice Jenks states:

> "As between the surrogate and my associates ,I am inclined to adopt the conclusion of the surrogate. In order to declare that the maximum amount that is subject to only twice the primary rates is $75,000, that amount must not only satisfy the statute that it is 'in excess of the said twenty-five thousand dollars,' but the other requirement thereof, 'and up to and including the sum of one hundred thousand dollars.' This requirement is not met by $75,000 save by the construction that the words 'in excess' mean the *difference* between $25,000 and $100,000. It is well recognized that the expression 'in excess' may indicate the difference between two numbers. But the question is whether they were used to express this idea in this instance. In a foregoing part of this very section the Legislature has provided, 'but if the amount so transferred to a father, mother, widow or a minor child is over five thousand dollars the excess shall be taxable at the rate of one per centum,' etc. Then follows the provision heretofore quoted. Here is a plain direction that 'the excess' shall be taxable. There is no apparent reason, if the Legislature intended that only 'the excess' of $100,000 over the $25,000,

namely, $75,000, should be subject to twice the primary rates, that it would not have employed the same language to express the same idea. Certainly there would have been uniformity in expression if, for example, the Legislature had enacted, 'but if the amount transferred is over twenty-five thousand dollars the excess up to one hundred thousand dollars shall be taxable at twice the primary rates.' But instead of using such expression, or one synonymous, it departs to provide: 'Upon all amounts in excess of the said twenty-five thousand dollars and up to and including the sum of one hundred thousand dollars.' It is not the 'excess,' but upon 'all amounts in excess.' It is not the excess up to $100,000, or even all amounts in excess up to $100,000, but 'all amounts,' including 'the *sum* of one hundred thousand dollars.' And, then, a further provision reads, 'Upon all amounts in excess of the said one hundred thousand dollars,' so that the said $100,000 as theretofore used is not regarded as having expressed the limit, but as an amount which is subject to twice the primary rates only.

"As between the two constructions up for review, I think the words 'all amounts in excess' refer to any amount that is greater than, larger than and thus exceeds $25,000, up to and inclusive of the amount of $100,000."

The New York Act of 1911 having changed the wording of the Amendment of 1910, the same question was raised by the Comptroller as had been raised in the Jourdan case.

The question was raised *in the Matter of Herman Schwartz,* where the order of the Surrogate was affirmed in 156 App. Div. 931 on the dissenting opinion of Jenks, *P. J., in the Matter*

of Jourdan's Estate, 151 App. Div. 8, adopted by the Court of Appeals 206 N. Y. 653. The Schwartz case was decided in the Court of Appeals June 20, 1913, affirming Appellate Division, First Department, order of May 2, 1913 (reported 141 N. Y. Supp. 349), and is reported in 209 N. Y. 537, 102 N. E. 1113.

The only opinion in the Schwarz case is that of Surrogate Fowler which is reported in N. Y. L. J. of September 19, 1912, as follows:

> "The decision of the Court of Appeals in the Matter of Jourdan (206 N. Y. 653), would seem to authorize the computation of tax assessable under chapter 732 of the Laws of 1911, as follows: One per cent. on the first $50,000 of taxable interest, 2 per cent. on the next $250,000, 3 per cent. on $1,000,000 and 4 per cent. on any amount in excess of $1,000,000. The decision of this court in the Matter of Lewis (Surr. Decs., 1912, p. 573), adopting a different method of computation, was made after the Appellate Division of the Second Department had reversed the order of the surrogate in the Matter of Jourdan (70 Misc. 59), and before the Court of Appeals had reversed the order of the Appellate Division and affirmed the order of the surrogate. While the language of Sec. 221a of chapter 732 of the Laws of 1911 is not exactly similar to that employed in Sec. 221 of chapter 706 of the Laws of 1910 (under which the decision of the Court of Appeals in the Matter of Jourdan was made), it is sufficient so to make that decision controlling in regard to the computation of tax under the law of 1911. Besides, any doubt as to the meaning of a statute imposing a tax should be resolved in favor of the citizen."

The Supreme Court's ruling in Torrance v. Edwards.

In the case referred to the Supreme Court decided in favor of the Comptroller's method of assessing the tax on the following grounds:

First.

To adopt the construction of the New York courts requires a twisting of the natural sense of the language of our act from its plain import.

Second.

It is fair to presume that the legislature adopted the California act and its construction in that State, which construction is similar to that adopted by the New Jersey Comptroller.

Third.

That there is no doubt from the reading of the act that the words "in excess of" and "up to" refer to the difference between the amount stated, and the next higher amount after deducting the first amount stated.

The first and third contentions of the Supreme Court may be considered together.

The opinion makes the mistake of presuming the rule "that the construction adopted by the highest courts of another state was adopted by our legislature when copying the act," refers to the opinion of the foreign court. The opinion is not a part of the foreign record. The judgment construing the act is what counts. The foreign court might have an opinion which we might think erroneous, but the legislature of our State when adopting the act does not adopt the opinion, they are presumed to adopt the construction of the act as construed by the courts

of the foreign State. The Supreme Court quarrels with the construction of the earlier New York act in the Jourdan case, but the later act and the one in effect when our act was passed and after which ours is practically patterned was construed in the Schwartz case as being in accordance with the construction for which we contend. This construction has been sustained by the highest court of New York and had been sustained at the time of the adoption of our act, and whether or not a better opinion might have been written does not change the case. The fact that the Court cannot agree with the opinion in the Jourdan case as to the earlier New York act is no ground for discarding the rule of construction for which we contend.

The construction contended for by the appellants and the one placed upon the New York Satute is the proper construction to be placed on the New Jersey Statute.

Nothing need be added to the argument of Presiding Justice Jenks in the Jourdan case. The sums referred to in the New Jersey act do not apply to the whole legacy. The statute, when it says 3 per centum on any amount in excess of $150,000 up to $250,000, does not mean that if a legacy is between either of these sums the entire legacy is taxed at 3%. Neither the Comptroller nor the Attorney-General claims this to be a fact. They claim that the $150,000 must be taken from the $250,000. Clearly this is not so. The sums referred to in the statute are the portions of the legacy taxed. The requirements of the provisions are that the portion taxed at 3% must be in excess of the $150,000, taxed at the lower rate, and that sum of the legacy beyond that taxed at the previous

rate up to $250,000 is taxed at 3%. In order to adopt the construction claimed by the Comptroller it is necessary to take $5,000 from the first $50,000. Clearly our legislators did not mean to do this. They meant to grant an exemption of $5,000 and then tax the first $50,000 at 2%. It is so unusual to pick out the sum of $45,000 to tax at the primary rate that it gives us a clear indication of what the legislature had in mind.

The very reference to the division of amounts leads to the conclusion that the Comptroller's method is the wrong method to adopt. Let us compare the methods.

	Comptroller's Method	Appellants' Claim
Exempt	$ 5,000	$ 5,000
1%	45,000	50,000
1½%	100,000	150,000
2%	100,000	250,000
3%	Excess	Excess

The figures used by the Comptroller are illogical and are not round numbers such as the usual grading in a taxing act.

The word "excess" as referred to in the statute means that every part of the $50,000 must be over $5,000. "Any amount" referred to that part of the legacy above the previous part taxed, and the words "in excess of" and "up to" are used because the limit of the legacy may be reached before the limit of the amount taxed at the higher rate is reached.

All doubts as to the construction of a taxing act must be resolved in favor of the taxpayer.

The Supreme Court in *Torrance* v. *Edwards, supra,* recognized the application of this rule. The opinion stated, at page 137:

> "If we entertained a doubt as to the meaning of the language of the act, as expressed by the Legislature, it would be incumbent upon us, in dealing with a statute imposing a tax, to resolve that doubt in favor of the taxpayer."

The Court then holds that it is not disturbed by any doubt.

The rule which the Court recognizes is clearly expressed and the reason for it definitely set out by Justice Cooley in his work on taxation, where he says, at page 199:

> "The question regarding the revenue laws has generally been whether or not they shall be construed strictly. The general rules of interpretation require this in the case of statutes which may divest one of his freehold by proceedings not in the ordinary sense judicial, and to which he is only an enforced party. It is thought to be only reasonable to intend that the Legislature in making provision for such proceedings would take unusual care to make use of terms which would plainy express its meaning, in order that ministerial officers might not be left in doubt in the exercise of unusual powers, and that the citizen might know exactly what were his duties and liabilities. A strict construction in such case is reasonable, because presumptively the Legislature has given in plain terms all the power it has intended should be exercised. It has been very generally supposed that the

like strict construction was reasonable in the case of tax laws."

The same rule has been adopted in the Federal and State Courts.

Earnshaw v. *Cadwalader,* 145 U. S. 247, 262; 36 L. Ed. 693.

Treat v. *White,* 181 U. S. 264; 45 L. Ed. 853.

United States v. *Wigglesworth,* 2 Story 369; Fed. Cas. No. 16,690.

In Re Vassar's Estate, 127 N. Y. 1, 12; 27 N. E. 394, 397.

In Re Stewart's Estate, 131 N. Y. 274, 282; 30 N. E. 184, 186.

In Re Enston, 113 N. Y. 174; 21 N. E. 87.

Hart v. *Smith,* 159 Ind. 182, 190; 64 N. E. 661, 664.

Combined Saw & Planer Co. v. *Flournoy,* 88 Va. 1029; 14 S. E. 976.

Appeal of Eastburn, 2 Chest Co. Rep. 241 (Pa.); *Id.* 243.

Dos Passos on Inheritance Tax, 2d Ed. page 74, par. 32.

Cullen's Estate, 142 Pa. St. 18; 21 Atl. 781.

Hale's Estate, 161 Pa. St. 182; 28 Atl. 1071.

Dean v. *Charlton,* 27 Wis. 522.

National Loan, etc. Co. v. *Linn County,* 138 Iowa 11; 115 N. W. 480.

In view of the exhaustive reasoning in the dissenting opinion of Justice Jenks in the Jourdan case, *supra,* the subsequent reversal of the Appellate Division by the New York Court of Appeals and the affirmance of the Surrogate's decree on the opinion of Justice Jenks, wherein the same phraseology as in the case at bar was under examination, it need not be argued here that the wording of the New Jersey statute does

raise a substantial doubt such as would give the appellants herein the benefit of the rule of statutory construction laid down in the extract from Cooley and in the cases cited. Evidence of a professional pen in the phraseology of the New Jersey statute is to be found in every sentence. This statute was drawn painstakingly and with much attention to detail. Had there been present in the mind of the draughtsman and the Legislature the desire to tax according to the method adopted by the Comptroller, they would unquestionably have set out in plain unmistakable English that the first $5,000 was to be exempt, and that the next $45,000, or any part thereof, should be taxed at 1%; that the next $100,000, or any part thereof, should be taxed at 1½%, and so on. Statutes of this character cannot be construed so as to extend their meaning beyond the clear import of the words used. When the import is not clear, it is submitted that the taxpayer gets the benefit of the doubt.

The California Statute and the decisions thereunder do not apply.

We now come to a consideration of the second point set out on page 81, where in the Supreme Court's ruling in *Torrance* v. *Edwards* was being considered.

The Supreme Court in the opinion in *Torrance* v. *Edwards* refers to the fact that the California Statute of 1905 (Statutes of California 1905, page 341) bears a close resemblance to the New Jersey Act and therefore it would be equally fair to presume that the provisions of the California Statute relating to the graduated tax were used as a pattern for our act, and further suggests that the New York Act of

1911 may have been copied from the California Act. The opinion then states:

> "From an examination of the California cases it appears that the same construction was put on the provisions in its statute as was exemplified by the defendant in his computation on the New Jersey statute. See *In re Bull's Estate,* 153 Cal. 715, 96 Pac. 366 (1908); *In re Timkin's Estate,* 158 Cal. 51, 109 Pac. 608 (1910)."

Before discussing these two cases, which we think do not apply, it will be necessary to have an abbreviated reading of the California Act of 1905, giving the parts which apply in the same manner as the comparisons which we have made between the New York Act and the New Jersey Act. Abbreviated, the California Act of 1905 is as follows:

Sec. 1. All property which shall pass by will, etc., shall be subject to a tax hereinafter provided for, etc. The tax so imposed shall be upon the market value of such property at the rates hereinafter prescribed and only upon the excess over the exemptions hereinafter granted.

Sec. 2. When the property * * * so transferred exceeds in value the exemption hereinafter specified and shall not exceed in value $25,000 the tax hereby imposed shall be (1) Where the person * * entitled * * * shall be the husband * * * at the rate of one per cent. of the clear value of such interest in such property.

(2) etc. (covering other relationship.)

Sec. 3. The foregoing rates in Section 2 are for convenience termed the primary rates. When the * * * value of such property * * * exceeds $25,000, the

rates of tax upon such excess shall be as follows:

(1) Upon all in excess of $25,000 and up to $50,000 one and one-half times the primary rate.

(2) Upon all in excess of $50,000 and up to $100,000 two times the primary rate.

(3) Upon all in excess of $100,000 and up to $500,000 two and one-half times the primary rate.

(4) Upon all in excess of $500,000 three times the primary rate.

Sec. 4. (2) Property of the clear value of $10,000 transferred to a widow or to a minor child of the decedent, and of $4,000 transferred to each of the other persons described in the first sub-divisions of Section 2 shall be exempt.

These sections must, of course, be read together, and when read together they simply mean—say in the case of a widow inheriting—that when the legacy exceeds $10,000 and does not exceed $25,000, it, the legacy is taxed at the primary rate of 1% but the $10,000 of the legacy up to $25,000 is exempt, and this means that the $15,000 is taxed at 1% where the legacy is $25,000; when the value of the property passing (this, of course, means the legacy) exceeds $25,000, the rate on the excess of the legacy over the $25,000 and up to $50,000 is taxed at one and one-half times the primary rate.

The decisions in the Bull and Timkin cases cleared up two questions which arose under these sections, neither of which was the question presented here.

In the Bull case (*supra*) the only question decided was that the fact that Section 2 referred to a legacy which exceeded $10,000 and did not

exceed $25,000 did not mean that when the legacy was over $25,000 Section 2 did not apply so as to exempt $25,000 of the legacy from tax and leave only the excess over the $25,000 to be taxed under Section 3 at the rates above the primary rate, but what was decided was that Sections 2 and 3 must be read together so that the tax at the primary rate was still imposed on the $15,000 of the first $25,000 of the legacy.

In the assessment of the tax in the Bull case, the State allowed an exemption of $10,000 (the legatee being a widow and entitled to that exemption) and taxed $15,000 of the first $25,000 of the legacy at the rate of 1%, or $150. The only question litigated in the case was whether or not this $150 should be included in the tax, the widow claiming that the tax started to be assessed at the rate of 1½% on the excess above $25,000.

In the Timkin Estate the exemption was $4,000 instead of $10,000, and was deducted from the legacy and the tax then computed on the first $25,000 at 1%, and so on, at the higher rates. The State contended before the Appellate Court that the $4,000 should be taken from the first $25,000 and the balance, or $21,000, taxed at the 1% rate, and the Appellate Court sustained the contention of the State.

Section 2 provides for the levying of a tax where the property passing exceeds the value of $25,000, and refers to the property passing (meaning the legacy), and fixes the rate at 1% on the property taxed. Section 3 provides that where the value of the property passing exceeds $25,000 (and it will be noted that it does not refer to the property taxed but does refer to the property passing, viz., to the legacy) the rate upon the excess over $25,000, viz, over the

$25,000 of the legacy is taxed at the next higher rate, and so on.

The exemption, however, is provided for by Section 4. The second paragraph of that section provides that $4,000 of the first $25,000 of the legacy is exempt. The distinction between the Timkin case and the one under consideration here is that the California statute refers to the exemption being deducted from a portion of the legacy which is taxed at a given rate. The exemption in our case is from the legacy itself and the rate and tax applies to the excess of property passing.

POINT III.

AN EXEMPTION OF FIVE THOUSAND DOLLARS, ALLOWED BY THE STATUTE, SHOULD BE DEDUCTED FROM THE PROPORTION OF THE PROPERTY PASSING TO EACH BENEFICIARY WHICH IS TAXABLE, IN THE CASE OF A NON-RESIDENT, AND NOT DEDUCTED FROM THE ENTIRE LEGACY PASSING UNDER THE WILL OF A NON-RESIDENT WITHOUT REGARD AS TO WHAT PART OF THE LEGACY IS PROPERTY THE TRANSFER OF WHICH IS TAXABLE IN THIS STATE.

The manner adopted by the Comptroller in figuring the tax in the manner hereinbefore referred to, under the last paragraph of Section 12 of the Act, is to deduct the exemption of five thousand dollars from the entire legacy and figure the tax upon the balance of the legacy. The exemption should be deducted from that part of the legacy which represents the proportion that the New Jersey assets are of the entire estate.

The difference in the claims may be illustrated as follows:

By taking a case where a legacy of $50,000 is left to a father by a non-resident. One-tenth of the entire estate is in New Jersey securities and the balance in property not taxable in this State. The respective methods of assessing the tax would be as follows:

COMPTROLLER'S METHOD.

	Legacy	Tax
Exemption	$ 5,000	....
2% on	45,000	$900
Total	$50,000	$900

One-tenth being the percentage of the whole estate in New Jersey, the tax would be one-tenth, or $90.

PROSECUTOR'S METHOD.

Legacy of $50,000, one-tenth in New Jersey assets, or $5,000
Exemption 5,000
No Tax.

Chapter 151 P. L. 1914, page 267, provides for the exemption of five thousand dollars. At page 268 the statute reads:

> "Property passing to churches, etc. * * * shall be exempt from taxation under this act and also property to the amount of five thousand dollars passing to a father, mother, husband, wife, child or lineal descendant * * * shall be exempt from taxation under this act, but no other exemptions of any kind or character shall be allowed. * * * Property transferred to a father (etc.) * * * shall be taxed at the rate of two per centum on any amount in excess of five thousand dollars up to fifty thousand dollars."

From this reading of the act it is very clear that the tax is levied upon the taxable property passing to each individual beneficiary. The State of New Jersey does not have any jurisdiction or control over property situate in another State, in the case of non-residents. To pro rate the exemption over the entire bequest, regardless of what proportion of it comprises New Jersey assets, will do violence to the language of the act and would be contrary to the principle on which a legacy, succession or transfer tax is based.

Under the New Jersey statute it is a tax upon the privilege of passing title to property on the death of its owner. In order to be valid it must be levied by the authority that conferred the privilege upon the property which passes by virtue of the privilege. If there by an exemption it must exempt the transfer of property which the State can tax.

The wording of our exemption while not specifically the same as the New York Act of 1892 is of the same purport and was taken therefrom, the wording in the New York Act, Chapter 399, Laws of 1892, Sec. 2, being

> "When the property or any beneficial interest therein passes by any such transfer to or for the use of any father * * * such transfer of property shall not be taxable under this act, unless it is personal property of the value of ten thousand dollars or more, in which case it shall be taxable under this act at the rate of one per centum upon the clear market value of such property."

We have inquired from the taxing authorities of the State of New York as to the practice in that State and find that the construction adopted

in the State of New York under the foregoing and later acts has been that contended for here by appellants. They have no judicial decision on the subject.

In the State of Massachusetts, the act (Statutes of 1909, c. 490, pt. 4, sec. 1, p. 483) providing for exemption reads as follows:

> "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 * * * to any person (the act then states the exceptions as to relationship and designates them by class). * * * 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. * * * 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 (etc.) * * * unless its value exceeds ten thousand dollars, * * * shall be subject to the provisions of this act."

The Supreme Judicial Court of Massachusetts in the case of *Attorney-General* v. *Barney* (1912), 211 Mass. 134, 97 N. E. Rep. 750, held that the word "estate" and the words "bequest, devise and distributive share" in reference to the exemption applied to the amount passing to the beneficiary and permitted an exemption to the full amount in favor of each beneficiary out of the share that was distributable from the Massachusetts assets.

There cannot be any doubt of the just construction of the proviso for exemption. This State is only taxing the property passing pursuant to the laws of our State, and if so in or-

der to treat non-residents on an equal basis with residents the full exemption should be allowed against the amount of New Jersey property, either actually or theoretically, toward the payment of the legacy taxed.

POINT IV.

THE TRANSFER TAX ACT, IN SO FAR AS THE CASE OF NON-RESIDENT DECEDENTS IS CONCERNED, IS UNCONSTITUTIONAL UNDER THE NEW JERSEY STATE CONSTITUTION.

The right of the State of New Jersey to impose a transfer tax on the transfer of stock in a New Jersey corporation comes from its jurisdiction over the corporation.

Being personal property owned by a non-resident, it is not necessary to appeal to our laws, relating to wills or distribution, in order to transfer the title to the stock of a non-resident who dies. The right to tax the transfer, therefore, comes from the control of the State over the transfer of the stock on the books of the corporation.

The act governing this right is the act under which the corporation is incorporated. All of the New Jersey corporations whose stock the decedent owned are corporations incorporated under the General Corporation Acts of 1875 and 1896. These acts provide for the transferring of the shares of stock in the corporation. (See Sec. 20, Comp. Stat. 1610.) The section providing for such transfer sets forth the manner of transfer and the section is part of the contract between the stockholders and the State. To impose this tax not as a tax under the right

to tax succession to real or personal property is to impose a pure and simple tax on the transfer of the stock in a corporation upon its books. This is the limit of the power of this State, and, therefore, applying it to the taxing acts under review, we submit that the taxing act violates our State Constitution in the following particulars:

It violates Art. IV, Sec. 7, Par. 3, by impairing the obligation of contracts.

It violates Art. IV, Sec. 7, Par. 4, by reason of its title being improper, not being an amendment of the Corporation Act, and by reason of its trying to make the Corporation Act part of the taxing act.

It violates Art. IV, Sec. 7, Par. 9, by reason of being a special act applying only to non-residents in taxing under the authority to which we maintain the State is limited.

It violates Art. IV, Sec. 7, Par. 12, by reason of its being an assessment for taxes not under general law, or by uniform rule, or according to true value.

CONCLUSIONS.

Under our contentions considered under Point I, it will be urged by the State that if the last paragraph of Section 12 of the Taxing Act establishes an unconstitutional method of computing the tax or that it is inconsistent with and repugnant to Section 1 as amended in 1914, there is no difficulty in setting aside that last paragraph of Section 12 and computing the tax in the method contended for by the appellants.

But the inability to sustain the tax in cases of non-residents in so far as a tax against the

relations other than collateral is concerned, by setting aside the statutory method of computation contained in Paragraph 12, comes from the fact that the Act of 1909 contains this method of computation objected to and that act, standing as it does, previous to the Amendment of 1914 is not necessarily unconstitutional, as under a flat rate it does not discriminate. The method of computation here objected to is contained therein and as applied to Sec. 1 of the Act of 1909, as then existing, residents and non-residents would be taxed under that method equally. It is only when the first section is amended by the Act of 1914, which provides for the taxing of different classes of beneficiaries and provides for taxing these classes at different rates and upon ascending scale, that the method of computation is rendered invalid.

The new first section as contained in the Amendment of 1914 if in force against non-residents other than those in the 5% class is unconstitutional by reason of the fact that the method of figuring must be as stated in the taxing act to which it is an amendment; the act being valid before the passage of the amendment, the amended section 1 is the section that must fall. Therefore the tax under review, in so far as it affects the widow, son and grandchildren, must be set aside.

WE RESPECTFULLY SUBMIT THAT SECTION 1 OF THE TAXING ACT AS AMENDED IN 1914 SHOULD BE DECLARED UNCONSTITUTIONAL FOR THE REASONS HEREINBEFORE STATED, AND THE TAX IN THIS CASE AGAINST THE WIDOW AND CHILD AND GRANDCHILDREN OF THE DECEASED SHOULD BE SET ASIDE.

WE FURTHER SUBMIT THAT FAILING IN OUR CONTENTION AS TO THE CONSTITUTIONALITY OF SECTION 1, THE TAX SHOULD BE COMPUTED AS SET FORTH AT THE HEAD OF THIS BRIEF, AND THAT THE METHOD PROVIDED FOR BY THE LAST PARAGRAPH OF SECTION 12 SHOULD BE HELD UNCONSTITUTIONAL AND THE TAX SHOULD BE REASSESSED IN ACCORDANCE WITH THE VIEWS HEREIN SUBMITTED.

COULT & SMITH,
Attorneys for Appellants.

WILLIAM A. SMITH,
EDWARD DE WITT (of the New York Bar),
Of Counsel.

LIST OF CASES CITED.

New Jersey Court of Errors and Appeals

MARCH TERM, 1917.

LAWRENCE MAXWELL, *et al.*, executors of the last will and testament of James McDonald, deceased, *Prosecutors-Appellants,* *vs.* EDWARD I. EDWARDS, Comptroller of the Treasury of the State of New Jersey, and WILLIAM T. READ, State Treasurer, *Defendants-Respondents.*	*On Appeal from Supreme Court.*

Brief of Respondents.

The Transfer Tax Assessed.

The writ in this case brought before the Supreme Court the assessment of transfer tax against the estate of James McDonald by reason of the succession through the will of the said James McDonald, a non-resident decedent, to the ownership of stock in the Standard Oil Company and certain other New Jersey corporations valued at $1,114,965.

James McDonald was a citizen of the United States and died resident in the District of Columbia on January 13, 1915, leaving a will and codicil which were duly admitted to probate before the Supreme Court of the District of Columbia, and letters testamentary thereon issued to Lawrence Maxwell and the Fulton Trust Com-

pany of New York, the prosecutors herein, who have duly qualified and are now acting (Record, page 28, Stipulations II and III).

The will, with the codicil, is set forth in full on pages 11 to 22 of the Record.

The decedent left no property of any kind in this State except certificates of stock in seven corporations organized under the laws of New Jersey (Record, page 28, Stipulations IV and X).

Of the executors one, Lawrence Maxwell, is a citizen and resident in the State of Ohio, and the other, Fulton Trust Company of New York, is a corporation organized and existing under the laws of the State of New York (Record, page 29, Stipulation VII).

None of the beneficiaries named in the will resided in this State at the time of the death of the decedent (Record, page 30, Stipulation VIII).

The details of the stocks occasioning the assessment and of the tax imposed thereon appear in the Record, pages 4 and 5.

There is a typographical error on page 5, in that the "Deductions" are stated to be $279,-813.17. This figure should be $270,813.17.

The tax was affirmed by the Supreme Court in an opinion by Mr. Justice Minturn (Record, page 45).

The total amount of the tax assessed was $29,071.68. The method by which the tax was levied and assessed is disclosed by the Comptroller's return to the writ (Record, pages 30, 31 and 32, Stipulation IX).

The appellants' brief erroneously states under Point I, page 17, that the difference in tax as between the method of the statute followed by the

Comptroller, and the method advanced by appellant under that point is $8,424.53. This amount is the amount which appears in their calculation at pages 5-7, and includes in the difference the result of the application by the appellant of the graduated rate as argued in their brief under Point II, page 71. If the graduated rate is applied as under the rule of *Torrance* v. *Edwards,* supported in this under Point III, the difference in result, instead of $8,424.53, is $6,860.84.

The Controlling Statutes.

This tax was imposed pursuant to authority of Chapter 228 of the Laws of 1909, 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," approved April 20, 1909 (P. L. 1909, 325), as amended by Chapter 151 of the Laws of 1914, approved on April 9, 1914 (P. L. 1914, page 267).

The brief for the prosecutors treats of the Law of 1909 as still further amended by Chapter 392 of the Laws of 1915, approved April 23, 1915 (P. L. 1915, page 745). But such last amendment did not receive the signature of the Governor until the 23rd day of April, 1915, nearly three months after the death of the decedent on January 13, 1915.

The final clause of the amendment of 1914 is not changed by the amendment of 1915, and so far as the property of a non-resident decedent is liable to transfer tax such liability is not affected in rate by Chapter 392 of the Laws of 1915. It is not perceived that this last amendment has any bearing on the dis-

cussion of the assessment of transfer taxes under the McDonald will.

The Act of 1909, *prior to amendment,* imposed a transfer tax at the rate of five per centum per annum on the clear market value, if of $500 or over, upon the transfer of any property, real or personal, by will or the intestate laws of this State, in trust or otherwise, to persons or corporations in the following cases:

First. When the transfer was by will or by the intestate laws of this State from any person dying seized or possessed of property while a resident of the State.

Second. When the transfer was by will or intestate law, of property within the State, and the decedent was a non-resident of the State at the time of his death.

Third. When the transfer was of property made by a resident or non-resident, when such non-resident's property was within this State, by deed, grant, bargain, sale, or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect, in possession or enjoyment, at or after such death.

Fourth. When any person or corporation came into the possession or enjoyment, by a transfer from a resident or non-resident decedent when such non-resident's property was within this State, of an estate in expectancy of any kind or character which was contingent or defeasible, transferred by an instrument taking effect after the passage of the act, or of any property transferred pursuant to a power of appointment contained in any instrument taking effect after the passage of the act.

It will be noted by reference to the title of the act that it applies to the transfer of prop-

erty of *resident* and *non-resident* decedents, and that in defining the conditions under which the tax was to be imposed, above set forth as First, Second, Third and Fourth, the first refers to *transfer by will or by the intestate laws of this State* from any person dying seized or possessed of property *while a resident of the State;* the second when the transfer is *by will or intestate law of property within this State* and the decedent was a *non-resident of the State* at the time of his death; the third relates to *the transfer of property made by a resident or a non-resident, when such non-resident's property is within this State,* in the lifetime of such resident or non-resident but intended to take effect, in possession or enjoyment, after death; the fourth refers to the coming into the enjoyment of estates in expectancy by *transfer from a resident or non-resident decedent when such non-resident decedent's property is within this State.*

The act, therefore, in title and definition emphasizes the distinction between the property of resident and non-resident decedents as well as the intention to tax transferees of the property of both.

As to the property of resident decedents the act by its language reaches every transfer, by will or by the intestate laws of this State, from any person dying seized or possessed of the property while resident.

As to the property of non-resident decedents the act by its language reaches every transfer, by will or intestate law (of this or any state or country), of property within this State at the time of the death of such non-resident decedent.

As to the property of resident decedents, the test of liability to the tax is the transfer by will or the intestate laws of this State; as to the property of non-resident decedents, the test of liability to the tax is the transfer by will or intestate law of property having its situs within this State at the time of the death of the non-resident decedent.

The distinctions of the original Act of 1909, between transfers of the property of resident and non-resident decedents as well as the legislative intention to tax transferees of both, were not lessened by the amendments of 1914.

The first amendment of 1914 (P. L. 1914, p. 91) did not change the definitions of the property of either resident or non-resident decedents made subject to tax under the original Act of 1909, but introduced the taxation of direct inheritances for the first time in New Jersey. The ratio plan of supplying the rate to transfers of property in this State of non-resident decedents, in section 12, was changed (except verbally) only by including in that term of the proportion relating to the entire estate of the non-resident decedents, his *real* property outside of this State, in apparent conformity to the suggestion of Mr. Justice Swayze in *Beers* v. *Edwards,* 84 N. J. L. 32.

The second amendment of 1914, (P. L. 1914, 267) redrafted the second sub-division of section 1, *confining the taxable property within this State of non-resident decedents to real estate, tangible personal property and stocks of New Jersey corporations and of National Banks located within this State.* An appropriate change in the language of the 12th section was at the same time introduced, making one term of the proportion for the applica-

tion of the ratio method the "taxable property" within this State of the non-resident decedent.

The amendments of 1914 did not change the basic theory of the scheme of the Act of 1909. A more particular analysis of the changes wrought by the last amendment and their effect will be found later in this brief, which, to avoid repetition, may be omitted here.

The tax imposed by the original Act of 1909 was a straight tax of five per centum upon the clear market value of the property made liable, but, by exemption clauses, transfers to certain charitable corporations and father, mother, husband, wife, child or children, or the lineal descendant thereof, brother or sister, or the wife or widow of a son, or the husband of a daughter, were excluded. The act was in effect, so far as applicable to natural persons, confined to collaterals and strangers, as had been all prior acts in this State from the original one in 1892. These acts have been the subject of much litigation, both as to matter of form and substance, in cases arising prior to the amendments of 1914.

Grossman v. *Hancock,* 58 N. J. L., 139.

In re Hartman's Estate, 70 N. J. Eq., 664.

Neilson v. *Russell,* 76 N. J. L., 27, 655, 131 Am. St. 673, 19 L. R. A. (N. S.) 887.

Dixon v. *Russell,* 78 N. J. L., 296, 79 N. J. L., 490.

Tilford v. *Dickinson,* 79 N. J. L., 302, 81 N. J. L., 576.

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

Sawter v. *Shoenthal,* 81 N. J. L., 197, 83 N. J. L., 499.

Beers v. *Edwards,* 84 N. J. L., 32.

Carr v. *Edwards,* 84 N. J. L., 667.
Senff v. *Edwards,* 85 N. J. L., 67.
Hopper v. *Edwards,* 88 N. J. L. 471.

From these litigated cases and other controlling decisions we may authoritatively conclude for the purposes of the present discussion:

(1) That the tax imposed by the Act of 1909 and its amendments, is not a property tax, and, therefore, its imposition or collection is in no way controlled by the provision of the State Constitution requiring that property shall be assessed for taxes under general laws and by uniform rules, according to its true value.

Neilson v. *Russell,* 76 N. J. L. 27, 33, 37, (Garrison, *J.*)
S. C., on error, 76 N. J. L., 655, 656, 658, (Swayze, *J.*)
Eastwood v. *Russell,* 81 N. J. L., 672, (Voorhees, *J.*)
Howell v. *Edwards,* 88 N. J. L., 134, (Kalisch, *J.*)
Magoun v. *Illinois Trust & Savings Bank,* 170 U. S., 283, 42 L. ed. 1037.

(2) That the tax imposed by the Act of 1909 and its amendments is a tax upon the succession to property and effective against all property designated in the law which may be subject to the sovereign authority of this State, either by reason of the residence of the decedent or the situs of the property.

Neilson v. *Russell,* 76 N. J. L. 27.
Dixon v. *Russell,* 78 N. J. L. 296.
Hopper v. *Edwards,* 88 N. J. L. 471.
Blackstone v *Miller,* 188 U. S. 189, 47 L. ed. 439.

Kinney v. *Treasurer,* 207 Mass. 268, 369, 93 N. E. 586, 587, 35 L. R. A. (N. S.) 784, Ann, Cas. 1912 A, 902.

(3) That the transfer of property, whether real or personal, of non-resident decedents, the situs of which is without this State, as situs is defined by the foregoing cases, may not be lawfully subjected to a tax of the character imposed by this act.

Neilson v. *Russell,* 76 N. J. L. 655.
Beers v. *Edwards,* 84 N. J. L. 32.

(4) That the tax imposed by the act and its amendments is a tax upon the succession by takers of the property, of resident or non-resident decedents, whether the succession is to the whole estate as a universal succession, or to the estate in New Jersey as a universal succession of the New Jersey executor or administrator, or the singular succession of a devisee or legatee, either under intestate laws or testamentary disposition, and that the provisions for payment from the estate through executors or administrators are for convenience and security of collection by the State.

Carr v. *Edwards,* 84 N. J. L. 667.
Senff v. *Edwards,* 86 N. J. L. 68.

(5) That the ascertainment of the tax upon the transfer of the property, real or personal, of non-resident decedents, the situs of which is in this State, by a proportional formula based upon the ratio of the property in this jurisdiction, or such part of it as the State elects to tax, to the entire estate of the non-resident decedent, does not subject the property of such non-resident without this State to the tax under the law, but is a lawful and appropriate method of ascertaining the amount

of the tax imposed by the act and its amendments upon the transfer of property of non-resident decedents within the jurisdiction of this State.

Carr v. *Edwards,* 84 N. J. L. 667.

(6) That the title to the Act of 1909 is sufficient to meet constitutional requirements, whether the tax imposed by the act and its amendments be regarded, as applicable in particular cases, wholly as succession tax or in part as succession tax and in part as legacy tax.

Sawter v. *Shoenthal,* 83 N. J. L. 499.
Carr v. *Edwards,* 84 N. J. L. 667.

These propositions are abundantly supported by the decisions of the courts of other states and of the United States. We may profitably mention the following in addition to those cited at other points in this brief:

Matter of White, 208 N. Y. 64, 101 N. E. 793, 46 L. R. A. (N. S.) 714, Ann. Cas. 1914 D, 75.

In re Blackburn's Estate, (Mont.) 152 Pac. 31.

Welch v. *Burrill,* (Mass.) 111 N. E. 774.

In re Peterson's Estate, (Ia.) 151 N. W. 66, L. R. A. 1916 A, 469.

State v. *Probate Court,* 128 Minn. 371, 150 N. W. 1094, L. R. A. 1916 A, 901.

In re Magnes' Estate, 32 Colo. 527, 77 Pac. 853.

Dixon v. *Ricketts,* 26 Utah 215, 72 Pac. 947.

Kochersperger v. *Drake,* 167 Ill. 122, 47, N. E. 321, 41 L. R. A. 446.

State v. *Henderson,* 160 Mo. 190, 60 S. W. 1093.

Pullen v. *Wake County Comm.,* 66 N. C. 361.

Strode v. *Comm.,* 52 Pa. 181.

Eyre v. *Jacob,* 14 Grat. 422, 73 Am. Dec. 367.

State v. *Dalrymple,* 70 Md. 294, 17 Atl. 82, 3 L. R. A. 372.

Rodman v. *Comm.,* 130 Ky. 88, 113 S. W. 61, 33 L. R. A. (N. S.) 592.

Argument.

The appellants as prosecutors below alleged twenty-six reasons against the validity of the assessment under attack, all of which are now renewed as grounds of appeal (Record, pp. 54-60.)

Some of these are founded in alleged conflict of the statutes with the United States Constitution, some in alleged conflict with the State Constitution, and some are aimed at the Comptroller's method of computing the tax.

I.

The legislation attacked is not in conflict with any provision of the Constitution of the State of New Jersey.

The brief of the appellants seems to press the charge of conflict with the State Constitution only under point IV on page 94. While this point does not specialize by its capital headlines, it opens with a statement that the right of the State of New Jersey to impose a transfer tax on the transfer of stock in a New Jersey corporation comes from its jurisdiction over a corporation, and concludes with four different allegations of violations of particular

paragraphs of Section 7 of Article IV. of the State Constitution in language equivalent to a reiteration of certain of the Reasons, and grounds of appeal.

Reasons 12, 13 and 14 and Grounds of Appeal specifically refer to a defect in the title of the Act of 1909, but the brief below and in this Court apparently abandons these reasons, probably because of the decisive effect of the decisions in *Sawter* v. *Shoenthal* and *Carr* v. *Edwards, supra.*

There seems to be no substantial basis for the position that the right of the State of New Jersey to impose a transfer tax on the transfer of stock in a New Jersey corporation is at all affected by the provisions of the general corporations acts of 1875 and 1896.

The shares of capital stock of corporations are personal property, having their situs in this State.

Amparo Mining Co. v. *Fidelity Trust Co.*, 75 N. J. Eq., 555; affirming 74 N. J. Eq., 197.

Andrews v. *Guayaquil & Quito Ry. Co.*, 69 N. J. Eq., 211; affirmed on opinion below, 71 N. J. Eq., 768.

Sohege v. *Singer Mfg. Co.*, 73 N. J. Eq., 567.

Jellenik v. *Huron, etc. Co.*, 177 U. S., 1; 44 L. ed., 647.

Baker v. *Baker, Eccles & Co.*, 242 U. S. 394, 401; 61 L. ed.—: Commented upon, 30 Harv. Law Rev. 486.

Re Culver (Ia.), 123 N. W., 743; 25 L. R. A. (N. S.), 384.

This proposition hardly needs any citation of authority, but it has had the approval of our court of last resort in the discussion of the very tax laws involved in the present case.

In *Dixon* v. *Russell,* 79 N. J. L., 490, 491, the Chief Justice, speaking for the Court of Errors, said:

> "From what was said during the arguments of counsel in the present case, it would seem that our opinion in the Neilson case is understood by some of the bar to indicate a doubt upon our part as to the power of the legislature to tax the succession to property located in this state of a non-resident decedent. Such a supposition is not justified by anything to be found in the opinion. On the contrary, our decision is based upon the *expressed* assumption that the succession to shares of stock in a New Jersey corporation may be taxed by the state legislature. We do not doubt the power of the state to impose a succession tax, where the succession is by reason of death, without regard to the domicile of the decedent from whom the property passes, provided that the property which is the subject of the succession is within the jurisdiction of the state."

The imposition of succession taxes does not repeal the laws relating to the devolution of property, real or personal, in the event of intestacy; it merely imposes a tax upon the right to take by grace of our law. With special reference to the property of non-resident decedents it was said by Mr. Justice Swayze, in *Carr* v. *Edwards,* 84 N. J. L., 667-669, that:

> "The only special right given by the New Jersey law in case of a non-resident is the right of an executor or administrator to succeed to the property having its situs in New Jersey."

The fact that the property having its situs here consists of stocks of New Jersey corporations neither increases nor diminishes the special right given by the New Jersey law, and

the succession to that species of property is just as legitimately the subject of succession tax as to any other species of property having its situs in this State.

No case is quoted by the brief of the appellants in support of the proposition that any contract obligation is impaired by a succession tax on shares of stock. Indeed, no case is quoted showing any inheritance tax law anywhere, or in any jurisdiction, to have been held by any court to have impaired the obligation of any contract relating to property. Our own investigations have brought to our attention no such case, and we venture to doubt that any can be found.

We do find cases to the contrary, *e. g.:*

State v. *Mollier,* 96 Kan. 514, 152 Pac. 771, L. R. A. 1916 C, 551.

Carter v. *Craig,* 77 N. H. 200, 90 Atl. 598, 52 L. R. A. (N. S.) 211, Ann. Cas. 1914 D, 1179.

Orr v. *Gilman,* 183 U. S. 278, 46 L. ed. 197.

Chanler v. *Kelsey,* 205 U. S. 466, 51 L. ed. 882.

Moffitt v. *Kelly,* 218 U. S. 400, 54 L. ed. 1086, 31 Sup. Ct. 79, affirming 153 Cal. 359, 95 Pac. 653, 1025, 20 L. R. A. (N. S.) 207.

The act does not impose, as counsel seems to argue, a pure and simple tax on the transfer of the stock in a corporation upon its books in contravention of the provisions of the acts relating to corporations; it has no application to shares of stock except such shares of stock as are part of the property of a decedent. The argument, if argument there be, is just as strong against a resident decedent as against a non-resident decedent, and is just as applic-

able to the imposition of taxes under the General Tax Act as under the Inheritance Tax Act.

There seems to be no real basis for any attack at this day on the constitutionality of the Act of 1909, as amended, in the provisions of the State Constitution. Almost every conceivable objection has been raised and disposed of by the courts and the act represents a revision and amendment made in the light of judicial decisions, and it is quite evident from the brief of the appellants that no serious hope is entertained of success in the attack upon the law by reason of conflict with the State Constitution.

II.

The legislation attacked is not in violation of the provisions of the Federal Constitution, or of Federal statutes passed under authority of such provision.

The real attack made by the appellants upon the constitutionality of the Act of 1909, and its amendments, is based upon alleged violation of the provisions of the Federal Constitution and the laws passed by authority thereof.

These objections are stated in different forms by Reasons 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 21 and 22 (Record, pages 35, *et seq.*), restated in the Grounds of Appeal, and are treated in the brief under Points 1, 2 and 13.

Reason 21, alleging conflict with the clause of the Federal Constitution forbidding impairment of obligation of contracts, seems to have been abandoned as there is no reference to it in the brief.

Reason 22, alleging violation of the provisions of the Federal Constitution, relating to unreasonable searches and seizures, seems also to have been abandoned as the subject is not referred to in the brief.

The appeal by the appellants to the provisions of the Federal Constitution and the Federal laws passed in pursuance of authority thereby conferred, can be successfully supported, if at all, only upon the theory that (a) inheritance taxes are laid upon the supposed right or privilege inherent in its possessor of transmitting property after death, whereas the better view is that inheritance taxes are laid on the right or privilege of succession to and receiving property, pursuant to permission of the State by its laws regulating both testacy and intestacy: and (b) that constitutional guaranties personal to the living possessor of property are operative from and after his death, as though he were yet alive, notwithstanding that at the moment of death such possessor of property ceases to be a constituent of that organized government which extends such constitutional guaranties to citizens and persons within its jurisdiction.

(a) *The tax is upon the right or privilege of the successor to receive the property.*

> "The tax is not imposed upon the right to give, but upon the right to take, property." *State* v. *Cline,* 91 Kan. 416, 137 Pac. 932, 50 L. R. A. (N. S.) 991.
>
> "* * * the succession * * * is the subject matter of the tax * * *, or, in other words, it is the right to become the successor * * * upon the death of the predecessor * * *" *Scholey* v. *Rew,* 23 Wall. 331, 23 L. ed. 99.

"* * * on the privilege of succeeding to the inheritance or of becoming a beneficiary under the will." *Washington County Hosp.* v. *Mealey's Estate,* 121 Md. 274, 88 Atl. 136, 48 L. R. A. (N. S.) 373, Ann. Cas. 1915 B, 1050.

"* * * a charge upon the right or privilege of receiving it, and when the right to receive the property is considered it is apparent that it is something distinct and separate from the property itself, and it is this right to receive property by descent or devise that the State taxes." *Northern Trust Co.* v. *Buck & Rayner,* 263 Ill. 222, 104 N. E. 1114, affirming 183 Ill. App. 170.

"* * * not on the right to give or grant, but upon the right to receive." *Lacy* v. *State Treasurer* (Ia.) 121 N. W. 179, 182.

"* * * upon the right to receive the property from the estate of the decedent * * *" *State* v *Vinsonhaler,* 74 Neb. 675, 105 N. W. 472.

"* * * upon the privilege of acquiring property by inheritance." *Wallace* v. *Myers,* 38 Fed. 184, 4 L. R. A. 171.

"The tax * * * is, once for all, an excise or duty upon the right or privilege of taking property, by will or descent, under the law of the State." *State* v. *Hamlin,* 86 Me. 495, 30 Atl. 76, 25 L. R. A. 632, 41 Am. St. 569.

"It is not a tax upon the right of alienation, but on the privilege of receiving by inheritance or will, or otherwise, at the death of a former owner" *State* v. *Alston,* 94 Tenn. 674, 30 S. W. 750, 28 L. R. A. 178.

And see note in 33 L. R. A. (N. S.) 606, to *re McKennan* (So. Dak.), 126 N. W. 611, 130 N. W. 33.

Re Macky, 46 Colo. 79, 102 Pac. 1075, 23 L. R. A. (N. S.) 1207.

State v. *Furnell,* 20 Mont. 299, 51 Pac. 267, 39 L. R. A. 170.

While it should not be supposed that our argument necessarily rests on this distinction, it may be said at the outset that if the taxes are laid upon the right of receiving property the claim of discrimination, so prominently advanced in the brief of the appellants, completely disappears.

(b) *The dead are not citizens or persons within the meaning of the constitutional provisions invoked.*

The clauses of the Federal Constitution and the Federal statutes relied upon by the appellants are as follows:

Constitution, paragraph 1, section 2, of Article IV:

> "1. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Constitution, Fourteenth Amendment, as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of 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."

United States Revised Statutes, Section 1977, as follows:

> "All persons within the jurisdiction of the United States shall have the same right in

every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of the laws and proceedings for security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses and exactions of every kind and to no other."

United States Revised Statutes, Section 1978, as follows:

"All citizens of the United States shall have the same right in every state and territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

Of course, the Federal statutes cannot have wider application than the provisions of the Constitution under authority of which they were enacted, and, while properly construed, the language of these statutes does not broaden the constitutional provisions, the present discussion practically turns on the effect of the constitutional provisions themselves.

The word "citizen" has no wider meaning in the Fourteenth Amendment than in Article IV, Section 2.

"The opening sentence of the Fourteenth Amendment is throughout affirmative and declaratory, intended to allay doubts and to still controversies which had arisen, and not to impose any new restrictions on citizenship." *U. S.* v. *Wong Kim Ark,* 169 U. S. 649, 687, 42 L. ed. 890. (Gray, *J.*)

"In the constitution and laws of the United States, the word 'citizen' is generally, if not always, used in a political sense to designate one who has the rights and privileges of a citizen of a State, or of the United States. It is so used in Section 1 of Article

XIV of the amendments of the Constitution." Waite, *C. J.*, in *Baldwin* v. *Franks*, 120 U. S. 678, 690; 30 L. ed. 766.

"The Constitution forbids only such legislation affecting citizens of the respective states as will substantially or practically put a citizen of one State in a condition of alienage when he is within or when he removes to another State, or when asserting in another State the rights that commonly appertain to those who are part of the political community known as the People of the United States by and for whom the Government of the Union was established." *Blake* v. *McClung*, 172 U. S. 239, 43 L. ed. 432.

"The Fourteenth Amendment did not radically change the whole theory of the relations of the State and Federal Governments to each other and both governments to the people. The same person may be at the same time a citizen of the United States and a citizen of a State. Protection to life, liberty and property rests primarily with the States, and the Amendment furnishes additional guaranty against any encroachment upon these fundamental rights which belong to citizenship, and which the State Governments were created to secure. The privileges and immunities of citizens of the United States as distinguished from the privileges and immunities of the citizens of the States are indeed protected by it, but these are privileges and immunities arising out of the nature and essential character of the National Government, and granted or secured by the Constitution of the United States." *Re Kemmler*, 136 U. S. 436, 448, 34 L. ed. 519. (Fuller, *C. J.*)

No privileges are secured by Article IV, Section 2 (or by this portion of the Fourteenth

Amendment) except those which belong to citizenship.

Conner v. *Elliot,* 18 How. 591, 15 L. ed. 497.

Blake v. *McClung, supra.*

Only natural persons are included.

Paul v. *Virginia,* 8 Wall. 168, 180, 19 L. ed. 357.

Citizenship, of course, has a beginning and and ending. It may begin, as to United States citizenship, with birth or naturalization, and may end with death or expatriation. It may begin, as to State citizenship, with birth, or naturalization, or with removal from another State *animo manendi,* and may end with death, or expatriation, or removal to another State *animo manendi.*

"Citizenship" and "residence" are not, of course, synonymous terms.

Robertson v. *Cease,* 97 U. S. 646, 648, 24 L. ed. 1057.

It may be noted in passing that James McDonald, a citizen and resident of the District of Columbia, was not, in his lifetime, a citizen of a State, and was not, therefore, embraced within the language of Article IV, Section 2, of the Federal Constitution.

He was concededly, in his lifetime, a citizen of the United States within the language of the first sentence of the Fourteenth Amendment, but that sentence does not confer State citizenship on a resident of the District of Columbia.

Other cases at the present term involve the estates of decedents who were in life citizens of other States, and we do not want to differentiate this case from such others, either as to citizenship or as to the guaranties of due pro-

cess and equal protection of the law common to all persons within the jurisdiction of the United States.

The argument under this head, therefore, will cover the provisions of Article IV, Section 2, and of the Fourteenth Amendment as related to citizens, and also the provisions of the Fourteenth Amendment as related to persons entitled to the guaranty of due process of law and equal protection of the law. The subjects are interrelated and many of the authorities common to both, so that a definite separation of the two could only result in much duplication.

A. THE DEAD ARE NOT CITIZENS OR PERSONS WITHIN ARTICLE IV, SECTION 2 OF, OR THE FOURTEENTH AMENDMENT TO, THE FEDERAL CONSTITUTION, AND THE NEW JERSEY ACT OF 1909 AND ITS AMENDMENTS CONTAIN NO DISCRIMINATION BASED ON CITIZENSHIP OR RESIDENCE AS BETWEEN LIVING SUCCESSORS TO THE PROPERTY OF DECEDENTS.

The word "person" does not include the dead.

Persons are divided by law into natural and artificial. Natural persons are such as the God of nature formed us; artificial are such as are created or defined by human laws for the purposes of society and the government, which are called "corporations" or "bodies politic." 1 Bl. Com. 123.

> "Person—Any human being, corporation or body politic having legal rights and duties." *Standard Dictionary* (law definition).

The word as used in the Fourteenth Amendment includes natural persons and, for some purposes, artificial persons.

Covington & L. Turnpike Co. v. *Sandford,* 164 U. S. 578; 41 L. ed. 560.

Smyth v. *Ames,* 169 U. S. 466; 42 L. ed. 819.

Northwestern Nat'l Life Ins. Co. v. *Riggs,* 203 U. S. 243; 51 L. ed. 168.

"Due process" and "equal protection" require legal personality, natural or artificial; having inherent capacity of prosecuting or defending.

"It is axiomatic that a corpse is not a person." Rugg, *C. J.,* in *Brooks* v. *Boston & N. Street Rwy. Co.,* 211 Mass. 277; 97 N. E. 760.

See also *State* v. *Frear,* 144 Wis. 79; 128 N. W. 1068; 140 Am. St. 992.

It is at once apparent from the foregoing that neither under the first paragraph of Section 2 of Article IV of the Federal Constitution nor under the Fourteenth Amendment is there any extension of the privileges and immunities of citizenship beyond the natural life of the citizen; and also that the provisions of the Fourteenth Amendment, that no State shall deprive any person of life, liberty or property without due process of law or deny to any person within its jurisdiction the equal protection of the law, do not include the dead.

There is nothing in the inheritance tax laws of New Jersey interfering in any way with the privileges or immunities of any citizen of any State in his lifetime. He is as free to inherit, purchase, lease, sell, hold and convey real and personal property in New Jersey or elsewhere, as free to enjoy his property in New Jersey or

elsewhere, and as fully entitled to the equal protection of the laws of this State as to his property within New Jersey or elsewhere, as though the New Jersey inheritance tax laws had never been passed.

There is no provision of the Federal Constitution or, indeed, of the New Jersey Constitution, which secures the right to anyone to control or dispose of his property after death, nor the right to anyone, whether kindred or not, to take it by inheritance.

Blackstone refers to the death of the occupant as an abandonment of property:

> "For, naturally speaking, the instant a man ceases to be, he ceases to have any dominion; else, if he had a right to dispose of his acquisitions one moment beyond his life he would also have a right to direct their disposal for a million ages after him; which would be highly absurd and inconvenient. All property must, therefore, cease upon death, considering men as absolute individuals, and unconnected with civil society; for, then, by the principles before established the next immediate occupant would acquire a right in all that the deceased possessed. But as under civilized governments, which are calculated for the peace of mankind, such a constitution would be productive of endless disturbances, the universal law of almost every nation (which is a kind of secondary law of nature) has either given the dying person a power of continuing his property, by disposing of his possessions by will, or, in case he neglects to dispose of it, or is not permitted to make any disposition at all, the municipal law of the country then steps in and declares who shall be the successor, representative or heir of the deceased; that is, who alone

shall have a right to enter upon this vacant possession in order to avoid that confusion which its becoming again common would occasion. And further, in case no testament be permitted by the law, or none be made, and no heir can be found so qualified as the law requires, still, to prevent the robust title of occupancy from again taking place, the doctrine of escheats is adopted in almost every country; whereby the sovereign of the state, and those who claim under his authority, are the ultimate heirs, and succeed to those inheritances to which no other title can be found.

"The right of inheritance or descent to the children and relations of the deceased seems to have been allowed much earlier than the right of devising by testament. We are apt to conceive, at first thought, that it has nature on its side; yet we often mistake for nature what we find established by long and inveterate custom. It is certainly a wise and effectual, but clearly a political, establishment; since the permanent right of property, vested in the ancestor himself, was no *natural* but merely a *civil* right. * * *

"With us in England till modern times, a man could only dispose of one-third of his movables from his wife and children; and in general no will was permitted of lands till the reign of Henry the Eighth, and then only of a certain portion; for it was not till the restoration that the power of devising real property became so universal as at present.

"Wills, therefore, and testaments, rights of inheritance and successions are all of them creatures of the civil or municipal laws, and accordingly are in all respects regulated by them; every distinct country, having different ceremonies and requisites to make a

testament completely valid; neither does anything vary more than the right of inheritance under different national establishments." 2 *Blackstone's Commentaries,* 10.

The courts of this country have almost universally accepted this doctrine and the authority to impose taxes on the successor to the property of a decedent is upheld not as a tax upon property but upon the succession to property.

The leading cases in our own State support this view and have been already cited.

In *Magoun* v. *Illinois Trust and Savings Bank, supra,* (170 U. S., 283, 42 L. ed. 1037), Mr. Justice McKenna makes historical reference to legacy and inheritance taxes, as follows:

> "Legacy and inheritance taxes are not new in our laws. They have existed in Pennsylvania for over sixty years, and have been enacted in other states. They are not new in the laws of other countries. In State v. *Alston,* 94 Tenn., 674, Judge Wilkes gave a short history of them as follows: 'Such taxes were recognized by the Roman law. 1 Gibbon, Decline and Fall of the Roman Empire, pp. 163, 164. They were adopted in England in 1780, and have been much extended since that date. Dowell, History of Taxation in England, 148; Acts 20 Geo. III., Chap, 28; 45 Geo. III., Chap. 28; 16 and 17 Vict., Chap. 51; Green *v.* Croft, 2 H. Bl. 30; Hill *v.* Atkinson, 2 Meriv., 45. Such taxes are now in force generally in the countries of Europe. Review of Reviews, February, 1893. In the United States they were enacted in Pennsylvania in 1826; Maryland, 1844; Delaware, 1869; West Virginia, 1887; and still more recently in Connecticut, New Jersey, Ohio, Maine, Massachusetts, in 1891; Tennessee in 1891, chapter 25, now repealed by chapter 174, acts 1893. They were

adopted in North Carolina in 1846, but repealed in 1883. Were enacted in Virginia in 1844, repealed in 1855, re-enacted in 1863, and repealed in 1884.' Other states have also enacted them—Minnesota by constitutional provision.

"The constitutionality of the taxes has been declared, and the principles upon which they are based explained (quoting various authorities).

"It is not necessary to review these cases, or state at length the reasoning by which they are supported. They are based on two principles: 1. An inheritance tax is not one on property, but one on the succession. 2 The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the states may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions, and are not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality of taxation."

In the course of a discussion of the Fourteenth Amendment it is said that such amendment was not intended to compel the State to adopt an iron clad rule of taxation, and the learned Justice quoted approvingly the language of Mr. Justice Bradley in *Bell's Gap R. R. Co.* v. *Pennsylvania,* 134 U. S., 232, 33 L. ed. 892, as to the range of the State's power, as follows:

"It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the

> rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their constitution."

And Mr. Justice Pitney, in *St. Louis & W. R. Co.* v. *Arkansas,* 235 U. S., 350, 59 L. ed. 265, said of the Fourteenth Amendment:

> "Nothing in the Fourteenth Amendment imposes any ironclad rule upon the states with respect to their internal taxation, or prevents them from imposing double taxation, or any other form of unequal taxation, so long as the inequality is not based upon arbitrary distinctions."

The case of *Knowlton* v. *Moore,* 178 U. S. 41, 44 L. ed. 969, dealt with the constitutionality of the Spanish War Tax Act of 1898, which imposed upon legacies and distributive shares of personal property a progressive tax. Chief Justice White, in the opinion, goes at some length into the history of succession taxes and quotes at length from Mr. Justice McKenna in *Magoun* v. *Illinois Trust & Savings Bank,* and arrives at the following conclusion:

> "Thus, looking over the whole field, and considering death duties in the order in which we have reviewed them—that is, in the Roman and ancient law, in that of modern France, Germany and other continental countries, in England and those of her colonies where such laws have been enacted, in the legislation of the United States and the several states of the Union—the follow-

ing appears: Although different modes of assessing such duties prevail, and although they have different accidental names, such as probate duties, stamp duties, taxes on the transaction, or the act of passing of an estate or a succession, legacy taxes, estate taxes, or privilege taxes, nevertheless tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested."

And, again, in discussing the right of the United States to impose such taxes:

"Confusion of thought may arise unless it be always remembered that, fundamentally considered, it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties. The qualification of such taxes as privileged taxes, or describing them as levied on a privilege, may also produce misconception, unless the import of these words be accurately understood. They have been used where the power of a state government to levy a particular form of inheritance or legacy tax has in some instances been assailed because of a constitutional limitation on the taxing power. Under these circumstances the question has arisen whether, because of the power of the state to regulate the transmission of property by death, there did not therefore exist a less trammeled right to tax inheritances and legacies than obtained as to other subject matters of taxation, and upon the affirmative view being adopted, a tax upon inheritances or legacies for this reason has been spoken of as privileged taxation, or a tax on privileges. The

conception, then, as to the privilege, whilst conceding fully that the occasion of the transmission or receipt of property by death is a usual subject of the taxing power, yet maintains that a wider discretion or privilege is vested in the states, because of the right to regulate. Courts which maintain this view have therefore treated death duties as disenthralled from limitations which would otherwise apply, if the privilege of regulation did not exist. The authorities which maintain this doctrine have been already referred to in the citation which we have made from Magoun *v.* Illinois Trust & Savings Bank, 170 U. S. 288.

* * * * * * * *

"All courts and all governments, however, as we have already shown, conceive that the transmission of property occasioned by death, although differing from the tax on property as such, is, nevertheless, a usual subject of taxation. Of course, in considering the power of Congress to impose death duties, we eliminate all thought of a greater privilege to do so than exists as to any other form of taxation, as the right to regulate successions is vested in the states and not in Congress.

"It is not denied that, subject to a compliance with the limitations in the Constitution, the taxing power of Congress extends to all usual objects of taxation."

The Chief Justice, therefore, sustained the right of the Federal Government to impose an inheritance tax because of the right of the Federal Government to reach all usual objects of taxation, but the opinion in no way denies the rights of the States to regulate successions, under the authority vested in them, to property, real or personal, within their jurisdiction.

The case does not involve the discussion of the effect of the Federal Constitution on the right of the states to levy inheritance taxes. The *Magoun* case did involve that question and very strongly sustained the power. The extended quotations from the *Magoun* case in *Knowlton* v. *Moore* show that the latter case was not intended to overrule the former. There is no withdrawal by the Supreme Court of the United States in the *Knowlton* case of the broadest recognition of the right of the states to regulate the succession to property within their jurisdiction, or any departure from the rule abundantly supported by legal history and previously recognized by the court, that the right of succession is a creature of municipal law.

The Chief Justice, in reasoning from the analogy of the imposition by the State of tax upon property subject to exclusive regulation by the United States, as for instance property engaged in interstate commerce, and the uncontested exercise of the imposition by the United States of taxes upon conveyances, mortgages, leases, etc., subject entirely to State regulation, concludes that both State and Nation may impose succession taxes. He holds that, while a tax placed upon an inheritance or legacy diminishes to the extent of the tax the right to inherit or receive, this is a burden cast by the Federal government upon the recipient and not upon the power of the State to regulate. Under our constitutional system both the National and State governments, moving in their respective orbits, have the common authority to tax many diverse objects, but this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of the government of the other, for if it did there would practi-

cally be an end to the dual system of government which the Constitution established.

Knowlton v. *Moore,* therefore, affords no comfort to those who would limit the power of the states to regulate successions to property within their respective jurisdictions, and on examination will be found to support the position that succession taxes under State laws are burdens cast upon the recipients of the property as a condition of the permission of the State to take and enjoy.

Whether or not the State could go so far as to absolutely appropriate property upon the death of the occupant is not properly involved in the present discussion, but even the courts which contest the authority of the State to take away altogether the inheritable quality of property, do not contest the authority of the State to regulate the right of succession and to impose taxes thereon.

> See *Nunnemacher* v. *State,* 129 Wis. 190, 108 N. W. 627, 9 L. R. A. (N. S.) 121, 9 Ann. Cas. 711 (Wisconsin).
>
> *Minot* v. *Winthrop,* 162 Mass. 113, 38 N. E. 512, 26 L. R. A. 259, Thayer's Cases on Const. Law, 1422, criticised adversely in 8 Harvard Law Review, 226, and apparently at variance in theory with the earlier case of *Brettun* v. *Fox,* 100 Mass. 234.

We are quite willing to accept the courts of the United States as the proper tribunals to define "privileges and immunities" as used in the Federal Constitution, and we find no occasion to multiply quotations from Federal authorities beyond those contained in the appellants' brief, or elsewhere herein cited.

However, we cannot admit that these authorities in any wise support the statement in appel-

lants' brief that such "privileges and immunities" include the "immunity of enjoyment of estates in succession." (P. 25.)

There is no reasonable ground for dispute as to the nature or extent of the constitutional guaranties of these privileges and immunities, or as to the interpretation of the Fourteenth Amendment of the Constitution of the United States so far as it relates to the enjoyment of property and the equal protection of the laws.

But the constitutional guaranties cease to operate at the death of the possessor of the property. *State* v. *Hamlin, supra* (86 Me. 495; 30 Atl. 76; 25 L. R. A. 632; 41 Am. St. 569). They grow out of citizenship and allegiance, ties which are loosed by death so far as such possessor is concerned. A law which can have no application until after death cannot be tested by the citizenship of the deceased.

Plainly a constitutional guaranty to a citizen ceases to operate when citizenship ends, and citizenship ends with death.

Appellants in their brief, however, do not content themselves with the attempt to have the Constitution of the United States prolong the citizenship of James McDonald beyond the span of his natural life. They have set up an artificial entity unknown to the law, styled "Estate of James McDonald non-resident decedent," and would extend the citizenship guaranty to this artificial entity.

In the first place it is clear that "Estate" is a figure of speech to describe the *property* of which the decedent died possessed in its entirety, and when visualized by the imagination does not disclose any other quality than such as appertains to property. We are dis-

cussing the privileges and immunities of "citizens" not of "property."

In the next place even if we conceive this "Estate" to be an artificial person, comparable to a corporation, whether comprising the living successors to the property of the decedent, like unto the living members of a corporation, or comprising a mass of material wealth with living owners other than the decedent, the constitutional guaranties assured to a citizen are not to be found. Corporations are not *citizens* within these sections of the Constitution.

Paul v. *Virginia, supra* (8 Wall. 168, 177; 19 L. ed. 357).

Pembina Consol. Silver Mining Co. v. *Penna.*, 125 U. S. 181; 31 L. ed. 650.

Norfolk, &c. R. Co. v. *Penna.*, 136 U. S. 114; 34 L. ed. 394.

A corporation does not have the rights of its personal members and cannot invoke the provisions of this section.

Waters-Pierce Oil Co. v. *Texas*, 177 U. S. 28; 44 L. ed. 657.

How much less must a claim of right to invoke the provisions of these sections be denied to an artificial entity, not only without a soul but minus even a legislative body!

The "Estate" being dismissed from the mind, and the successors to the property of the decedent, whose right of succession is the subject of the tax, being called forward, we find no possibility of complaint, as there is no discrimination as between such takers whatever their citizenship.

The Act of 1909 and its amendments makes no discrimination of any kind based on diverse citizenship of successors to any property, real

or personal, of non-resident decedents. Such successors are treated with absolute uniformity, and without regard to residence or non-residence.

If all of the successors to the property of James McDonald had been citizens and residents of New Jersey, the succession tax upon his estate would have been exactly the same as that in fact levied, all successors being non-residents.

If both executors of his will had been citizens and residents of New Jersey, the tax would have been no different.

In short, the discrimination alleged is not based on residence or citizenship of the successors.

As we have seen, the Federal and State courts have repeatedly held the imposition of inheritance taxes not to be governed by any state constitutional regulations bearing on the taxation of property unless by reason of peculiar provisions, including specifically or by necessary construction, succession taxes.

The Supreme Court has held the Act of 1909, as amended in 1914, being all the legislation involved in the present case, to be not in contravention of the Fourteenth Amendment of the Constitution of the United States (*Howell* v. *Edwards,* 88 N. J. L. 134) without, however, passing upon the question suggested in the present case and not included in the discussion in that case, viz: that involved in the allegation of illegal discrimination between citizens of other States and citizens of this State.

B. THE LEGISLATURE MAY CLASSIFY FOR PURPOSES OF SUCCESSION TAXES ESTATES OF RESIDENT DECEDENTS AND NON-RESIDENT DECEDENTS WITHOUT INFRINGEMENT OF ARTICLE IV, SECTION 2 OF, OR THE FOURTEENTH AMENDMENT TO, THE FEDERAL CONSTITUTION.

Admittedly under our State decisions the tax is not, from the New Jersey Constitution standpoint, a tax on property and is not, therefore, required to be uniformly laid, and we are not concerned in the present case as to whether the tax imposed is reasonable, as no attempt has been made to question the imposition on that ground.

The Federal Constitution does not require exact equality of taxation on property in this State as between citizens of this and another State. As was said by Mr. Justice Brewer in his dissenting opinion in *Magoun* v. *Illinois Trust & Savings Bank, supra,* absolute equality is not obtainable. The fact that a law, whether this law or other, works some degree of inequality in its actual operation does not prove its unconstitutionality.

Cotting v. *Kansas City Stockyards Co.,* 183 U. S. 79; 46 L. ed. 92.

In the quotation we have already made from *Magoun* v. *Illinois Trust & Savings Bank* the wide latitude of the State in matters of taxation has been shown, and we have seen that tax regulations, so long as they proceed within reasonable limits and general usage, are within the discretion of the State legislature notwithstanding any of the provisions of the Federal Constitution.

The case of *Board of Education* v. *Illinois,* 203 United States, 553; 51 Law. Ed., 314; 8 Annotated Cases, 157, affirming *in re Speed's Estate,* 216 Ill., 23; 74 N. E. 809; 108 Am. Stat., 189, adjudges valid an exemption from inheritance taxation of bequests for charitable uses whether to natural persons or corporations, *confined, however, by the construction of the Illinois court, to residents of the State.* 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 corporation 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 purposes of the state and its legislation."

The appellants attempt to distinguish this case on the ground that a corporation was involved. (P. 46.) We reply that corporations are "persons" entitled to "equal protection of the laws," and that the decision was not based on the distinctions between domestic and foreign corporations.

Mr. Justice McKenna, speaking for the United States Supreme Court, in *Citizens' Tel-*

ephone Company v. *Fuller,* 229 U. S. 322; 57 Lawyers' ed., 1206, affirming 185 Fed., 634, and after citing cases, says:

> "They illustrate the power of the legislature of the state over the subjects of taxation, and the range of discrimination which may be exercised in classifying those subjects when not obviously exercised in a spirit of prejudice and favoritism. Cook *v.* Marshall County, 196 U. S. 274, 49 L. ed. 474, 25 Sup. Ct. Rep. 233; Missouri *v.* Dockery, 191 U. S. 165, 48 L. ed. 133, 63 L. R. A., 571, 24 Sup. Ct. Rep. 53. The cases decided subsequent to the decision in Bell's Gap R. Co. *v.* Pennsylvania have applied its principle to many varying instances. Granting the power of classification, we must grant government the right to select the differences upon which the classification shall be based, and they need not be great or conspicuous. Keeney *v.* New York, 222 U. S. 536, 56 L. ed., 305, 38 L. R. A. (N. S.) 1139, 32 Sup. Ct. Rep. 105. The state is not bound by any rigid equality. This is the rule; its limitation is that it must not be exercised in 'clear and hostile discriminations between particular persons and classes.' See Quong *v.* Kirkendall, 223 U. S. 59, 62, 63, 56 L. ed. 350-352, 32 Sup. Ct. Rep. 192. Thus defined and thus limited, it is a vital principle, giving to government freedom to meet its exigencies, not binding its action by rigid formulas, but apportioning its burdens, and permitting it to make those 'discriminations which the best interests of society require.' "

Under one of the inheritance tax statutes of New York, both personal and real property of a non-resident, was subject to tax; but through an imperfection in the machinery the State was able to collect its taxes only if there was realty within the State. Hence, a non-resident-owner

of personalty paid a tax on it only if he happened also to own New York realty. This situation resulting from statute, was held not to constitute a denial of equal protection in *Beers* v. *Glynn,* 211 U. S. 477; 53 L. ed. 290; 29 Sup. Ct. 186, affirming 186 N. Y. 549; 79 N. E. 1110.

In *Billings* v. *Illinois,* 188 U. S. 97; 47 L. ed. 400, affirming 189 Ill. 472; 59 N. E. 798, the Supreme Court held that equal protection of the laws was not denied by an inheritance tax law under which life estates were taxable when the remainder passed to issue of the decedent but not when the remainder passed to collaterals or strangers. The opinion contains a most illuminating discussion of the problem of classification by Mr. Justice McKenna.

The Supreme Court of the United States has vindicated our inheritance tax law, as well as many others not materially unlike it, against the charge of antagonism to the Federal Constitution because of exemptions, application of different rates to near relatives and collaterals and strangers, difference in rates by reason of the amount enjoyed by the successor, progressive impositions because of amounts, etc.

Campbell v. *California,* 200 U. S. 87; 50 L. ed., 382.

A different policy on the part of the State in the imposition of succession taxes as between succession to the property of resident decedents and the property within the jurisdiction of non-resident decedents, is not in contravention of the Federal Constitution.

District of Columbia v. *Brooke,* 214 U. S. 138; 53 Law ed. 941 (and cases cited therein). In that case the court dealt with the question

as to whether equal protection had been denied to a resident of the district by a law providing for the establishment of a sewerage system, compliance with which was enforced in the case of a resident by criminal punishment and in the case of a non-resident by making the cost of the improvement a lien on the property. As to the alleged invalidity of this law, Mr. Justice McKenna said:

> "Passing on that amendment, we have repeatedly decided—so often that a citation of the cases is unnecessary—that it does not take from the states the power of classification. And also that such classification need not be either logically appropriate or scientifically accurate. The problems which are met in the government of human beings are different from those involved in the examination of the objects of the physical world, and assigning them to their proper associates. A wide range of discretion, therefore, is necessary in legislation to make it practical, and we have often said that the courts cannot be made a refuge from ill-advised, unjust, or oppressive laws. Billings *v.* Illinois, 188 U. S. 97, 47 L. ed. 400, 23 Sup. Ct. Rep. 272; Heath & M. Mfg. Co. *v.* Worst, 207 U. S. 338, 52 L. ed. 236, 28 Sup. Ct. Rep. 114. In the light of these principles the contentions of defendant in error must be judged. The act in controversy makes a distinction in its provision between resident and non-resident lot owners, but this is a proper basis for classification. Regarded abstractly as human beings, regarded abstractly as lot owners, no legal difference may be observed between residents and non-residents; but, regarded in their relation to their respective lots under regulating laws, the limitations upon jurisdiction, and the power to reach one and not

the other, important differences immediately appear. We said in St. John *v.* New York, 201 U. S. at page 637, 50 L. ed. 898, 26 Sup. Ct. Rep. 554, not only the purpose of a law must be considered, but the means of its administration—the ways it may be defeated. Legislation, to be practical and efficient, must regard this special purpose as well as the ultimate purpose. This was in effect repeated in Field *v.* Barber Asphalt Paving Co. 194 U. S. 618, 48 L. ed. 1142, 24 Sup. Ct. Rep. 784, where a privilege to protest against a street improvement, given by the statute assailed to resident property owners and denied to non-resident property owners, was sustained, and the statute held not to violate the equality clause of the 14th Amendment. See Travellers' Ins. Co. *v.* Connecticut, 185 U. S. 364, 46 L. ed. 949, 22 Sup. Ct. Rep. 673."

The successors to the property within this jurisdiction of non-resident decedents are not, by the Federal Constitution, guaranteed equality either in rate or method of assessment with the successors to property of resident decedents.

We do not agree that there is any real discrimination to be found in the Act of 1909 as amended in 1914. We argue, and we think the proposition sound, that the succession subjected to the tax and the rate are fixed by the law without discrimination, and that the direct and ratio methods of application of the rate to the succession are after all but mere machinery appropriately applied to the succession to the property of resident decedents in the one case by direct calculation and to the succession to the taxable property of non-resident decedents in the other case by the ratio. The distinction

is applicable, pointed out by Justice Depue in *Central R. R. Co.* v. *State Board of Assessors,* 48 N. J. L. 337, that every system of taxation consists of two parts—the one relating to the designation of the persons or things subject to taxation and the apportionment of the tax burden in the ration prescribed by law; the other the collection of taxes by the enforced payment thereof. The latter relates to mere machinery and neither State nor Federal constitutions interfere with differences in machinery. They do not change the rate or disturb the substantial equality of the burden. This will appear as to the Federal Constitution by the cases later cited, and, of course, the Federal requirements to be considered here are by no means so inflexible as the provisions of the State Constitution regulating the assessment of taxes upon *property.*

Certainly, however, if the successors to property within this jurisdiction of non-resident decedents are so circumstanced as to the property and the permission given by the State to succeed to it, as to justify their grouping into a class by themselves, and under such grouping all in the class are treated alike, there is no constitutional ground for complaint.

At the outset it may be said that classification, to the extent, at least, of difference in procedure, is forced upon the State and is not a matter of choice. In the case of a resident decedent the thing taxed is the universal succession to all personal property (*Bullen* v. *Wisconsin,* 240 U. S. 625, 631, affirming 143 Wis. 512; 128 N. W. 109; 139 Am. St. 1114); the power to tax is derived from the universally admitted principle that movables have their situs at the domicile of the owner; and the

enforcement of the tax is based upon jurisdiction over the person of the universal successor, namely, the executor or administrator. The procedure in the case of a resident estate is essentially *in personam.*

In the case of a non-resident decedent the thing taxed is the local succession to the property actually situated within the State; the power to tax is based on the control of the State over such property, and the enforcement of the tax is necessarily *in rem.*

That there is a radical difference in situation from the standpoint of the State imposing a tax upon the privilege of succession, between successors to the property of resident decedents and successors to the property of non-resident decedents, is apparent. Indeed, many States levy a succession tax only on the estates of *residents,* a common recognition of the basis for classification. This was in effect the policy of our own State under the Act of 1894, as construed in *Neilson* v. *Russell, supra.*

There is, of course, no presumption that the successors to the property within this jurisdiction of non-resident decedents would all be non-residents of this State. Indeed they might all be residents.

The absolute control of the State over succession to property has already appeared from the authorities cited, but we may here insert by way of further illustration of this power a quotation from the opinion of the Court of Appeals of Maryland in *State* v. *Dalrymple,* 70 Md. 294, quoted approvingly by Mr. Justice Brown in *United States* v. *Perkins,* 163 U. S. 625, 41 L. ed. 287, and again by Mr. Justice Shiras in *Plumber* v. *Coler,* 178 U. S. 115, 131, 44 L. ed. 998.

> "Possessing then the plenary power indicated it necessarily follows that the State, in

allowing property to be disposed of by will and in designating who shall take such property where there is no will, may prescribe such conditions not in conflict with or forbidden by the organic law as the legislature may deem expedient. These conditions, subject to the limitations named, are consequently wholly within the discretion of the General Assembly. The act that we are now considering plainly intended to require that a person taking the benefit of the civil right secured to him under our law should pay a certain premium for its enjoyment; in other words, one of the conditions upon which strangers and collateral kindred may acquire the decedent's property, which is subject to the domination of our laws, is that there shall be paid out of such property a tax of two and a half per cent. into the treasury of the State. This, therefore, is not a tax upon the property itself but is merely a price exacted by the State for the privilege accorded in permitting property so situated to be transferred by will or by descent or by distribution."

Mr. Justice Shiras, in sustaining the validity of a tax imposed under the inheritance tax laws of the State of New York upon a legacy consisting of United States bonds, issued under a Federal statute declaring them to be exempt from State taxation in any form, found a perfect analogy between the imposition of inheritance taxes, under the plenary power of the State to control the succession to property, and franchise taxes imposed by the State upon corporations, both foreign and domestic. Both taxes are excise taxes and are imposed as a condition of enjoyment of privileges absolutely under the control of the State.

There can be no doubt about the power of the State to discriminate between resident and non-resident corporations in the matter of franchise taxes. That is a matter resting entirely within the control of the State and not a matter of Federal law. *Horn Silver Mining Co.* v. *New York,* 143 U. S. 305, 36 L ed. 164. The exceptions or qualifications of this doctrine, referred to in the opinion of Mr. Justice Field in the last cited case, do not need to be considered on this argument.

> "Whatever extension may properly be given to the provision of the Constitution which forbids the denial by a State to any person or selected number of persons within its jurisdiction of equal protection in the enjoyment of these civil rights secured by its fundamental law to all citizens, it cannot cover the establishment by this amendment of the constitutional rule of 'equality in taxation.' The broad dictum of the United States Court, speaking by Mr. Justice Miller, that while State constitutions may contain provisions against inequality in taxation 'the Federal Constitution imposes no restraints on the states in that regard' (Davidson *v.* New Orleans (1877), 96 U. S. 97, 105) has been fully confirmed by the logic of recent decisions. *State* v. *Travelers' Insurance Co.* (1900), 73 Conn. 255, affirmed (1902) 185 U. S. 364." 9 Fed. Stats. Ann. 608 note.

Assuming now (but not admitting except for the purpose of argument) that some inequality may result from the operation of the New Jersey succession tax laws, as between succession to the estates of resident decedents and the estates of non-resident decedents, if such difference is not based upon arbitrary distinctions and is not obviously the result of prejudice and favoritism but is the result of a classification along natural

lines or by common characteristics, the New Jersey act would not antagonize any provision of the Federal Constitution or of the amendments thereto. To quote the words of Mr. Justice McKenna in *Citizens' Telephone Company* v. *Fuller, supra*:

> "Granting the power of classification, we must grant government the right to select the difference, upon which the classification shall be based, and they need not be great or conspicuous."

There is a perfectly apparent and natural distinction between the succession to property of the estates of resident decedents and the succession to property of the estates of non-resident decedents. The whole matter of the settlement of estates and the distribution thereof is so differentiated as between estates of resident decedents and non-resident decedents as to establish a natural division into two classes with distinguishing characteristics as to their relation to the State, requiring separate treatment for the protection of creditors and distributees and for the securing to the State the payment of and for the enforced collection of succession taxes on property within this jurisdiction of the estates of resident and non-resident decedents.

It is still true that a foreign administrator or executor cannot be sued in the courts of this State. A foreign administrator or executor can only sue here upon compliance with statutory conditions. A foreign will executed in accordance with the law of the domicile of the testator will not pass real estate in this State except it happens also to be executed in accordance with the laws of this State, and, if so, the title to real estate passing under the will so passes by virtue of the laws of this State and not by virtue of the laws of the

testator's domicile. It is only because of comity, not by compulsion, constitutional or otherwise, (*Baker* v. *Baker, Eccles & Co. supra,* 242 U. S. 394, 61 L. ed. —) that we extend to non-resident estates the privilege of succeeding to personal property within this jurisdiction according to a *foreign law,* the law of the domicile. For some purposes original or ancillary letters of administration on property of non-resident decedents, having its actual *situs* in this State, is essential, while for other purposes, under rules of comity or statutes originating in comity, recognition of the authority of foreign executors or administrators is sufficient to protect citizens of this State, in the transaction of business relating to the property of non-resident decedents having its actual *situs* here, even against subsequent letters of administration, original or ancillary, taken out here.

The laws of our own and other states teem with provisions peculiar to the administration, testamentary and non-testamentary, of the estates of resident and non-resident decedents.

Local administration of the estates of resident decedents makes easy the imposition and collection of succession taxes. The administrators and executors are not only subject to the control of our laws, but also to the control of our courts.

The imposition and collection of succession taxes on property within this jurisdiction of non-resident decedents cannot be accomplished by like easy methods or without much additional trouble and expense. The hazard of non-collection is much greater and the extra trouble and expense of enforced collection is enhanced. Nor can there be any doubt that, under the most rigid law, a larger proportion of the property of non-resident decedents would altogether escape transfer taxation than of resident decedents under the local administration of the estates of resi-

dent decedents. The State can, of course, protect itself in the collection of the tax by lien on the property within the jurisdiction, but a different degree of care and different methods are appropriate and essential to secure to the State the succession taxes on property within this jurisdiction of non-resident decedents. (See for illustration *Senff* v. *Edwards,* 85 N. J. L. 67.) Classification is reasonable and, as we have already seen, as to procedure is absolutely necessary. The very conditions justify not only classification but the application to the class comprising the succession to non-resident estates of a larger tax commensurate with the difference in conditions.

There is greater difficulty, too, in ascertaining the quantum of the total estate of a non-resident decedent, and, while it is true that no tax can be imposed except on property within its jurisdiction, none the less fair consideration, in the imposition of taxes on the property of a non-resident decedent, and particularly in the application of allowances for exemptions and debts and administration expenses, require that attention should be given, in order to preserve any reasonable degree of equality with the successors to the property of resident decedents, to the proportion of the non-resident decedents' wealth in this State to his total wealth.

The legislature may, to equalize the proportional contribution of the successors to property within this State of a non-resident decedent whose total wealth is in equality with a resident decedent, reasonably establish a rule of assessment which when applied will compel comparable contributions from estates of equal wealth, whether of resident or non-resident de-

cedents. In the one case the State has within its jurisdiction the property not merely distinguished by situs but drawn to the person of the resident. In the other the State has within its jurisdiction only the fraction of the estate distinguished by situs, but the State is not therefore compelled to regard the fraction as the whole in determining the propriety of a progressive tax based on the size of an estate, or the large amount of a bequest or distributive share. If it appears that the direct application of a progressive rate will not apply to the non-resident fraction the intended progression (and, because a fraction must be less than a whole, the intended progression cannot apply without abandonment of the assumed equality of wealth of the resident and non-resident decedents) it is competent for the legislature to equalize the imposition of the tax as between the estates of the two decedents by applying the rate to the two respectively by such different methods as will secure such equality.

The progressive rate is of itself unobjectionable and finds its justification in the amount of the estates to the succession of which it is applied.

This is conceded by the brief of prosecutors on the authority *Magoun* v. *Illinois Trust & Savings Institution, supra.* The appellants' brief, in denial of this concession, erroneously assumes that the New Jersey fraction of a non-resident decedent's estate is his whole estate, and that such New Jersey fraction can alone be considered by the legislature in determining the tax burden. Such assumption is not only contrary to fact, but, moreover, requires the legislature to unfairly discriminate in favor of the non-resident, in the imposition

of an inheritance tax, as between the estates of resident and non-resident decedents with equal total wealth. The theory on which the application of the progressive rate is justified does not insist that the total wealth required for its imposition shall be within the jurisdiction of the State. The method of applying it to a fraction of total wealth within the jurisdiction, which will make its application comparable to its application to an estate of like total all within the jurisdiction, assures equality as between resident and non-resident estates and is clearly within the power of the legislature, that imposes it and the theory which applies it. The protection of property within the jurisdiction which is the basis of ordinary taxation for current support of government is not at all the justification for the imposition of succession taxes, which represent an excise or duty upon the right or privilege of successsion. Assume a citizen of New Jersey to have a million dollars of property all within this State, and also assume a citizen of New York to have a million dollars scattered in New Jersey and nine other jurisdictions in equal parts. Why should New Jersey impose a succession tax of lighter relative burden on the succession in New Jersey to the property in New Jersey of the millionaire resident of New York, all of whose property, except one hundred thousand dollars, is without the State, than on the millionaire resident of New Jersey all of whose property is within the State? The ratio method of Section 12 makes the estate of the New York resident millionaire decedent, with one-tenth of the property in New Jersey, pay one-tenth of the succession tax assessable against the like estate of the New Jersey resident millionaire decedent, on the

ten-tenths of property in New Jersey. The only deviation from actual equality is due to the liberality of the New Jersey law toward non-resident decedent estates in omitting from their taxable property the New Jersey intangibles. We shall later illustrate the practical equality resulting in the operation of the law in actual application to estates of resident and non-resident decedents, the actual differences being minor and incidental. The ratio provision of Section 12 justly equalizes the burden as between estates of resident and non-resident decedents of like total wealth in exact comparison to the proportion of wealth of resident and non-resident decedents within the control of New Jersey law. The distinguishing feature, requiring the double method of accomplish substantial equality in imposing the tax on estates of sufficient value to call for the imposition of the progressive rate, grows out of the differing power of the State, to regulate the succession of property, due to the residence or non-residence of the decedents, and justifies the classification of succession to estates as of resident and non-resident decedents for the application of the equalizing process.

The argument of the appellants would moreover lead to an unfounded and anomalous distinction between a non-resident estate of wealth, where all of the foreign property was concentrated in one State having a law such as ours, on the one hand, and a case where as much wealth of equal amount was scattered in different jurisdictions having like laws. Thus, a New York resident's estate owning only $100,000 in New Jersey stocks would pay a fair tax on the succession to the New Jersey stocks; whereas if such an estate owned $100,-

000 in stocks of twenty different States, of which $5,000 was invested in the stock of corporations of each State, and all the property were left to a widow or child, it would pay no tax at all under laws similar to that of this State. Such a result can be justified by no argument and shows that the method of taxation provided by our statute is essentially fair and founded on sound considerations.

The amount of property which can be taxed by any one State is necessarily limited to that within its jurisdiction; but the appellants would have not only the amount of property subject to tax, but also *the rate at which it should be taxed,* dependent upon the fact of location. It is not perceived that any legal, moral, or economic consideration requires or persuades that *rate* should be determined by any such test. Under such a test an estate would escape a progressive tax entirely, by mere diversification of investment (except insofar as subject to tax on "movables" in the State of domicile). In short, the appellants claim that succession taxes can be levied at a progressive rate *only by the State of domicile.*

The State may lawfully measure or fix the amount of the tax by referring to the value of the property passing; and the incidental fact that some of that property is not subject to a property tax by the State, does not invalidate an inheritance tax in part measured thereby. *Plumber* v. *Coler,* 178 U. S. 115, 134; 44 L. ed. 998, 1008.

Lest it be supposed that the differences in result between the method advocated by appellants and that laid down by the statute are not subject to assignable limits, it will be well to examine the actual working of the ratio

provision, keeping in mind that the difference in result, within the assignable limits, depends on the total amount of the estate, and the relative size of the New Jersey fraction.

In the case of collaterals it will be seen that the only effect of including foreign property is to absorb a portion of what we may, for the purposes of argument, inexactly call the exemption of $500. In any case in which the value of the New Jersey interest passing to any collateral legatee is over $500 there is no effect whatever upon the tax, because the inclusion of the foreign property is exactly offset by the use of the ratio. The extreme case of the effect of the ratio provision upon a gift to collaterals can be illustrated by a bequest of New Jersey stock amounting to $499.-99 and foreign property amounting to one cent. The contention of the appellants would result in no tax, while the application of the ratio provision would result in the tax of a fraction of a cent less than $25.00. The inclusion of foreign property to whatever extent merely tends to cut down the "exemption" of $500 at 5%; so that the difference between the two methods tends to equal, but never quite equals, $25.00.

In its application to the two classes of successions taxable at graduated rates the effect of the inclusion of foreign property is to absorb a lesser or greater amount of the exemption of $5,000 and to bring closer together the points at which the graded rates of tax begin respectively to operate upon the New Jersey fraction of the entire estate. In other words, tends to subject the entire amount of the first $250,-000 of the New Jersey fraction to the highest rate, namely, 4% in one case and 3% in the other

case. In the case of the first class the greatest imaginable difference in any one bequest will be the difference between a tax at the graduated rate upon the first $250,000, namely, $6,400, and a tax upon this $250,000 at slightly less than 4%, namely, approximately $10,000. The addition of an infinite amount of foreign property will tend to make the tax approach but never equal the $10,000. So that the limit of the difference in this case is $3,600. In the case of the second class, the limit of the difference is obtained by subtracting the tax at the graduated rate upon $250,000, namely $3,950, from a tax at slightly less than 3% upon the same amount, namely, approximately $7,500.

The difference thus obtained approaches but can never reach $3,550.

In practice, it is obvious that the difference varies from nothing to an amount much less than these limits, dependent as above stated on the total amount of the estate and the relative size of the New Jersey fraction.

It is obvious, therefore, that the statement on p. 21 of appellants' brief that the variance ranges to over $25,000, goes beyond the bounds of probability, and, indeed, of possibility, unless in the case of an estate of hitherto unheard of size and divided into at least seven shares passing to persons subject to tax at the graduated rate. The "variance" in the case of a billionaire, owning $100,000,000 of New Jersey stocks, and leaving all equally to six sons-in-law, however worthless, would be $19,440.

The foregoing analysis relates only to New Jersey taxable property. The bearing of the exclusion from taxation of certain species of property is later discussed. Nor do above illustrations involve any comparison between the taxa-

tion of resident and non-resident estates. That, likewise, will be hereafter dealt with when it will be shown that exactly the same differences exist as between resident and non-resident estates of like relative amounts.

Inasmuch as the ratio provision which by itself is conceded to be unobjectionable was introduced into the law earlier than the provisions for taxation at the graduated rate, any result from the combined operation of the ratio provision and the graduated rate cannot have occurred from a deliberate design by the legislature to conceal in the ratio provision a formula from which discrimination would result.

The maximum differences above in the possible application of the progressive rates, on the basis advocated by the appellants, on any one bequest, disappear if the legislative right be conceded to impose the rate upon the New Jersey fraction by a method which will equalize the tax burden as between estates of resident and non-resident decedents of equal total wealth. Remembering that the progressive tax is justifiable because of the large amount of an estate, that the theory is not limited to estates of resident decedents, and that the application of the theory against the succession to the property in this State of a non-resident decedent, whose total estate is partly within and partly without the jurisdiction, is accomplished by so applying the rate to the New Jersey fraction as to impose on such fraction a tax proportionate to the tax upon a New Jersey resident estate of like total with the whole estate of the non-resident decedent, the New Jersey statute, in theory and fact, imposes a tax free from substantial differences in burden as between the two classes under comparable conditions.

There is entirely apart from these considerations another justification for the segregation by the State of the property in this State of non-resident decedents for the purpose of transfer tax on the succession, a reason which would in fact justify a higher imposition on that succession than on the succession to the property of resident decedents.

Such justification rests on the differing "relation * * * to the State" (*Board of Education* v. *Illinois, supra*) of residents and non-residents, and is a "discrimination which the best interests of society require" (*Citizens Telephone Co.* v. *Fuller, supra,* or which the legislature may deem to be required.

There can be no doubt that at the time of the adoption of the Federal Constitution the citizens of the other states were aliens to New Jersey, and the ownership of property in this State by such aliens could have been absolutely prohibited. If that were still the case, New Jersey could clearly have permitted ownership of property in this State by aliens resident in the other states on such terms as New Jersey chose to prescribe. The Constitution of the United States prevents New Jersey from denying the right to have property in New Jersey to citizens of the other states or of the United States, but the guaranty protecting against such denial ceases with the death of the non-resident in whose favor it operates. The law of alienage as applied to the denial of the right to hold property is based on the want of citizenship and the duty of allegiance. Citizenship involves reciprocal duties on the part of the State to the citizen and on the part of the citizen to the State. In the case of citizens of other states the Constitution of the United States imposes upon this State a one-sided bargain

which compels the protection by this State of the property within this State of citizens of other states, the State receiving in return no contra benefit from the performance by the non-resident property owner of the duties of citizenship. The death of the non-resident revives untrammelled all the rights of the State existent at the adoption of the Federal Constitution applicable to the succession to property, and the State is free to classify by itself the succession to property in this State of non-resident decedents, so long as it does not infringe constitutional guaranties operating in the right of the successors as between such successors. Such succession could be logically subjected (although in fact New Jersey has not made it so) to a different transfer tax burden than that imposed on transfers of property of resident decedents.

These considerations, taken with the soundest views of the economic basis of succession taxes, point to a justification for laying a heavier impost upon the estates of non-residents than upon the estates of residents. While it is doubtless true that there are several different bases for the succession tax, one of the weightest reasons for its levy is found in the following consideration, supported by the ablest thinkers on this question.

In the existent conditions surrounding the relations of owners of wealth to society, and particularly in view of the vast extension of property holding in the form of intangibles and the difficulty of ascertaining the ownership and discovering the extent of property holdings in these forms, and in levying property taxes upon these forms of wealth, it is unquestionably true that owners of property generally, and especially owners of property in these forms, escape during

their lifetime full taxation; that is, do not contribute to the State dues proportionate to the benefits derived by them as such property owners. It is not necessary to consider that such owners have evaded taxation—it is enough to say that they have escaped, and in proportion to the amount of their wealth, so proportionately do they escape taxation according to their ability and the benefits received by them. Hence the theory that a succession tax is a form of capitalized income tax payable once for all in consideration of past benefits, payable at the moment when the extent of their wealth is for the first time fully disclosed and conveniently reached by the taxing power. See *C. F. Bastable on Public Finance,* p. 594. (The Macmillan Co., 1903.) *Richard T. Ely, "Property and Contract in their Relations to the Distribution of Wealth,"* p. 433 (The Macmillan Co., 1914); *Max West, The Inheritance Tax,* 204 (Second edition, Columbia University Press, 1908).

This view commands high judicial, as well as economic, support.

> "For, after all, what is an inheritance tax but a debt exacted by the State for protection afforded during the lifetime of the decedent? It is often impracticable to secure from living persons their fair share of contribution to maintain their administration of the State, and such laws seem intended to enable to secure payment from the estate of the citizen when his final account is settled with the State." *Plumber* v. *Coler,* 178 U. S. 115, 138, 44 L. ed. 999, 1009.

This view is particularly apt in the case of non-residents, for not only does the non-resident owner of wealth fail to render to the State the ordinary duties of citizenship in the varied forms of political service; not only does he fail to ren-

der economic service to the State in the production of wealth, and by the exercise of useful and productive labor, but he escapes also to a greater degree the due and proportionate burden of property taxes. Can it be doubted that, in this State, the non-resident owner of bank deposits, bonds and mortgages, and other forms of intangible property, escapes almost entirely the burden of taxation upon property, notwithstanding which such forms of ownership of wealth would be almost valueless to him were it not for the actual or potential protection afforded by the legislation of this commonwealth, the administration of its laws by the executive power, and the processes of judicial administration of law. Such forms of wealth, moreover, would be at least impaired in value by any failure on the part of the government to perform the functions of organized society, in educating, safe-guarding the health of, and promoting the material welfare of, its citizens, aiding and encouraging the commercial and productive activities of the community, and otherwise through its manifold activities directly or indirectly promoting the acquisition, enjoyment and stability of property. To the expense of the performance by the State of these social functions the non-resident contributes little or nothing. To tax the succession to his property—a succession which in most cases is enjoyed by a non-resident—is not to deny either to the dead or to the living the equal protection of the laws, but is to exact a small recompense for the past enjoyment by the one and the assured future enjoyment by the other of the equal protection of just and beneficent laws. Of course, the non-resident successors may not leave the property invested in New Jersey. In that case, the State suffers by the withdrawal of so much wealth.

That distinctions in the taxation of the succession to property of residents and non-residents, even in respect to rate, are not contrary to natural justice may be deduced from the fact that civilized government has often made such distinctions.

There are or have been a number of instances in which States of this country have taxed succession by non-resident aliens at substantially higher rates. We may instance the State of Louisiana (see *Mager* v. *Grima,* 8 How. 490, 12 Law ed. 1168; *Frederickson* v. *Louisiana,* 23 How. 445, 16 Law ed. 577): the State of Iowa (see *re Peterson's Estate,* 151 N. W. 66, L. R. A. 1916 A, 469): the State of Washington(see *re Stixrud's Estate,* 58 Wash. 339, 109 Pac. 343, 33 L. R. A. N. S. 632).

The Provinces of New Brunswick and Quebec levy a substantially higher rate on successions passing to non-residents (see *West on Inheritance Tax,* pp. 81, 82).

Holland imposes a higher rate on real estate left by foreign decedents (*Id.,* p. 48); and in ancient times the city of Hamburg levied a higher rate on property passing to non-resident successors (*Id.,* p. 32).

The Federal Estate Tax (Act Sept. 8, 1916, 39 Stat., c. 463, p. 777; 6. U. S. Comp. Stat. 1916, Ann., section 6336½, p. 7364) which imposes an estate duty on both residents and non-residents of the United States, provides in Section 203 that the net estate of a resident shall be calculated by the allowance, among other things, of one exemption of $50,000, but provides for no such exemption, or any proportionate part there of, in the case of a non-resident—that is, an alien.

C. THE LEGISLATURE HAS NOT BY THE ACT OF 1909 AND ITS AMENDMENTS IN FACT DISCRIMINATED AS BETWEEN ESTATES OF RESIDENT AND NON-RESIDENT DECEDENTS.

Putting these considerations aside for the moment, we pass to an analysis of the legislation in its provisions in their special relation to non-resident estates.

The general scheme of the Act of 1909, as originally passed, in its application to the property of non-residents, was sustained by the Supreme Court in *Beers* v. *Edwards, supra* (84 N. J. L. 32). Section 12, as originally enacted and considered in *Beers* v. *Edwards,* did not specifically include in the final paragraph real property located out of this State as a part of the entire estate of a non-resident decedent, and, by construction in *Beers* v. *Edwards,* real property so situated was omitted. In that opinion, however, Mr. Justice Swayze said (p. 34):

> "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 here. 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 non-resident 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.' ''

By the amendment of 1914 the final clause of Section 12 has been changed so as to comply with Mr. Justice Swayze's suggestion. The one term of the proportion is now the entire tax to which the said estate would have been subjected 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, and another term is now all the taxable property of the non-resident decedent within this State. The legislature has defined the term referable to property located within this State "as such taxable property within this State," because by this same amendment of 1914 the second paragraph of the first section of the Act of 1909 has been amended so as to relieve from taxation a part of the property within this State of non-resident decedents.

The proportion under the amendment of 1914 is as follows:

> The tax to be assessed on the taxable property within this state of a non-resident decedent is to the entire tax which the estate of the non-resident deceased 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 is to the entire estate wherever situated.

The legislature has thus adopted literally the suggestion of the Supreme Court in *Beers* v. *Edwards.*

Under the second paragraph of Section 1 of the Act of 1909, as originally passed, the tax was imposed when the transfer was by will or intestate law of property within this State and the decedent was a non-resident at the time of his death. The earlier part of the first paragraph, section 12, of the original act, forbade the transfer on the books of New Jersey corporations by foreign executors, administrators or trustees of shares of stock standing on such books in the name of a non-resident decedent or in the joint names of such a decedent and one or more persons, or in trust for a decedent, without the consent of the State comptroller. *This plainly was to assure to the State the collection of the tax upon this particular species of property owned by non-resident decedents within the jurisdiction of the State, and did not bring under the imposition of the law any property not already included by the second paragraph of section 1.*

The revision of 1909 was approved April 20, 1909, but did not take effect until July 4th. Section 12 in this revision was taken from an earlier act of the same session approved April 17, 1909, and taking effect immediately, amending section 11 of the Act of 1894 (P. L. 1909, 236). This Act of April 17, 1909, first introduced into our law the method of assessment of property within this State of non-resident decedents made the subject of attack in the present case, and was first discussed by the Supreme Court in *Tilford* v. *Dickinson,* 79 N. J. L. 302, reversed 81 N. J. L. 576, on the authority of *Dixon* v. *Russell, supra,* without disapproval of the views of the Supreme Court. In that opinion Mr. Justice Reed, for the Supreme Court, said, after rejecting the distinc-

tion made by the New York courts between testacy and intestacy (p. 307):

> "Speaking of intestate estates, I am inclined to think that apart from the statute, the logical rule to be adopted where property is situated as in this class, is the rule provided for by our statute. The theory upon which it rests is that each distributee has an undivided interest in all the assets of an estate, and that no particular portion of such assets passes to any particular distributee. Therefore, when it is ascertained what portion of the whole estate goes to all of the collateral distributees as a class, it will be presumed that such proportion of the New Jersey property goes to such class of collaterals as the property in New Jersey bears to the property in New York—it being assumed that equal proportions of the property in both states will be devoted to the payment of collateral distributees. This rule was so applied in the present assessment."

Mr. Justice Reed further says that the reasoning is not disturbed by the proviso of the final paragraph of section 12, that nothing in the clause contained shall apply to any specific bequest or devise of property in this state, and holds that when designated beneficiaries are general and not specific legatees, no legatee takes any specific assets of the testator's estate but does take an interest in the entire estate, to be ascertained upon administration after the application of the estate to the payment of debts, by the distribution of the remaining estate according to the terms of the will.

In *Carr* v. *Edwards, supra,* (84 N. J. L. 667), Mr. Justice Swayze, speaking for this court, said (p. 670):

> "The object and the effect of section 12 was to equalize the rate of the transfer tax as between the estates of resident and of non-resident decedents. This determination of the rate of taxation by the ultimate beneficial succession to the property, did not, however, change the nature of the tax from a transfer tax to a legacy duty. Nor does the fact that by section 7 the administrator, executor or trustee is authorized to deduct the tax, change its character. Section 7 does not merely authorize the deduction of the tax from the legacy or its collection from the legatee. The legislature was careful to add authority to deduct the tax not only from a legacy but also from 'property for distribution,' and to collect it not only from the legatee but from 'persons entitled to such property.' The authority to deduct from a legacy or to collect from a legatee could refer only to estates of resident decedents, for it is only in the case of such estates that the amount or validity of the legacy can be determined by New Jersey law. Neilson *v.* Russell, *supra.* In the case of the estates of non-resident decedents, it is open for the law of the domicile to provide as testators sometimes do, that such taxes shall be a general charge against the estate. Our legislature must be assumed to have had in mind its lack of jurisdiction over legacies under a non-resident's will, and in order to protect the New Jersey executor, administrator or trustee who paid the tax, authorized its deduction from 'property for distribution.' This phase suffices to reach not only a distributive share of a resident's estate in case of intestacy, but the whole of the New Jersey property of a non-resident

> when turned over to the executor or administrator at the domicile of the decedent. The provision for both cases—legacies and property for distribution—demonstrates that the legislature did not mean to provide, as counsel contends, for a legacy duty only."

And earlier in the same opinion (foot of page 669) the learned Justice said:

> "No greater difficulty is presented by section 12. That section contains nothing to indicate that it is not the succession of the New Jersey representative that is meant to be taxed. 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."

Inquiry as to the entire property of a taxpayer within and without the jurisdiction for the purpose of assessing the property within the jurisdiction is not obnoxious to the Federal Constitution. Such inquiry is a feature of many tax laws which have been upheld by the Supreme Court of the United States; for example:

> *Adams Ex. Co.* v. *Ohio State Auditor,* 165 U. S. 194; 166 U. S. 185, 41 L. ed. 683, 965.
>
> *American Ex Co.* v. *Indiana,* 165 U. S. 256, 41 L. ed. 707.
>
> *Adams Ex. Co.* v. *Kentucky,* 166 U. S. 171, 41 L. ed. 960.
>
> *St. Louis & W. R. Co.* v. *Arkansas, supra,* (235 U. S. 350, 59 L. ed. 265).
>
> "The selected measure may appear to be simply a matter of convenience in computation and may furnish no basis whatever for

> the conclusion that the effort is made to reach subjects withdrawn from the taxing authority. We have recently had occasion (Baltic Mining Co. *v.* Massachusetts, 231 U. S. 68, 83, 58 L. ed. 127, 133), to emphasize the necessary caution that 'every case involving the validity of a tax must be decided upon its own facts'; and if the tax purports to be laid upon a subject within the taxing power of the state, it is not to be condemned by the application of any artificial rule, but only where the conclusion is required that its necessary operation and effect is to make it a prohibited exaction.''

By Justice Hughes in *Kansas City, etc., Ry.* v. *Botkin,* 240 U. S. 227, 233, 60 L. ed. 617, 619.

It seems to be conceded by the brief for the appellants that section 12, in the form in which it was first adopted in P. L. 1909, page 236, was unobjectionable, but to be contended that the introduction, by the amendment of 1914, of a progressive tax, and the elimination from the law of the exempted class of beneficiaries nearly related to the decedent and the imposition of a different rate of tax on different classes, have opened the law to the criticism of being obnoxious to the provisions of the Federal Constitution.

It is also conceded that classification in inheritance tax cases by relationship and by the amount of property passing was not objectionable under the decisions of the United States Supreme Court, particularly *Magoun* v. *Illinois Trust & Savings Bank, supra.* But it is claimed again that by the provision requiring the tax to be computed according to the last paragraph of section 12 objectionable inequality results.

We have, therefore, the concession of the appellants and the authority of the courts for these propositions:

(1) *That the legislature in imposing inheritance taxes may discriminate as to the rate of taxation between those near to the decedent and those farther removed and strangers.*

(2) *That the legislature may, in its discretion, exempt any class from the imposition of the tax entirely, or may exempt definite amounts.*

(3) *That the legislature may impose a progressive rate, increasing with the amount of property passing.*

(4) *That the legislature may measure the tax on the property within this State of non-resident decedents by the ratio of the New Jersey property to the entire estate.*

The Act of 1909, both before and after amendment, altogether excluded from the tax imposed by the act transfers of any property, real or personal, of resident or non-resident decedents of less than $500.

The act originally exempted property passing to certain corporations and also to a father, mother, husband, wife, child or children, or lineal descendant, brother or sister, or wife or widow of a son or husband of a daughter.

The act originally taxed all other transfers, by will or intestate laws, of property of resident decedents and all property of non-resident decedents within this State.

The act originally imposed a uniform rate of five per centum upon the clear market value of the property passing, ascertained in the case of transfers of property of resident decedents by direct application of the rate to the value of the

property, and in the case of transfers of property within this State of non-resident decedents by the ratio method set forth in section 12.

It must be conceded, and it has been adjudicated, that, by the direct application of the rate to the value of the property as to transfers from resident decedents, and by the ratio method as to transfers of property within this State of non-resident decedents, there was an equal distribution of the burden of the tax imposed upon the succession to the property of resident decedents and non-resident decedents similarly situated as to the amount and distribution of property. True it was as remarked by Mr. Justice Swayze in *Carr* v. *Edwards,* that the tax upon the succession to the New Jersey property of the non-resident decedent was not necessarily exactly five per cent. upon the whole New Jersey succession, as the amount depended upon the ratio of the New Jersey property to the entire estate wherever situated. This, however, merely afforded a measure of the tax imposed and equalized the rate as between the estates of resident and non-resident decedents.

Remembering that, notwithstanding the frame of the Act of 1909, it is entirely competent for the legislature to eliminate the exemptions and to apply different rates as between near and distant relatives and strangers, and to impose a graduated tax increasing with the amount of the property passing, it is not perceived that the scheme of the Act of 1909, conceded by the appellants to be unobjectionable and sustainable *in toto,* both as to the transfer of the property of resident decedents and the property within this State of non-resident decedents, is changed in theory or motive except within the limits of recognized rules applicable to inheritance taxes.

The amendment of 1914 retains the general exclusion of transfers of property, real or personal, of less than $500 and the exemption of certain charitable corporations.

It brings under the law property passing to father, mother, husband, wife, child, or lineal descendant, brother or sister, wife or widow of a son, and husband of a daughter if amounting to $5,000 or more, and subjects property so transferred to father, mother, brother or sister, or the wife or widow of a son or the husband of a daughter, to a tax at the rate of 2% on any amount in excess of $5,000 up to $50,000; 2½% on any amount in excess of $50,000 up to $150,000; 3% on any amount in excess of $150,000 up to $250,000; and 4% on all amounts in excess of $250,000; 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, to a tax at the rate of 1% on any amount in excess of $5,000 up to $50,000; 1½% on any amount in excess of $50,000 up to $150,000; 2% on any amount in excess of $150,000 up to $250,000; and 3% on any amount in excess of $250,000.

It does not change the application of the law under the first sub-division of section 1 to all property, real or personal, of the value of $500 or over when the transfer is by will or by the intestate laws of this State from any person dying, seized or possessed of property while a resident of the State, thus leaving practically the whole estate of a resident decedent subject to the taxes imposed upon the transfer thereof, subject to the exemptions and the varying rates imposed by the law.

It materially modifies the second sub-division of section 1 by limiting the taxation of the transfers of property, real or personal, of the

value of $500 or over, of non-resident decedents, as follows:

> "Second: When the transfer is by will or intestate law of real property within this state, or of goods, wares and merchandise within this state, or of shares of stock of corporations within this state, or of national banking associations located in this state, and the decedent was a non-resident of the state at the time of his death."

Thus it releases from the burden of the tax the transfer of all property within this State of non-resident decedents except the particular kinds of property newly named, that is to say, real property within this State, goods, wares and merchandise within this State, shares of stock of corporations of this State, or of national banking associations located in this State.

Under the original second sub-division of Article I other property of non-resident decedents was unquestionably subject to transfer tax, such as deposits in banks of this State, mortgages on real estate in this State, notes and bonds actually within this State (*Hopper* v. *Edwards, supra,* 88 N. J. L., 471), and probably all open debts owing to the non-resident decedent by citizens of this State.

Kinney v. *Stevens,* 207 Mass. 368, 93 N. E. 586, 35 L. R. A. (N. S.) 784, Ann. Cas. 1912 A, 902.

Re Rogers, 149 Mich. 305, 112 N. W. 931, 11 L. R. A. (N. S.) 1134, 119 Am. St. 677.

Bliss v. *Bliss,* 221 Mass. 201, 109 N. E. 148, L. R. A. 1916 A, 889 (Commented on, 29 Harv. Law Rev. 107).

State v. *Probate Court, supra.*

Bradley v. *Merriam,* (Mich.) 111 N. W. 196, 9 L. R. A. (N. S.) 1104.

Re Houdayer, 150 N. Y. 37, 44 N. E. 718, 34 L R. A. 235, Am. St. 642.

The transfer of property of like character belonging to resident decedents is taxable under the law of this state and that notwithstanding that by taxing it here double taxation may result. *Hartman's Case,* 70 N. J. Eq. 664.

None of the changes made by the amendment of 1914 is of itself in contravention of admitted authority on the part of the state, and for any one of these changes, taken singly, abundant judicial support can be produced.

How can the inclusion of these lawful impositions in one act be held to be discriminatory as between citizens of different states?

All kinds of suppositious cases can be devised without the exercise of great imagination which will show conflicting results as between an equal amount of property passing under transfer from resident and non-resident decedents. Equally conflicting results can be produced by examples of the passing of property under different schemes of disposal. Examples are given in the appellants' brief of results said to be adverse to transferees of the property of non-resident decedents, but by changing the character of the property and the distribution of the property examples can be produced which would show very advantageous differences in favor of non-resident transferees as compared with the succession to like amount of property of resident decedents.

Exact equality being a dream in the application of any scheme of taxation, the different situation of estates of resident decedents and non-resident decedents, and the different conditions surroundig the imposition and collection of the tax, are sufficient justification for

a different method of imposing the same general plan of taxation upon transfers of property in this state of non-resident decedents and that applied to the transfers of property of resident decedents. There is no real difference in the New Jersey plan as applied to both except in method of application. There is no substantial discrimination in theory or in fact.

In *Travelers Insurance Company* v. *State of Connecticut,* 185 U. S. 364, 46 L. ed. 949; *S. C.* below, 73 Conn. 255, 47 Atl. 299, the Supreme Court of the United States, in an opinion by Mr. Justice Brewer, upheld the taxing law of Connecticut providing for the assessment at a flat uniform rate of the stock of non-resident stockholders in domestic corporations of Connecticut at its market value, with no deduction on account of real estate held by the corporation, although provision for such deduction in assessing resident stockholders was made by the Connecticut law, and the stock of the latter was assessed at the varying rates of the several municipal sub-divisions of the state.

The attack upon the act was based upon paragraph 1 of section 2 of Article IV of the Federal Constitution and the Fourteenth Amendment of the Federal Constitution exactly as in the present case. The court was not carried away by theories or technicalities. The opinion emphasizes the wide latitude open to the states, notwithstanding the provisions of the Federal Constitution, and expressly holds that a mere inequality in the stress of taxation cannot produce that effect. The case was, of course, much stronger than the present case, because it involved taxes on property as such and not the levy of excise taxes, but it was decided, not on any local constitution but under the very pro-

visions of the Federal Constitution appealed to by the present appellants.

Mr. Justice Brewer said:

> "You cannot put one resident against one non-resident stockholder, and by a comparison of their different burdens determine the validity of the legislation * * *."

Again, approving the following language of the Connecticut court:

> " 'Here is no hidden purpose to attack the rights of citizens of other states, no evidence that the underlying intention and real substance of the legislation is to hinder citizens of other states in acquiring and holding property.' "

And further:

> "It is enough to say that the state has secured a reasonably fair distribution of burdens, and that no intentional discrimination has been made against non-residents."

If under the provisions of the Federal Constitution it was competent that the legislature should separate and classify stockholders of a corporation as between resident and non-resident, certainly there can be no reasonable objection to the grouping together of all successors of property within this state of non-resident decedents and all successors of property of resident decedents. The succession in both instances is under the regulation of this state and the differences which surround the succession in the two classes are sufficient to justify the legislature in differentiating them for the application of a substantially common scheme of imposition of succession taxes. We do not need to consider the provisions of the State Constitution, as they have no application. We are dealing with the requirements of the Federal Constitution.

The Supreme Court in *Tilford* v. *Dickinson, supra,* rejected the claim of a foreign executor that he could relieve the property in this state from succession tax by applying it to the payment of exempt legacies and by paying the taxable legacies out of property without this jurisdiction, the court declining to follow the construction put upon a similar statute, from which ours was largely copied, by the courts of New York. To reach this result the court applied the same rule which would have been applied against intestate estates to cases of testacy. The will under examination in the *Tilford* case conferred authority upon the executor to distribute securities, or their cash value, to the legatees in his judgment. The court held that this authority did not modify the conclusion that no particular portion of the estate was by the testator devoted to any particular legatee and that the interest which passed on the death of the testator was only to have some property delivered or money paid in the course of the administration. As already stated the court did not overlook the possible presence in wills of strictly specific legacies, but was not dissuaded thereby from the conclusion that the rule should be applied in cases of testacy exactly as in intestate estates. The ratio statute of 1909 had been passed but was not in existence at the time of the death of the decedent whose estate was involved in the *Tilford* case. Judge Reed, however, referred to the statute saying that it adopted a logical rule.

The ratio statute was later completely supported by the Supreme Court and this court in *Carr* v. *Edwards, supra.*

It is apparent that as between transfers of the property of a resident decedent and transfers of the property within this state of a non-

resident decedent, if neither the resident decedent nor the non-resident decedent die seized of real estate located without this state, the ratio method of ascertaining the amount of the tax on the transfer of the property in this state of the non-resident decedent can work no discriminating inequality. The theory upon which it rests is that each distributee has an undivided interest in all of the assets of the estate and that no particular portion of the said assets passes to any particular distributee. The same theory underlies the payment of debts by the executor, the application of exemptions to succession taxes, and the payment of legacies other than specific, whether general or residuary. In ascertaining the net estate, therefore, for the prorating, debts and exemptions are to be taken into consideration as applicable to no portion of the estate but distributable over the whole estate.

In the application of the ratio system in cases of intestacy there is, of course, no room for criticism as there can be no differences in the assessment of the tax against the succession to the property within this state except such differences as may arise by reason of the nearer or more distant relationship of the successor to the deceased or the amount of the estate passing, all such differences, of course, being uniformly applicable under like conditions.

In the rule adopted in New Jersey, that the ratio principle should be applied in cases of testacy, there is no difference in circumstances of the application of the succession tax in cases of testacy except such as are due to the provisions of the will, the successor finding himself subject to such burden as his nearness or remoteness of relationship to the testator or

the amount of the bounty extended to him impose. All wills are not alike and great variety of succession necessarily results, but where conditions are alike the successors receive equality of treatment.

The appellants are, of course, driven in their efforts to demonstrate inequality of application to illustrations under wills, and their illustrations are all applied to the New Jersey fractional parts of estates chiefly located elsewhere, and to get discriminating examples they conceive illustrations, (quite, it may be conceded, within the realms of possibility), showing an apparently larger burden of tax upon the New Jersey fraction, *if regarded as a New Jersey whole,* when compared with a resident decedent's estate *no larger in total amount than the non-resident's New Jersey fraction.* They should compare the tax on the non-resident's New Jersey fraction with the tax on a like New Jersey fraction of a resident decedent of like total estate but with a like amount of personalty without the state.

Thus the illustrations on pages 19 and 20 of appellants' brief should be amended so as to compare the non-resident's estate with that of a New Jersey resident owning not only $1,000,000 in New Jersey stocks, but also $3,000,000 in foreign personalty. In that case the tax on the entire estate would be $113,800, (there is a slight error in calculation, and this amount should be $115,800), and on the New Jersey stocks forming one-fourth thereof, $28,450 ($28,950).

The comparison of things which are unequal necessarily results in inequality.

To show the unfairness of the appellants' comparison, it is only necessary to invert it.

If the deceased died a resident of New Jersey and left $4,000,000 in all, and of this amount $500,000 went to strangers, $500,000 to his wife, and $3,000,000 to three children in equal proportions, and the New Jersey stocks amounted to $1,000,000 the total tax would be $115,800, of which one-fourth, or $28,950 would be in respect to the New Jersey stocks.

Whereas, if our decedent died non-resident, and left $1,000,000 in New Jersey stocks as his total estate, and divided his estate among beneficiaries in the above proportions, the tax on the New Jersey stocks would only be $19,675. The same fallacy is found in the comparison of average rates on p. 18 of appellants' briefs. The same difference in average rate exists in the case of New Jersey estates of like total amount.

There can be no claim for discrimination as to specific legacies as they are excepted from the ratio calculation, and there is absolute equality in the imposition of the tax in form as well as in substance on the succession to specific legacies, whether from resident or non-resident decedents. (See *Lawyers T. & T. Co.* v. *Comptroller,* 85 N. J. Eq. 481).

If any differences arise as between specific legatees and general legatees or residuary legatees of like relationship to the decedent, they result *from the provisions of the will* and not from any individual discrimination *by the law* against persons in the same degree of relationship to the decedent. It is the privilege of a testator to give to persons, within the same degree, different amounts, which might result in the imposition of no succession tax upon a son, for instance, to whom $5,000 might be given, in the imposition of a tax at the rate of 1% on a son to whom $50,000 might be given, and the impo-

sition of a tax in part of 1% and in part 1½% on another son to whom $150,000 might be given, and so on, as required by the amount and rate fixed by the law. Such a result would not be discriminating, although it would result in a difference of burden, nor does the illustration, put on page 39 of the brief, show any discrimination between the widow and son except such as is the direct result of the terms of the will. The specific bequest of property situate in New Jersey to the widow is without the ratio provision. Any other widow under a similar will and like estate would be subject to exactly the same burden. The succession to the specific bequest is definitely of property in New Jersey. The succession of the son, however, to property belonging to the estate situate in the State of New Jersey is not to the particular New Jersey property, as no particular portion of the New Jersey assets passes to him as a distributee, and, because such is the case, he is made subject to the ratio method for the purpose of equalizing the proportion of his burden to the burden imposed upon distributees similarly situated succeeding to the property of estates of resident decedents.

The proviso in respect to specific gifts does not necessarily discriminate against the general legatee.

Take the case of a non-resident owning $1,000,000 in New Jersey stocks, and $1,000,000 in foreign personalty, and leaving half to a collateral, and half to a wife. If the New Jersey stocks are specifically bequeathed to the collateral the tax is $50,000; if specifically bequeathed to the wife, the tax is $26,450; whereas if bequeathed in blended residue, the tax on the New Jersey stock is $38,225.

With respect to the appellants' illustration on pages 38, 39, it is enough to remark that if the son were the specific legatee, the difference would be in his favor.

In considering this point it should also be noted that there is no deduction of debts and expenses in respect to a specific bequest or devise.

But the appellants are not adversely affected by the alleged discrimination in favor of specific legatees. In the computation contended for by them (pages 5-7), they follow the statute in this respect. If the proviso relating to specific legacies were disregarded by the Comptroller or set aside by the court *the tax in the case at bar would be greater than that assessed.* See following computation:

Debts and expenses		$ 270,813.17
Widow—N. J. stocks	$246,685.53	
Life estate	294,712.99	541,398.52
Collaterals—		
N. J. stocks	$ 82,228.51	
Other interests	356,761.26	438,989.77
Issue		2,718,131.79
		$3,969,333.25

Widow	$ 5,000.	Exempt		
	45,000.	1%	$ 450.00	
	100,000.	1½%	1,500.00	
	100,000.	2%	2,000.00	
	291,398.52	3%	8,740.75	
	$ 541,398.52		$12,690.75	$ 12,690.75
Collaterals	$ 438,989.77	5%	$21,949.48	21,949.48
Issue	$ 15,000.	Exempt		
	135,000.	1%	$ 1,350.00	
	300,000.	1½%	4,500.00	
	300,000.	2%	6,000.00	
	1,968,131.79	3%	59,043.95	
	$2,718,131.79		$70,893.95	70,893.95
Total tax to be apportioned				$105,534.18
Percentage of all New Jersey stocks to entire estate				.28

3969333.)1114965.0(.28+
7938666

32109840
31754664

3551760

84427344
21106836

Tax $ 29,549.6704

The tax, however, as assessed, is $29,071.68.

Therefore it is apparent that the argument found on p. 37 in appellants' brief is moot, so far as based on comparison of the respective treatment of specific and general legatees.

Reference was made above to the impossibility of discrimination, as between the successsion to estates of resident decedents and to the property situate within this State of non-resident decedents, where no part of the estate of either the resident or non-resident decedent was real estate located without this State.

Specific complaint is made by the appellants under their Point I (page 62, *et seq.*), that the assessment of the tax by the ratio method is in fact the taxing of real estate outside of the State of New Jersey and therefore unconstitu-

tional. Both the Supreme Court and this court, as we have already seen, have held that the application of the ratio method is not the taxing of property outside of this State. It is true that at the time it was so decided the statute did not include in the total estate, in the application of the ratio method, the value of real estate of a non-resident decedent without this jurisdiction, but the inclusion of such value cannot modify the holding as the theory of the ratio method necessarily includes for its application (but not for taxation) property without this State and not within its jurisdiction, and therefore is the same whether real property located without the State be included or excluded. No distinction is drawn between non-residents owning real estate and personal estate outside of New Jersey. The foreign property is brought into computation for the purpose of determining the applicability of the progressive rate, and also for the purpose of determining the proportionate part of the debts and expenses to be borne by the New Jersey taxable property, as well as the extent and nature of the beneficial interests which the legatees take in the New Jersey property, and for such purposes the character of the foreign property is of materiality.

The proper comparison of the justice or injustice of succession taxes as against the estate of resident and non-resident decedents is not, of course, between the burden imposed upon the whole estate of the resident decedent and the part in New Jersey of the estate of the non-resident decedent. The appellants seem to think the comparison can only be made between the whole estate of the New Jersey decedent and the New Jersey fraction of the estate of the non-resident decedent. *To concede this would*

be to concede the propriety of discrimination against the estate of the resident decedent. If a man die resident in New Jersey worth a millon dollars with his entire estate subject to succession tax here, and another man dies worth a million dollars in New York State, with only a hundred thousand dollars of his estate and property in New Jersey, New Jersey does not discriminate against the successors to the New Jersey property of the New York decedent, if it considers, in the determination of the tax to be put upon the succession, that they should bear the same proportion of the burden imposed by succession taxes upon a like estate in New Jersey, that the New Jersey property, one hundred thousand dollars in amount, bears to the total estate of one million dollars. The two citizens die in different commonwealths but leaving estates of the same value, and the imposition of a like proportionate burden on both by this State is just both from the standpoint of sound political economy and good government.

It is apparent, inasmuch as the State of New Jersey cannot tax real estate without its jurisdiction and has not undertaken to set up any ratio method for its inclusion in determining the amount of succession taxes on the property of resident decedents, that, by the exclusion of the real estate which may be owned by a New Jersey resident in another State, there may be a comparison between the estates of decedents of equal wealth, resident and non-resident, in which the exclusion of the foreign owned real estate may seem to show advantage to the estate of the resident decedent as against the non-resident whose foreign owned real estate is included in the application of the ratio method. It is also evident, that, if, as between the estates

of two decedents of equal wealth, one a resident and the other a non-resident, the estate of the resident should include no real estate and the estate of the non-resident should include no real estate except real estate located in New Jersey, that there would be no room for disadvantageous imposition of the burden of the succession tax on either estate as against the other.

The only instance, therefore, in which there can be any demonstration of discrimination under the New Jersey inheritance tax law, except such discriminations as arise by reason of the varying provisions in wills and which are due not at all to the law, are cases in which the estates of the New Jersey decedents are apparently relieved of the inclusion, in the calculation of the tax against them, of the foreign real estate, while like real estate, under the ratio provision of section 12, is taken into the totals in ascertaining the tax on the property in New Jersey of non-resident decedents. Such result is incidental and such inclusion of foreign real estate forms no arbitrary distinction which must condemn the whole scheme as obnoxious to the 14th Amendment.

Not at all yielding what we think we have already shown, that it is entirely competent for the legislature to separate into groups, for the purpose of imposing this tax, the succession to the estates of resident decedents and succession to the property within this State of non-resident decedents, we now suggest that the difference which may occasionally arise by reason of the inclusion of foreign owned real estate, in the ascertainment under section 12 of the succession tax on property in New Jersey of non-resident decedents, is not such a substantial difference as to justify interference with the law

as a whole under the authorities already referred to.

In the present case it appears, that, in the total estate of $3,969,333.25, a trifling amount of $4,250 represents real property in the State of Idaho, and that such real property is the only real property held by the estate (Case, page 22). The inclusion of such real estate in the computation of the tax increases the tax exactly *seventy-seven cents.* [If excluded, the residue is reduced by $4,250, thus decreasing the assumed New Jersey tax on the residue by 3% on $4,250, i. e., $127.50, to $97,262.75, instead of $97,390.25; but the proportion of the New Jersey property to the whole is increased from 21.59232% to 21.61755%, making the total tax on the residue $21,025.78, instead of $21,026,55]. So far as the present case is concerned, therefore, the inclusion of real property located without New Jersey is of small importance, and if the court should conclude, contrary to what we believe it should conclude, that the real property of non-resident decedents located without New Jersey can not be included within the total estate, the law can readily be upheld in all other respects and the foreign real property eliminated from the equation. That would mean nothing more than letting the law stand as it was before that particular inclusion was brought into section 12 by the amendment of 1914, and the rejection of such unconstitutional feature would not of necessity require the court to declare the whole amendment of 1914 unconstitutional, *although it might indeed require that so much of the second amendment of 1914 as relieves intangibles owned by non-residents must fall as a part of the same scheme, thus leaving non-resident*

estates subject to taxation on all property within the State.

But, to return from digression, at the same time that the legislature by the amendment of 1914 included the real estate, situate without this State, in the ascertainment of the succession tax on the property within this State of non-resident decedents, the legislature relieved from succession tax part of the property of non-resident decedents within this State theretofore subject to such tax.

As before explained, the legislature, by the amendment of 1914, limited the property within this State of non-resident decedents subject to the transfer tax, all of which had theretofore been subject to such tax, *to real property within this State, to goods, wares and merchandise within this State, and shares of stock of corporations of this State and of national banking associations located in this State.* This restricts the succession tax on the property of non-resident decedents to real property and tangible personal property and shares of corporate stock of corporations of this State and of national banks located in this State.

This is a very substantial omission of property of non-resident decedents theretofore taxable, and probably greatly exceeds in practical every day experience the value of the real estate of resident decedents located without this State, the exclusion of which, in imposing the burden of succession tax on the estates of resident decedents, is the subject of the complaint by the appellants of discrimination under the Federal Constitution.

That the exclusion of New Jersey intangibles, other than stock, from the taxation of non-resident successions, renders the classification, con-

sidered (as it must be) in its entirety, of resident and non-resident estates, vastly more favorable to non-resident estates than to resident estates, is clear as to the great plurality of cases, notwithstanding the statute, in the case of a non-resident estate, prorates the exemptions and the application of the graduated rates, and draws the foreign realty into computation.

Take the following cases:

1.	$2,000,000	New Jersey intangibles.
	1,000,000	New Jersey stocks.
	$3,000,000	All to widow.
Resident estate	Tax	Non-resident estate.
$86,450.00		$28,816.66
2.	$2,000,000	New Jersey intangibles.
	1,000,000	New Jersey stock.
	1,000,000	Foreign realty.
	$4,000,000	All to widow.
Resident estate	Tax	Non-resident estate.
$86,450.00		$29,112.50
3.	$2,000,000	New Jersey intangibles.
	1,000,000	New Jersey stock.
	1,000,000	Foreign personalty.
	$4,000,000	All to widow.
Resident estate	Tax	Non-resident estate.
$116,450.00		$29,112.50

(Of which tax on the resident's estate three-fourths, or $87,337.50, is on the property actually having a situs in New Jersey).

4. $2,000,000	New Jersey intangibles.
1,000,000	New Jersey stock.
1,000,000	Foreign realty.
1,000,000	Foreign personalty.
$5,000,000	All to widow.

Resident-estate Tax	Non-resident estate.
$116,450.00	$29,290.00

(Of which tax on the resident's estate $87,337.50 is on property actually having a situs in New Jersey).

The above figures illustrate, incidentally, to what a trifling extent the introduction of foreign realty as a factor in the computation affects the amount of the tax on a non-resident estate.

They forcibly evidence the liberality shown to non-resident estates in permitting succession, free from tax, to a large class of property (debts, bank deposits, bonds, mortgages, commercial paper), *actually having a situs within this State,* succession to which is taxed in the case of resident decedents.

The question whether the classification which excludes altogether from taxation intangibles owned by non-residents, but includes in the computation of the tax real estate owned outside our borders, discriminates against the non-residents, might at a superficial glance be thought to depend upon the fact of the extent of individual holding by New Jersey residents of realty outside of the State as compared with the individual holdings of intangibles within the State by non-residents. If this be so, the question could readily be determined in favor of the State. Real estate ownership is necessarily circumscribed by the fact that it is a tangible

local form of property, by its immobility as a form of investment, by its less easy transferability, by its greater liability to certainty of taxation and by the lack of markets of exchange. Investment in intangibles, however, knows no boundary lines.

As we have already clearly seen, however, such is not the question to be determined. The inclusion of real estate has the effect not of laying a tax thereon, but *only of absorbing a small portion of the exemption allowed by law and of drawing closer together the points at which the graduated rates begin to fall upon local property considered wholly without reference to foreign property.*

For example: Under case 1, *supra,* the exclusion of the New Jersey intangibles saves the non-resident $57,633.34, whereas, in case 2, the inclusion of the foreign realty increases the tax only $295.84.

There are other features of the ratio provision which repel the conclusion that discrimination inheres therein.

In the absence of such provision, the State would be justified, according to some authorities, in disallowing any claim for deduction of debts and expenses, save the debts owing to local creditors and expenses incurred in local ancillary administration, which last are in the plurality of cases, negligible or non-existent.

Memphis Trust Co. v. *Speed,* 114 Tenn. 677, 88 S. W. 321.

McDougald v. *Low,* (Cal.) 127 Pac. Rep. 1027.

This prorating of debts and expenses under the statute may, in some cases, be more favorable in result to the non-resident estate than a computation based exclusively upon the New

Jersey property in accordance with the doctrines maintained by appellants.

Take case of non-resident owning $100,000 New Jersey stocks and $50,000 foreign personalty, subject to $50,000 in debts and administration expenses, and leaving all to widow. The tax according to the statute would be as follows:

Net estate		$100,000.00
Exempt	$ 5,000.00	
1%	45,000.00	$450.00
1½%	50,000.00	750.00
	$100,000.00	
Tax to be apportioned		$1,200.00
Two-thirds (being ratio of New Jersey property to entire estate)		$800.00

If the statutory command to prorate the debts and expenses were non-existent, and it were not shown that the New Jersey stocks were in fact employed in payment of debts, the tax might be assessed as follows, and in accord with the appellants' contentions:

New Jersey estate		$100,000.00
Exempt	$ 5,000	
1%	45,000	$450.00
1½%	50,000	750.00
Tax		$1,200.00

Whatever be the sound rule in respect to proportional deduction for debts and expenses from the value of local personalty in the absence of statute, there can be no doubt that our statute distinctly favors the non-resident in allowing such a deduction against local realty. *For this is in disregard of the rule which would otherwise apply, namely, that the personalty is the primary fund for the payment of debts.*

Take, e. g., an estate left to widow, consisting of $20,000 New Jersey realty and $10,000 foreign personalty, subject to $5,000 debts and expenses. The statutory computation of the tax would be:

Net estate		$25,000.00
Exempt	$ 5,000.00	
1%	20,000.00	$200.00
Tax to be apportioned		$200.00
Two-thirds (ratio of New Jersey property entire estate)		$133.33

In the absence of the statute the widow would be taxed $150.00 upon the devise.

The legislature has, therefore, by this statute, under a scheme generally applicable to the succession to all property within the jurisdiction, recognized differences between the succession to property of resident decedents and the succession to property located in this State of non-resident decedents, and, without distinguishing in any way the burdens cast upon such succession as to destination of the property or basic rate of the tax, has imposed different methods of calculation of the tax, direct in the one case and by the ratio method of section 12 in the other case. The legislature has also seen fit to relieve, in determining the amount of the property in New Jersey to which the tax is applicable, the property of non-resident decedents except real estate, tangible personal property and stocks of New Jersey corporations and of national banks located in New Jersey.

It may be that occasionally some small inequalities may result in the application of this scheme of succession tax. It may be that instances of apparent discrimination may be conceived for purposes of illustration. Like con-

ception can be had of discriminations in the other direction. Yet we find no basis in the Federal Constitution or in the decisions of the Federal courts justifying the condemnation of this law as in conflict with the requirements of the Federal Constitution.

No case is quoted in the appellants' brief in direct support of the propositions necessary to successful attack upon this law. The discriminations which by inference can be said to be condemned by the cases cited therein are discriminations applicable to successors to the property, and as between such successors similarly situated the New Jersey law makes no distinction.

Confidently maintaining therefore, the justice and legality of such classification as the legislature has made as between resident and non-resident estates, against the contentions of appellants, whether founded on the guaranties relating to "privileges and immunities" of citizens, or to "equal protection of the laws," and whether asserted in the supposed constitutional standing either of the deceased owner or of the living successors, we thus conclude and summarize our discussion of the statutory classification, which should, of course, be considered as a whole:

(1) The situation in which the State finds itself in respect to the enjoyment of property by non-residents justifies the imposition of a different and a greater premium upon the privilege of succeeding to such property upon death. We do not intend to concede the appellants' claim that New Jersey has by the present law imposed a different and greater premium upon the succession to the property in New Jersey of non-resident decedents, but the authorities would support a classification which accomplished that result.

(2) The situation in which the State finds itself in respect to the property of a non-resident decedent justifies it in placing such property in a separate class for the purpose of ascertaining the amount of the tax and prorating the exemptions allowed, and applying proportionately a graduated scale of taxation—at the same rate, however, which is applied in the case of the universal succession of a resident decedent in respect to all of his property wherever situated. That is to say, the State, taxing at the same rate, may apply that rate in a different manner in the case of a succession to property of a non-resident actually situated within the State from the case of a universal succession to property of a decedent domiciled within the State, so long as there be no arbitrary and deliberate discrimination in the manner of application.

(3) The New Jersey statute is not discriminatory because (a) the ratio provision, so far as it affects foreign personal property of a non-resident, operates in exactly the same manner as in the case of a resident and, in effect, is a mere formula for the application of the same rate; (b) in so far as it slightly affects the exemption and the application of the graduated rate by inclusion of foreign real estate, such provision is valid, because based upon wealth, a proper criterion *(Magoun* v. *Illinois Trust Co., supra);* and because the slight relative disadvantage arising therefrom is not demonstrably greater than the advantage accruing to the non-resident estate by the prorating of debts and expenses, not otherwise mandatory upon the State.

(4) Whether either or both of the above mentioned alleged manifestations of a discriminatory purpose be substantially injurious, considered by themselves, they are but parts of a scheme which, in its entirety, operates to the great advantage of

the non-resident as compared with the resident by reason of the exclusion of intangibles (other than stock) having an actual situs in New Jersey from taxation in the case of succession to the estates of non-residents.

III.

The Comptroller has correctly applied the graduated rate in calculation of the tax.

Under Point II of the appellants' brief the application of the graduated rate in the calculation of the tax is condemned, and a contrary rule advocated based on the construction of a New York statute. This contention was rejected by the Supreme Court in *Torrance* v. *Edwards*, (see Case, p. 63), argued at the same term as this case; and the opinion below followed that decision. Appellants' argument in the case at bar is directed against the ruling in *Torrance* v. *Edwards* (Brief, p. 81).

Appellants assume that the New Jersey statute of 1914 in this regard is copied from New York. This assumption is fallacious in view of the lack of identity of the statutes, and the opportunity open to the New Jersey legislature to borrow the graduated tax theory from many other states than New York. Because we closely followed New York in the framing of our original collateral inheritance act it may not be concluded that this late incorporation in our system of direct and graduated taxes must have the same origin. The legislature did not adopt the peculiar language of the New York statute, but in its own words expressed a concept familiar to almost all modern inheritance tax legislation. Language is to be found in many such statutes other than of New York quite as similar as that of the New York act, or more

so. This may be seen by glancing at a collection of Inheritance Tax Statutes, such as *Blakemore & Bancroft.*

The language of the New Jersey Act of 1914, the same, *mutatis mutandis,* in its reference to the two classes subjected to graduated tax, except in the final clause, is:

> "Property transferred shall be taxed at the rate of one per centum on any amount in excess of five thousand dollars, up to fifty thousand dollars; and 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 amout in excess of two hundred and fifty thousand dollars."
>
> The final clause in the 2% class is as follows: "and four per centum on all amounts in excess of two hundred and fifty thousand dollars."

The Comptroller's rule of application is as follows (using the succession of a wife for illustration):

Exemption			$ 5,000
In excess of $	5,000 to $	50,000	1½
In excess of	50,000 to	150,000	1½%
In excess of	150,000 to	250,000	2%
In excess of	250,000		3%

This, it is submitted, is the natural construction of the statute, and imperative unless the final clause, "and three per centum on any amount in excess of two hundred and fifty thousand dollars" be entirely ignored.

The appellants have not set forth in their brief the New York Act of 1910, on which the controlling New York case is based. That sta-

tute is as follows: (N. Y. Statutes, 1910, Chap. 706; Blakemore & Bancroft on Inheritance Taxes, p. 830):

"When property, real or personal, or any beneficial interest therein, of the value of not more than five hundred dollars passes by any such transfer to or for the use of any father, etc. * * * such transfer of property shall not be taxable under this article; if real or personal property, or any beneficial interest therein, so transferred is of the value of more than five hundred dollars, it shall be taxable under this article at the rate of one per centum upon the clear market value of such property except as herein provided. No such tax shall be assessed upon property, real or personal, or any beneficial interest therein so transferred to a father, etc. * * * if the amount so transferred to such father, etc., * * * is the sum of five thousand dollars or less; but if the amount so transferred to a father, etc., * * * is over five thousand dollars the excess shall be taxable at the rate of one per centum upon the clear market value of such property as hereinbefore provided. The rates of taxation hereinbefore prescribed in this and the preceding section are hereby designated as 'primary rates.' Whenever any property, real or personal, or any beneficial interest therein which passes by any such transfer to or for the use of any person or corporation, shall exceed the amount of twenty-five thousand dollars over and above the exemptions hereinbefore provided the rate of taxation shall be as follows:

"Upon all amounts in excess of the said twenty-five thousand dollars and up to and including the sum of one hundred thousand dollars, twice the primary rates;

"Upon all amounts in excess of the said one hundred thousand dollars and up to and including the sum of five hundred thousand dollars, three times the primary rates;

"Upon all amounts in excess of the said five hundred thousand dollars and up to and including the sum of one million dollars, four times the primary rates;

"Upon all amounts in excess of the said one million dollars, five times the primary rates."

An examination of the opinion of Mr. Justice Jenks, as quoted in appellants' brief, pp. 44 and 45, shows that the New York statute of 1910 there construed was very different from the New Jersey statute of 1914. The New York courts were much divided, the Appellate Division being finally reversed by the Court of Appeals which adopted the dissenting opinion below of Mr. Justice Jenks.

Re Jourdan's Estate, 70 Misc. 159, 128 N. Y. Supp. 728; 151 App. Div. 8, 135 N. Y. Supp. 172.

S. C. on Appeal, 206 N. Y. 653, 99 N. E. 1109.

The opinion of the justice there adopted by the final court is not at all satisfying or convincing, but in any view the statute construed was variant with ours, and the language in the exemption clause and in the body of the act so different as to deny authority to the case in the construction of our own Act of 1914.

The ruling as to the later New York Act of 1911 is by a surrogate, who in construing an act more like, but not yet identical with, our own of 1914, deemed himself bound by the *Jourdan* case, and he was affirmed without opin-

ion, but with dissent in the Appellate Division by Mr. Justice Laughlin.

Matter of Herman Schwartz, 141 N. Y., Supp. 349, *S. C. on appeal,* 209 N. Y. 537, 102 N. E. 1113.

In the meantime Surrogate Woodin of Cayuga County had reached another conclusion as to the law of 1911.

In re Ellettson's Estate, 136 N. Y. Supp. 455.

While it is true that doubts in the construction of a taxing statute should be solved in favor of the taxpayer, this rule cannot apply where a reasonable and natural construction will sustain the tax as imposed. The language of our statute of 1914 is so clear and free from doubt that the intention of the legislature is to be gathered from its language rather than from assumed historical parentage and forced construction of another court.

The words chiefly relied upon by Mr. Justice Jenks in interpreting the New York act are, however, missing from our law. Our statute is clear that "property to the amount of five thousand dollars passing, etc., shall be exempt from taxation under this act," that property transferred, etc., shall be taxed at the rate of 1% on any amount in excess of $5,000 up to $50,000; at 1½% on any amount in excess of $50,000 up to $150,000; at 2% on any amount in excess of $150,000 up to $250,000; "and three per centum on any amount in excess of two hundred and fifty thousand dollars."

Under any natural construction of this final clause the 3% begins in its application at $250,000. Under prosecutors' construction 3% would begin at $455,000, and that would necessitate a

positive contradiction of the clause fixing the maximum rate.

It is more likely that the legislature, in imposing a progressive rate, should have fixed a regular progression, as from $50,000 to $150,000 and to $250,000, than a progression from $5,000 to $55,000, thence to $205,000, and thence to $455,000.

This act has been in operation since March 26, 1914, and the practice of the Comptroller's office in the application of the graded tax is now first attacked, although the records of this court disclose numerous litigations conducted by careful and experienced lawyers involving many points of attack upon assessments made under this statute. The conclusion is to be irresistibly drawn that the consensus of opinion of the bar supports the Comptroller's construction and practice.

The California statute of 1905 is practically identical with the New Jersey act. (Stat. 1905, c. 314).

> "Sec. 2. When the property or any beneficial interest therein so passed or transferred exceeds in value the exemption hereinafter specified and shall not exceed in value $25,000 the tax hereby imposed shall be:
>
> "(1) Where the person * * * entitled to any beneficial interest in such property shall be the * * * wife, lineal issue, * * * at the rate of 1% of the clear value of such interest in such property.
>
> "Sec. 3. The foregoing rates in section 2 are for convenience termed the primary rates. When the market value of such property or interest exceeds $25,000, the rates of tax upon such excess shall be as follows:

"(1) Upon all in excess of $25,000 and up to $50,000, one and one-half times the primary rates.

"(2) Upon all in excess of $50,000 and up to $100,000, two times the primary rates.

"(3) Upon all in excess of $100,000 and up to $500,000, two and a half times the primary rates.

"(4) Upon all in excess of $500,000, three times the primary rates.

"Sec. 4. The following exemptions from the tax are hereby allowed:

"(2) Property of the clear value of $10,000 transferred to the widow or to a minor child of the decedent, and of $4,000 transferred to each of the other persons described in—"

This statute was given the same construction put upon the New Jersey act by the Comptroller, in the case of *In re Timken's Estate,* 109 Pacific Reporter, 608 (Cal. 1910), and *In re Bull's Estate,* 153 Cal. 715; 96 Pac. 366 (1908). The calculations made by the court in both cases appear in the report.

The construction placed by the Comptroller upon the language of the act is that which for many years has had continuous and unchallenged judicial and administrative application to substantially identical language in other statutes of this State. These statutes clearly bear the same construction as the language in Section 1 of the Inheritance Tax Act and a decision in favor of appellants' construction of that act will necessarily overthrow the settled construction of the other provisions of our law to which we refer, and which are as follows:

(1) Section 129 of the Orphans' Court Act (Comp. Stat. 3860) regulating the commissions

of executors, administrators, guardians and trustees, and providing that they shall not exceed the following rates:

> "On all sums that come into their hands, not exceeding one thousand dollars, seven per centum; if over one thousand dollars, and not exceeding five thousand dollars, four per centum on such excess; if over five thousand dollars, and not exceeding ten thousand dollars, three per centum on such excess; and if over ten thousand, two per centum on such excess; provided, that the commissions of executors, etc., in any estate where the receipts exceed the sum of fifty thousand dollars, shall be determined * * * according to the actual services rendered, etc."

Under this section it has always been the practice to allow 7% on the first thousand, 4% on the next four thousand, 3% on the next five thousand and 2% upon the portion of the total receipts exceeding ten thousand.

(2) Such has also been the construction of the act providing for the fees of sheriffs upon execution sales (Comp. Stat. 2284):

> "When a sale is made by virtue of an execution, on all sums not over one thousand dollars, two per centum on the amount of sales; if over one thousand dollars, and not exceeding three thousand dollars, one per centum on such excess; and if over three thousand dollars, one-half of one per centum on such excess * * *."

(3) Likewise Chancery rule, No. 147, providing for the percentage allowed as fees to solicitors in uncontested foreclosures (old rule No. 224) and which reads:

> "On all sums decreed to be paid in such causes amounting to $5,000 or less, at the rate of one per cent.; upon the excess over

> $5,000, and up to $10,000, at the rate of one-half of one per cent; upon the excess over $10,000, and up to $25,000, at the rate of one-quarter of one per cent.; and upon the excess over $25,000, at the rate of one-fifth of one per cent."

The application of the graduated rate in the mode sustained by *Torrance* v. *Edwards, supra,* would increase the tax as calculated by appellants at pp. 5-7 of their Brief from $20,647.15 to $22,210.84.

IV.

The transfer tax under review has been correctly calculated by the Comptroller at $29,071.68, and should be affirmed.

On pages 4 and 5 of the return will be found the Comptroller's calculation of the tax. On pages 6 and 7 will be found, in an affidavit by Henry W. Reighley, the details as to the property, debts, administration expenses, etc., of the McDonald Estate. The statements contained in this affidavit are, by Stipulation I, page 27 of of the Record, to be taken as true.

The total estate amounts to $3,969,333.25, of which all but $4,250 is personal estate.

The property within the jurisdiction of New Jersey owned by the decedent is all personal property and, at actual value at the date of the death of the decedent, amounts to $1,114,965.

The items of the property within New Jersey appear Schedule B, page 23, of the return, and are also listed at the beginning of the Comptroller's calculation on page 4. The taxable property in New Jersey consists entirely of stocks in New Jersey corporations.

The will of the testator is set forth, pages 9 to 22, and shows stocks of New Jersey corporations specifically bequeathed to the widow and to strangers totalling, as appears on page 4 of the Comptroller's calculation, $328,914.04.

Deducting these New Jersey stocks specifically bequeathed to widow and strangers, as required by the proviso in section 12 (*Lawyers T. & T. Co.* v. *Comptroller,* 85 N. J. Eq. 481), the value of the New Jersey property to be used in calculating the tax under the ratio plan of section 12 is $786,050.96.

Of the New Jersey stocks specifically bequeathed the widow received $246,685.53 and strangers received $82,228.51.

The assessment on the specific legacies to strangers, at the straight rate of 5%, in the amount of $4,111.42, is conceded to be correct on page 5 of the brief.

The widow is within the so-called 1% class and the tax assessed against her by the Comptroller is $3,933.71.

The only criticism against this is the fact that the Comptroller has applied the graduated rate pursuant to the practice of his office under the construction of the act above discussed in this brief under sub-division III. If the State's construction of the act in the application of the graduated tax is sound there is no room for criticism of the tax assessed against the New Jersey stocks specifically bequeathed to the widow.

The Comptroller's application of the ratio plan to the balance of the estate appears in detail on page 5 of the return. He calculates the tax on the entire estate as though it were all situate in New Jersey, and there is no real

reason for criticism of his figures. The result, if all the property had been in New Jersey is necessarily as follows, eliminating, of course, the tax on specific legacies to the widow and strangers:

Appraised value of the Estate, real and personal	$3,969,333.25	
Stocks specially bequeathed to widow and strangers	328,914.04	
Total appraised value of estate as though all situate in New Jersey		$3,640,419.21
Debts, (Record p. 7)	$ 20,213.17	
Funeral and administration expenses, (ditto)	250,600.00	
		270,813.17
		$3,369,606.04
Legacies 5% class	$ 356,761.26	
Widow's interest other than under special bequest, $294,712.99, (inclu. exemption, $5,000)	294,712.99	
		651,474.25
Residuary estate		$2,718,131.79

These interests would be taxable as follows:

Legacies to beneficiaries in 5% class, $356,761.26 $17,833.06

Interest of widow in estate other than specific bequest, $294,712.99, less statutory exemption, $5,000, $289,712.99, taxable if all in New Jersey subject to graduated rate because of prior application of the tax on the specific bequest to the widow—on $3,314.47, at 2%	66.29
On $286,398.52, at 3%	8,591.95
Residuary estate passing to son and two grandchildren in equal parts, $2,718,131.79, less three statutory exemptions of $5,000 each, $15,000, leaving $2,703,131.79 taxable:	
$135,000 (three times $45,000) at 1%	1,350.00
$300,000 (three times $100,000) at 1½%	4,500.00
$300,000 (three times $100,000) at 2%	6,000.00
$1,968,131.79 (three times $616,043.93) at 3%	59,048.95
	$97,390.25

This is the total tax assessable, if all the property were in New Jersey, over and above the amount required for specific bequests, and with allowances for debts, administration expenses and statutory exemptions properly made.

The ratio rule of section 12 provides that the tax on the transfer of the property situate in New Jersey of a non-resident decedent, subject to the tax, shall be assessed and shall bear the same ratio to the entire tax which the said estate would have been subject to if such non-resident decedent had been a resident of New Jersey and all his real and personal property located within this State, as such taxable property bears to the entire estate wherever situate, provided that nothing in this clause contained

shall apply to any specific bequest or devise of any property within the State.

The Comptroller, therefore, in compliance with the proviso, deducted from the New Jersey property of the McDonald Estate that part of it which was the subject of specific bequests to the widow and strangers, leaving $786,050.96 as the appraised value of the New Jersey property.

The entire estate, as we have seen, is $3,-969,333.25, from which the Comptroller deducted the specifically bequeathed New Jersey property in the amount of $328,914.04, leaving a total estate for the proportion required by section 12 of $3,640,419.21.

The New Jersey property was, therefore, 21.59% of the entire estate.

The brief of the appellants does not criticise this percentage except to carry the decimal further. (Brief, page 4).

This percentage of total tax assessable against the estate, if the decedent had been resident in New Jersey and all his property, real and personal, had been located within this State, which total tax would have been, as we have seen above, $97,390.25, when applied to such total tax results in $21,026.55, and that amount is exactly the tax required by the ratio provision of section 12, and is the tax which bears 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 taxable property of the decedent within this State bears to the entire estate wherever situated, giving due heed to the proviso requiring the exclusion of property in this State specifically bequeathed.

The appellants condemn this result and submit an application of this percentage to debts, administration expenses and to legacies, for the ascertainment of the parts of such debts, expenses and legacies to be payable under their theory from the New Jersey property. In their calculation they also ask application of the full exemption of $5,000 in every case as against the New Jersey property.

The method of the appellants is absolutely at variance with the requirements of the ratio provision and contradicts the theory of that provision which is so lucidly explained by Mr. Justice Reed in *Tilford* v. *Dickinson,* 79 N. J. L. 302, 307, hereinbefore referred to. We may, however, quote:

> "The theory upon which it (the rule provided by our statute) rests is that each distributee has an undivided interest in all the assets of an estate, and that no particular portion of such assets passes to any particular distributee. Therefore, when it is ascertained what portion of the whole estate goes to all of the collateral distributees as a class, it will be presumed that such proportion of the New Jersey property goes to such class of collaterals as the property in New Jersey bears to the property in New York—it being assumed that equal proportions of the property in both states will be devoted to the payment of collateral distributees. This rule was so applied in the present assessment."

The same theory is equally applicable to debts and administration expenses, as no creditor or claimant takes any interest in any specific assets of the estate; he is to be paid from the entire estate and not proportionately

from one and another except as proportion may be the result of final administration.

The same theory applies also to exemptions. The object and effect of section 12, as was said by Mr. Justice Swayze in *Carr* v. *Edwards,* 84 N. J. L. 667-670, was to equalize the rate of the transfer tax as between the estates of resident and non-resident decedents, and the purpose would be defeated if the statutory exemptions were not also made the subject of the prorate provided by the section.

The statute ascertains by the ratio provision the whole amount of tax payable on transfer of the New Jersey property of a non-resident decedent. It makes no difference in sustaining the validity of the law whether the transfer tax be that of the ultimate beneficial succession or the universal succession of the foreign administrator or executor. Mr. Justice Swayze said in *Carr* v. *Edwards,* page 670:

> "In the case of the estates of non-resident decedents, it is open for the law of the domicile to provide, as testators sometimes do, that such taxes shall be a general charge against the estate. Our legislature must be assumed to have had in mind its lack of jurisdiction over legacies under a non-resident's will, and in order to protect the New Jersey executor, administrator or trustee who paid the tax, authorized its deduction from 'property for distribution.' This phrase suffices to reach not only a distributive share of a resident's estate in case of intestacy, but the whole of the New Jersey property of a non-resident when turned over to the executor or administrator at the domicile of the decedent."

The State of New Jersey need not be interested in the distribution of the burden of the

tax upon the beneficial succession to the property. It makes the tax a general charge against the estate, as though upon the universal succession of the foreign executor or administrator to the New Jersey property. Such foreign executor being furnished with the calculation of the New Jersey tax can readily apply the percentage to each one of the beneficial interests in exact proportion to their proper burden, if operating under a will in which the testator has failed to make succession taxes a general charge against his estate. So, as a matter of fact, the burden may be put upon the beneficial succession if desired. The State is not required to attend to that.

There is no difference, as Mr. Justice Reed said in *Tilford* v. *Dickinson, supra,* page 308, between the administration of an estate by a testator and the administration of an estate by an executor in respect to the application of succession taxes.

> "Apart from strictly specific legacies, I am unable to perceive any substantial ground for differing the administration of an estate by an administrator from the administration of an estate by an executor, in respect to the question now presented. Technically, of course, by will the estate goes to the executor; but it goes to him as trustee for all who are designated beneficiaries in the will which he is appointed to execute. Equity will compel him to administer the estate for the benefit of the legatees and devisees. His required assent to the payment of the legacies may be compelled in equity. 2 Wms. Ex. 1238.
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> "Indeed his required assent is without substance, because by the statute of many states, including New York and New Jersey, the executor is compelled to pay the

legacies within a stipulated period. 2 Woerner Am. L. of Admin. 997.

"The legatee, before the assent of the executor, had such an inchoate title as passed to his personal representative in case of his decease. Redf. Wills, part 2, p. 565.

"Indeed, the schemes of administration in both testate and intestate estates are designed to secure in the first instance, the payment of the debts of the decedent, and then to secure to the beneficiaries the remainder of the estate, whether such beneficiaries are designated in the will or by the statute of distribution in cases of intestacy. When the designated beneficiaries are, as in this case, general and not specific legatees, no legatee takes any specific assets of the testator's estate. He does take an interest in the entire estate, to be ascertained upon administration after the application of the estate to the payment of debts, by the distribution of the remaining estate according to the terms of the will."

The $21,026.55, thus ascertained, is the percentage of the transfer tax to be ascertained under section 12. Adding the tax assessed on the specific bequests, to the widow $3,933.71, and to strangers $4,111.42, we have the total tax of $29,071.68 assessed by the Comptroller.

V.

The act being constitutional and the tax having been correctly assessed by the Comptroller in accordance with its terms, the transfer tax under review should be affirmed.

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