IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 13 Original

STATE OF TEXAS,

Plaintiff,

vs.

STATE OF NEW JERSEY, *et al.,*

Defendants.

REPLY BRIEF FOR THE STATE OF NEW JERSEY

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POINT I

Claims for royalties on gas and oil production from lands in and rental on leases on lands in Texas and for mineral proceeds are intangible personal property.

Texas argues that the claims for royalties on gas and oil production from lands in and rental on leases on lands in Texas and for mineral proceeds from lands in Texas are real property interests and would be classified as real property under the law of Texas. Therefore, Texas argues, these claims should be subject to escheat only under the laws of Texas.

We submit that under the facts as stipulated by the parties, which the Master adopted as his findings of fact, (Report of Special Master, p. 10), all the claims for royalties, rentals and mineral proceeds are accrued cash claims. As such, under established principles of law, these claims are personal property. *United States* v. *Noble,* 237 U. S. 74, 80 (1915); *Kendall* v. *Ewert,* 259 U. S. 139, 149 (1922).

In the case of royalties and rentals, Sun issued checks in an attempt to make payment of these cash claims. (Report of Special Master, p. 10). The only reason checks were not issued to attempt payment of the cash claims for mineral proceeds was that the persons entitled could not be determined. The report by Sun to the State of Texas gives the money value of each claim and indicates a claim for money rather than an interest in real property. The said cash claims should not be confused with "oil and gas in place" or "delayed rentals" which Texas refers to in its brief. No claims for oil or gas in place or delayed rentals are involved in this action.

The very law under which Texas claims the money here involved is a "personal property" escheat law and indicates that Texas has characterized this money as personal property. Texas sues here only under its Personal Property Escheat Law.

In *United States* v. *Noble, supra,* the Court said that accrued rents and royalties on mineral interests in land are personal property. There Charley Quapaw Blackhawk, a member of the Quapaw Tribe of Indians, had been allotted certain lands by the United States Government. The statute under which the allotment was made provided that said allotments shall be inalienable for a period of 25 years from and after the date thereof. This restriction was modified by a specified power to lease. Charley made several leases and assignments of royalties which the Government felt were procured by fraud and in violation of the restriction against alienation imposed by the Congress. In holding that it was beyond the power of Charley to alienate any interest in the land except as permitted by the law, the Court stated at page 80, nevertheless, with respect to his assignment of rents and royalties under a lease:

> "We may first consider the assignments of rents and royalties. Under his patent, the allottee took an estate in fee, subject to the limitation that the land should be 'inalienable for the period of twenty-five years' from date. This restriction bound the land for the time stated, whether in the hands of the allottee or his heirs. *Bowling* v. *United States, supra.* It put it beyond the power of him, or of them, to alienate the land, or any interest therein, in any manner except as permitted by the acts of 1896 and 1897. See *Taylor* v. *Parker,* 235 U. S. 42. The comprehensiveness of the restriction was modified only by the power to lease; and while the allottee could make leases, as provided

in these acts, they gave him no power to dispose of his interest in the land subject to the lease, or of any part of it. *The rents and royalties were profit issuing out of the land. When they accrued, they became personal property;* but rents and royalties to accrue were a part of the estate remaining in the lessor." (Emphasis added.)

Kendall v. *Ewert, supra,* held that accrued royalties for zinc and lead ores mined from lands are personal property. This was an action commenced to set aside a sale of Indian lands which had been unlawfully purchased by an officer of the United States Government through an agent. It was also alleged that a fraud had been perpetrated on Redeagle who was a known drunkard.

Before the litigation was completed, Redeagle died and his administrator and three heirs continued the case.

While the appeal was pending, defendant obtained a quit-claim deed from the heirs of Redeagle for a sum substantially higher than that paid to Redeagle. Then defendant moved to dismiss on the grounds the claim was settled. He argued that the land and royalties passed to the heirs freed of any charges and there was no property or estate for an administrator to administer and no functions for him to perform. In rejecting this argument on the grounds that accrued royalties were personal property the Court stated at page 149 of 259 U. S.:

"* * * The record shows that large sums in royalties for zinc and lead ores mined from the lands involved had been paid to Ewert, *and these when accrued were clearly personal property* (*United States* v. *Noble,* 237 U. S. 74, 80), which, on the death of Redeagle, would pass to his administrator for purposes of paying any inheritance or other taxes which might be properly chargeable against it, and for other administration charges and for distribution." (Emphasis added.)

The property involved in this action consists of money claims against Sun and is unquestionably personal property.

POINT II

The rights of States to the unclaimed intangibles here involved cannot and should not be determined by principles of conflicts of law.

Texas contends that the taking of the unclaimed intangibles involved in this action should be resolved by "the points of contact theory of conflict of laws." Texas Brief, p. 38. We submit that if this theory is adopted as the standard defining the power of states to take ownerless intangibles from a corporation with multistate business operations, it will increase rather than eliminate the risk of multiple liability.

The question presented by the claims of the several states to the same unclaimed intangibles held by Sun cannot be resolved by principles of conflicts of law. The problem does not arise because of a conflict in the law of these states. These laws, rather than conflicting, have the same objective and lead to a similar result. They seek to take from Sun ownerless property held by Sun for the payment of unclaimed intangibles owed to persons who are unknown or whose present whereabouts are unknown. This situation does not present any question of conflicts of law. It presents a question of priority of jurisdiction for proceeding against Sun. It presents for determination the question of the certain and sure location of the intangibles so that when it is taken by one state no other state can assert a claim against the holder for the same intangible. It is the elimination of the threat of double or multiple liability to the holder which we believe is the primary concern

of this Court. *Western Union Telegraph Co.* v. *Pennsylvania,* 368 U. S. 71 (1961).

Texas argues that the question should be determined upon a theory of "points of contact," "grouping of contacts" or "center of gravity." The limited recognition of the theory of "points of contact," "grouping of contacts" or "center of gravity" has occurred in some contract and tort cases where courts have considered a "choice of law" question. This theory should not be applied in the case at hand. See: *Hausman* v. *Buckley,* 299 F. 2d 696 (2d Cir. 1962), *cert. denied,* 396 U. S. 885 (1962) which rejected the use of New York law on a points of contact theory and applied the law of the domicile of a corporation to determine rights pertaining to the internal affairs of the corporation.

In *Hausman* a stockholder commenced a derivative action on behalf of a Venezuelan corporation. The Court of Appeals held that under applicable New York conflicts of law rules the Venezuelian law, providing that a stockholder may not bring suit on behalf of his corporation, applied to bar the action. The Court rejected an argument by appellants that the New York rigid "choice-of-law" rules had given way to a flexible formula variously described in terms of "grouping of contacts" or the finding of a "center of gravity." On page 703 of 299 F. 2d the Circuit Court stated:

> "Appellants also maintain that the cases in which the 'internal affairs' rule has been applied demonstrate only what the New York law was—and not what it is, or should be. They argue that in New York, 'rigid' choice-of-law rules such as this have given way to a 'flexible' formula variously described in terms of 'grouping of contacts' or the finding of a 'center of gravity,' as enunciated in *Auten* v. *Auten,* 308 N. Y. 155, 159-161, 124 N. E. 2d 99, 101-102, 50 A. L. R. 2d 246 (1954). This Court readily agrees that the *Auten*

case has substantially changed the manner in which New York courts decide which law 'governs' multistate contracts. Although it is less clear, it would appear that something in the nature of the *Auten* rule may also have been applied in tort cases. See *Kilberg* v. *Northeast Airlines, supra.* But we are unable to ascertain any authority which even remotely substantiates appellants' assertion that, 'The center of gravity doctrine is encroaching on and superseding traditional conflict of laws rules in all areas of litigation' (Appellants Brief, p. 32).

"Appellants have brought to our attention a number of cases in which this Court, in order to resolve 'commercial' controversies, referred to the *Auten* rule. But all of these cases involved questions concerning the law governing contracts or liability for torts. None of them directly or indirectly suggests that this Court was of the opinion that New York tribunals have introduced the *Auten* rule into corporate stockholder litigation. And appellants have not cited any decisions by New York courts in which this has been done. We do not wish to be understood as intimating in any way that the *Auten* rule could or could not be applied profitably to some corporate questions. Nor do we pass judgment upon the relative merits of the 'internal affairs' doctrine, vis-a-vis the *Auten* rule except to note our disagreement with appellants' suggestion that the 'internal affairs' doctrine has no application to the branch of the law with which we are dealing, or that it clearly serves no useful purpose at all. We think it is generally agreed that, in fact, 'the values of predictability and ease of application are best served by this rule.' *Reese and Kaufman, supra,* at p. 1144."

The adoption of any "points of contact," "grouping of contacts," or "center of gravity" theory in escheat cases would deprive the holders of any certainty whatsoever as to their liability. Insurmountable practical difficulties would be presented. Competent attorneys would have difficulty predicting the result of weighing contacts in a given case, and litigation would be encouraged, not discouraged, by such a rule. The expense to the holder would be greatly disproportionate to the benefits any state could obtain.

It has been recognized that the "grouping of contacts" theory has at least two disadvantages even in contract cases where all of the facts relative to the transaction are normally available. Unquestionably the disadvantages would be numerous in escheat cases where many years have passed since the claim became payable and facts relating thereto are meager and in many instances entirely unknown. The disadvantages in the contract cases are (1) litigants will be deprived of any certainty as to the outcome of a given case and (2) the theory might furnish a convenient means for justifying any desired result. By piling up real and fancied connections with one jurisdiction, however slight, a court could show an overwhelming connection with such jurisdiction. Note: "Choice of Law Problems in Direct Actions Against Indemnification Insurers," 3 *Utah L. Rev.* 490, 498 (1953).

A clear example of the inapplicability of the theory of "points of contact" in escheat cases is disclosed by the argument of Texas in support of its claim for the cash and stock dividends (Texas Brief, p. 48) and the obligations of unknown origin (Texas Brief, p. 52).

The only contact the State of Texas had with these claims is that the person entitled at one time had an address in Texas. The insignificance of this contact was indicated by Texas early in its brief where it objected to the Mas-

ter's recommended conclusions on last known address as a standard for escheat. Nevertheless, Texas now argues that when the last known address is in Texas it is the most significant contact under the theory of "contacts" they advance and supports a judgment escheating these claims to the State of Texas. How such a judgment is to protect the holder from multiple liability under this theory is not explained.

In their argument on cash and stock dividends, Texas attempts to minimize the significance of New Jersey's contacts by suggesting that large numbers of corporations are incorporated in New Jersey and leave only record and office addresses as required by the statute. Not only is this untrue as a general statement, but it is clearly not so in the case at bar. The stipulated facts establish that Sun is incorporated and exists under the laws of New Jersey and also conducts extensive business activities in New Jersey. Sun's authority to declare and pay dividends is regulated by the laws of New Jersey. Such contacts are of such forceful significance that even under a "contacts" theory all the property involved in this action could be held to be subject to escheat only in New Jersey. The lack of certainty resulting from the arguments for and against the right to escheat under a "contacts" theory could not possibly result in the protection from multiple liability which stakeholders are entitled to.

The problems which have developed in the application of laws providing for the escheat of ownerless intangibles held by corporations with multistate business operations sharply point up the importance of certainty, simplicity and convenience so that protection from multiple liability will unquestionably be provided.

To achieve this objective with a minimum of expense to the stakeholder as well as under a certain and sound rule

leads to the adoption of the standard of state of corporate domicile. This conclusion is necessarily reached after the several standards of "last known address," "number of contacts" and "corporate domicile" have been critically analyzed. The only standard which can be fully acceptable to be applied in the taking of unclaimed intangibles from such corporations is the state of corporate domicile. The values of predictability and ease of application as well as full protection from multiple liability will best be served by the adoption of this standard.

Under the corporate domicile standard the holder will be protected from any further liability to another state under the Full Faith and Credit Clause of the United States Constitution. *Standard Oil Company* v. *New Jersey,* 341 U. S. 428 (1951).

CONCLUSION

For the foregoing reasons as well as those presented in our main brief, we again respectfully urge that this Court should enter judgment determining that the ownerless, intangible obligations held by Sun are subject to the superior right of New Jersey, as the state of incorporation of Sun, to take such property under its Custody and Escheat Laws and that neither Texas, Pennsylvania nor Florida has established a superior right to such intangibles.

Respectfully submitted,

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Proof of Service

I, Charles J. Kehoe, Deputy Attorney General of the State of New Jersey, one of the attorneys for defendant, State of New Jersey, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 13th day of March, 1964, I served copies of the Reply Brief of the State of New Jersey on each of the other parties to this action by depositing copies in a United States post office or mail box, with first class postage or air mail postage prepaid, and addressed to:

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