In the

Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA,
Plaintiff,
and
STATES OF CONNECTICUT, CALIFORNIA,
and INDIANA,
Intervening Plaintiffs,

v.

STATES OF NEW YORK, FLORIDA, OREGON
and VIRGINIA, and the WESTERN UNION
TELEGRAPH COMPANY,
Defendants,
and the
STATE OF ARIZONA,
Intervening Defendant.

No. 40
Original

Washington, D. C.
March 29, 1972

Pages 1 thru 44

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IN THE SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA, Plaintiff, and STATES OF CONNECTICUT, CALIFORNIA, and INDIANA, Intervening Plaintiffs, v. STATES OF NEW YORK, FLORIDA, OREGON and VIRGINIA, and the WESTERN UNION TELEGRAPH COMPANY, Defendants, and the STATE OF ARIZONA, Intervening Defendant.	No. 40 Original

Washington, D. C.
Wednesday, March 29, 1972

The above-entitled matter came on for argument at 11:35 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

HERMANN ROSENBERGER, II, ESQ., Assistant Attorney General of Pennsylvania, Philadelphia, Pennsylvania, for Plaintiff Pennsylvania.

F. MICHAEL AHERN, ESQ., Assistant Attorney General of Connecticut, 30 Trinity Street, Hartford, Connecticut, for Intervenor-Plaintiff Connecticut.

[Appearances continued on page following.]

APPEARANCES (Continued):

MRS. WINIFRED L. WENTWORTH, Assistant Attorney General of Florida, Capitol Building, Tallahassee, Florida 32304, for Defendant Florida.

JULIUS GREENFIELD, ESQ., Assistant Attorney General of New York, for Defendant New York.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 40, Original: Commonwealth of Pennsylvania against the State of New York and others.

Mr. Rosenberger, you may proceed when you're ready.

ORAL ARGUMENT OF HERMANN ROSENBERGER, II, ESQ.,

ON BEHALF OF PLAINTIFF PENNSYLVANIA

MR. ROSENBERGER: Mr. Chief Justice, Members of the Court:

This is an original action initiated by the Commonwealth of Pennsylvania between the states to determine a controversy as to the application of the law set down in Texas v. New Jersey to instances of intangible obligations where the debtors' records with varying degrees of frequency do not indicate the identity or street address of the creditor. With specific respect to Western Union, this action requests a declaratory judgment as to which state should be assigned priority for purposes of escheating or taking custody between one and one and a half millions of dollars of unclaimed debts arising from the sale of intangible telegraph money orders on or before December 31, 1962.

Inferentially this action will govern instruments unclaimed issued before and after that date with respect to

money orders sold by Western Union and other companies over the counter and travelers checks issued by the American Express Company and other species of bearer instruments sold to the public.

Pennsylvania and the other states, excepting New York, support a rule which, like that of Texas v. New Jersey, will give preference to the state where the creditor is deemed to have last resided and the debt was payable as shown by the debtor's records. This would be the state where the creditor's right accrued, the state of purchase where a draft has not been issued to the sendee, or the state of destination where a draft was so issued but not negotiated. Such a rule would not only reflect the underlying realities of the transaction involved but would be equitable to the scheating states and would distribute escheats among the states in proportion to the commercial activities of its citizens.

New York supports a rule which, on the facts of the present case, would give preference to the state of corporate domicile where the creditor's identity or street address did not appear on the debtor's record or where it was not feasible to determine the same. This rule as applied to the facts of this case would result in most of the escheatable claims flowing into New York's treasury due to the accident of Western Union's incorporation. And with

respect to travelers checks and over-the-counter money orders would give New York exclusively the millions of dollars of escheatable funds involved.

The differing positions of the parties to this action are reflected in their statutes. The statutes of all parties to the case, excepting New York, are basically patterned after the uniform disposition of unclaimed property act, which allows for the custodial taking of property held or owing in the particular jurisdiction. The statute of the State of New York is divided into escheatable occurrences occurring before or after 1958. Before 1958, New York maintained that it is entitled to take all obligations, regardless as to where the rights were accrued, of the holder, which is incorporated in the State of New York.

With respect to items after 1958, New York's statute provides for custody of New York where the creditor's address is not on the debtor's records. However, with respect to corporations incorporated outside of New York, Section (c) of that particular statute provides that New York would take where the obligation was incurred in the State of New York. In other words, New York essentially has it both ways.

The states of Pennsylvania, California, North Carolina, and Indiana have explicitly provided in their

statutes for a presumption that where the creditor's address does not appear on the records of the debtor with respect to money orders and travelers checks, that that address will be deemed to be in the state of sale. Sixteen states, including the four that I just mentioned, implicitly provide for the same presumption by adopting a state-of-sale test with respect to money orders and travelers checks. And the revised uniform disposition of unclaimed property act which was passed in 1966 and adopted or approved by the American Bar Association in the same year also provides for a state-of-sale test with respect to this particular class of property.

A further reason for the institution of this action is that Western Union's records reflect two possible creditors, the sender and the sendee of the telegraph money order, but do not denominate either as such. The Special Master found that the creditor in all instances, save where a draft is issued to the sendee, is the purchaser. And with this finding all parties agree. The Master further found that any rule should be applicable to all involved transactions regardless of their date of origin, before 1958 or after 1958, and with this no party has taken exception.

Insofar as the rule proposed by the Special Master and supported by New York fails to take into account the characteristics which distinguish the transactions involved

in the present case from those considered in Texas v. New Jersey, all the states to this litigation, save New York, vigorously take exception to his report. In deciding this case the Court is bound by neither statute or precedent, save its decision in Texas v. New Jersey, which was the first which involved such a controversy between the states.

Pennsylvania's position today is twofold. First, that in Texas v. New Jersey the Court was basically concerned with the state which should be given priority for the purposes of scheat. And, within that context, the word "address" refers to the state in which the creditor is deemed to reside and not his street address. This is essentially a matter of semantical interpretation.

Secondly, we would urge the Court that if in fact "address" did mean street address in the context of Texas v. New Jersey, then that rule should be modified to fit the distinctive circumstances concerning the sort of transaction which we are involved with in a money order situation.

With respect to the first point, the Court specifically said in Texas v. New Jersey that it was not concerned with technical concepts of domicile and residence in determining an interstate controversy. Western Union's record and those of other affected enterprises always show the location and the state where its escheatable obligations were purchased. But in many instances they do not show the

creditor's identity or street address. Even in those instances where applications retained by Western Union do show identity and street address, the cost of surveying and reporting the information would be prohibitive in terms of the funds involved; and even in your Court you said that it is not feasible to do so.

As far as over-the-counter money orders and travelers checks are concerned, such records are never maintained, as they are not required by the business.

The states that have adopted the state-of-sale test with respect to money orders and travelers checks and the four states California, Pennsylvania, North Carolina, and Indiana, which have a presumption right in their statute that for purposes of this situation where there is no address, it will be presumed that the purchaser of the obligation resides in the state of purchase. We would suggest to the Court that to uphold or to determine that in fact there was no rational basis for this presumption, to overturn those statutes and the uniform act as suggested by New York, would be to destroy that presumption without any evidence on the record that in fact it is an invalid presumption.

In fact, Pennsylvania offered to the Special Master a 1963 survey conducted by Western Union of all escheatable items or unclaimed items which totaled 2951 in

that particular year. In 1740 items the address of the sender was in the same state as the state in which the application originated. In 1066 of the items or in more than one-third, 33-1/3 percent, there was no address given on the application form. The sender had not filled in his application. On 145 items the address of the sender was in a different state than where the application originated. Thus, in those items, the 1740 items where in fact there was an address, in 93 percent of the cases the address of the purchaser and the state in which the investigation indicated that he resided coincided.

The Special Master rejects this survey in its report, stating New York's objection that, one, it was not properly authenticated; secondly, it is irrelevant because it pertains to a survey that was done one year after the last year involved in Pennsylvania's complaint. I would suggest to the Court that for this item of secondary evidence that this survey was as revealing, as authenticated and as relevant as the survey mentioned in the stipulation between the parties and in the facts in that stipulation several of which involved years prior to 1961.

But even if in fact the Court does not accept this survey which has been submitted to the Court with the other papers by the Special Master, the Court can take judicial notice that the presumption of the states which have this

state-of-sale test coincides with everyday experience. That is particularly with respect to money orders which are purchased in grocery stores, banks, et cetera; people tend to purchase these items, these convenience items, near where they live and do not cross interstate lines. The presumption in any event is embodied in the statutes adopted by the respective states, and there is no evidence on the record or in reason to indicate that that presumption is invalid.

As I have already submitted to the Court, in Texas v. New Jersey the Court said it was not concerned with logic; the result in that decision was not required either by precedence, statute, the Constitution, or logic; and the use of the word "logic" by Mr. Justice Black was a considered one, because New Jersey, which championed the corporate domicile rule in that case had argued in its brief an argument to the Court that it was totally illogical to assume that a last address shown on Sun Oil's records which could have been placed on those records up to 40 years previously and to which their drafts had been mailed and returned, it was totally illogical to assume that the residence of the creditor and his address coincided. And the Court said, "We are not concerned with logic in this situation. What we are concerned with is a rule that will distribute these funds equitably among the states which have power to escheat or to take custodial."

New York has adopted the same presumption urged by Pennsylvania and the other states when it suits its purposes. As I have already advised the Court with respect to their abandoned property act, with respect to these institutions which are incorporated outside of New York and which issue obligations in New York, New York provides for custody in that state when those obligations were issued in New York State. And presently the Department of Audit and Control in New York has presented to the Legislature and it's up for final reading at this time a bill that would provide for escheat to New York in the case of securities which have been sold in New York without reference to any last known address of the creditor or in fact where there is no last known address but without reference to the question as to whether or not the broker is incorporated in New York or not.

Secondly, even if the Court holds that the last known address rule as stated in Texas v. New Jersey referred to street address and was not simply a shorthand for determining that state which would be given priority in the specific instance, the facts of the underlying classes of transaction in the instant case justify a modification of the rule to fit the present factual situation. And it is our contention that the transactions involved with respect to the Western Union money orders, with respect to over-the-

counter money orders, and Express travelers checks involving distinctions between those obligations which were considered by the Court in Texas v. New Jersey. The distinction is between a service purchasing corporation or a service purchasing enterprise which was involved with the Sun Oil Company which purchased services from its workers, from its investors, from its lessors, et cetera, and a service selling enterprise. In this particular case we are dealing with an enterprise, the Western Union Telegraph Company, which sells services to the public at large. The service is the transmitting and the delivery of these money orders.

In the former situation the debtor ordinarily maintains records of his creditor's last known address. He does so, number one, because the creditor's services are necessary for the successful functioning of the corporation and, secondly, because he is dealing with a limited number of creditors or classes of creditors. In this second situation when we are dealing with Western Union, another issue of these bearer instruments, we are dealing with a situation of an enterprise that is dealing with the public at large where it is selling services and in only a very few times did those services fail to be performed. There is no reason for the enterprise to maintain records or the address of creditors. And, in fact, in the particular situation if they were required to do so, it would quite

possibly increase the cost of their service.

The modification of the creditor state rule which we propose, which would either interpret the word "address" in Texas v. New Jersey to simply refer to the location and state of purchase because in each of the instances here that is reflected in Western Union's records. Or would apply Texas v. New Jersey to the facts of this particular case where in many instances there is no such record.

Our proposed modification would not have affected the outcome of that case, because in that case Sun Oil retained records in an overwhelming number of cases. Therefore, it would not affect the integrity of that decision.

The proposals of Pennsylvania and all the other states, save New York, serve the three overriding considerations which the Court gave in Texas v. New Jersey. Number one, it is equitable. It distributes escheats to the states in proportion to the commercial activities of its citizens. It would be acceptable to the great majority of states involved. And it is also equitable to the State of New York, because the State of New York will still receive the preference to take custody for items originating in that jurisdiction and also the 14 jurisdictions which do not have escheat statutes.

Secondly, it is a result which would encourage the

ease of administration and application of escheat statutes. It would not require burdensome record keeping; it would not require burdensome litigation to determine whether or not state requirements were reasonable or not.

And, third, it is a rule which will foster certainty.

Q Do you mean by that, Mr. Rosenberger, that you can put a couple of reasonably trained accountants on the job and make it come up with all the essential facts under the tests you're now discussing?

MR. ROSENBERGER: Yes, Your Honor, I think in fact the test that I am discussing is that the escheat would be given to the state where the creditor's right was accrued, namely the state of issue in all cases except where a draft was issued in the receiving state. Western Union's records, their ledger records, show in each instance the location and state of purchase, and their records also show where in fact drafts have been issued. So that I do not believe that it would require anything significant to determine it.

Finally, it would foster certainty because there are no factual issues left to resolve. If the Court adopts the Master's report, which essentially restates the rule of Texas v. New Jersey without a consideration of the underlying circumstances in this particular case, I would suggest that there might be further litigation with respect

to what the word "address" means, with respect to the questions involved in the decree of Texas v. New Jersey, and this was another indication that the Court in Texas v. New Jersey was loathe to allow a state to escheat these items simply on the accident of incorporation. As the Court will recall, in the decree in that case, the Court allowed primarily escheats to the creditor states. Again I am talking about escheat or custodial take. To the extent of that state's powers under its own laws to escheat or to take custodially. The Court was not concerned with the power of the state to escheat. The question was priorities between the states. In that taking, of course, there were no ifs and buts and wherefores.

However, where there was no address of the person entitled thereto shown on the books and records, and we are suggesting as a substitution, where there is no indication on the books and records of the state in which the creditor's right was incurred, then it was given, and only then--and, of course, the Court specified that they presumed this situation would arise infrequently, with relative infrequency--then and only then was it given to the state of Sun Oil's incorporation, subject to the right of any other state to recover the property upon proof that the last known address of the creditor was in that state. And, of course, there the proof was not limited to the records of the debtor

corporation.

And then finally where the creditor state did not even have an escheat statute on its books, it was still allowed to recover from the state of incorporation at any time it subsequently passed such an escheat statute. And New Jersey filed a motion for the Court to modify that decree, urged that it would result in uncertainty, and the Court denied the motion.

So, in conclusion I suggest that the position presented by Pennsylvania here is one that will serve the spirit and the intention of the Court in Texas v. New Jersey, and is equitable and will be acceptable by the great majority of the states. I challenge the State of New York to show this Court how its position in any way is equitable to its sister states. Thank you. I have reserved some time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well. Mr. Ahern.

ORAL ARGUMENT OF F. MICHAEL AHERN, ESQ., ON BEHALF OF INTERVENOR-PLAINTIFF CONNECTICUT

MR. AHERN: Mr. Chief Justice, and may it please the Court:

In the interests of brevity and in order to avoid repetition, the State of Connecticut subscribes to the oral arguments advanced here this morning by my colleague from the State of Pennsylvania. I would just like to touch on one

point which has not been mentioned.

Under the recommendation of the Special Master in this case, the State of New York will take all of the unclaimed money presently held by Western Union. In its oral argument and in its briefs, New York emphasizes the fact that under the New York abandoned property law there is no statute of limitations and therefore the owners of this property or these monies will be protected, because the state of New York will not be in a position to foreclose their claiming it at any time in the future. The inference is that the State of New York will hold these monies ad infinitum.

However, I submit that there is no prohibition which I am aware of whereby the State of New York Legislature could not pass amendatory legislation which would provide for the escheat of these funds to the State of New York. What I am suggesting to this Court is that whatever states take the money now held by Western Union by virtue of an order of this Court or a decision of this Court, the monies eventually will find their way into the general treasuries of the state.

Q If New York can hold them indefinitely, they don't need to pass an escheat statute. They're getting the same benefit from them as if they had the escheat statute.

MR. AHERN: They would hold them custodially but

they wouldn't be able to use the funds for general purposes.

Q They're getting interest on them.

MR. AHERN: They would be getting interest, Justice Rehnquist, but they wouldn't be able to use the funds. If they passed an escheat law, they would eventually be able to use the funds themselves.

Q But if New York moved in that direction, would it not be within the power of this Court to place a trust of some nature on it to be sure that no subsequent legislation of New York could alter that status?

MR. AHERN: I would assume the Court could issue such an order, yes, Chief Justice Burger.

Q And a state the size of New York, with its enormous operations, undoubtedly has bank balances many, many times exceeding this that is unused money.

MR. AHERN: That may be true, Mr. Chief Justice, but with the continuing cry for more revenue by all of the states, I think the State of New York is seeking this money for purposes other than just to hold it custodially, or they wouldn't have the fine array of legal talent here aggressively pursuing their rights.

Thank you very much.

[Whereupon, a noon recess was taken. The afternoon session proceeded as follows.]

MR. CHIEF JUSTICE BURGER: Mrs. Wentworth, you may

proceed.

ORAL ARGUMENT OF MRS. WINIFRED L. WENTWORTH,

ON BEHALF OF DEFENDANT FLORIDA

MRS. WENTWORTH: Mr. Chief Justice, and may it please the Court:

The State of Florida, as I think counsel for Pennsylvania has indicated, now joins that state and the other parties which are now unanimous in opposition to New York in this case. The State of Arizona, which has also coincided with Florida's position in the case, also now joins in the Pennsylvania position in asking the Court to reject the conclusion of the Special Master and to clarify and to apply the creditor address rule adopted in the Texas case. We believe that the opinion in that case, in referring to the state of the last known address of a creditor, according to the debtor's books, did not state and did not intend that the address must be an address specifically declared by the creditor for resident purposes but instead that apparent reference was to a geographic creditor reference, creditor address, which we believe is what is shown by Western Union records in this case as to the address of its office at which a money order creditor would be entitled to the refund. That address would both practically and legally be the creditor's address so far as the debt is concerned, since neither law nor custom has compelled the

debtor to keep records of the residence or street or domiciliary address of the creditor.

In addition, there are very few instances when a purchaser designating a place different from the Western Union office would result in a different distribution which is shown by Pennsylvania's argument in this case.

Florida's original argument was based on the same construction of the Texas case but depended upon in part the definition of a creditor under our particular statute as the payee of an obligation, and upon a different view of the particular contract involved in this case, in the case of Western Union money orders.

We now accept the Master's construction of the contract and abandon the contention the destination state would be the proper party for escheat purposes. The position was presented for the purpose of attain a full consideration of all of the possible applications of the Texas rule and to obtain its clarification. In spite of those questions that we have raised, we believe that the record and the briefs of all the parties in this case will show the greater virtue of Pennsylvania's argument, and we now join them because of the need for a rule that is both reasonable and of very wide applicability under all types of escheat or custodial-taking laws and as to a wide variety of intangible properties. We urge the Court to apply the Texas decision

to preserve the creditor address rule in accord with its primary intention in that case to give weight to the fact that the debt is the property of the creditor and not the debtor, and to permit the domiciliary escheat only if, in this case, Western Union's records should in some isolated instance fail to show the address of the office where this money is payable, where the obligation was issued and where it could be refunded to its creditor, or where the state that would have that right has no escheat law.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Wentworth.

Mr. Greenfield.

ORAL ARGUMENT OF JULIUS GREENFIELD, ESQ.,

ON BEHALF OF DEFENDANT NEW YORK

MR. GREENFIELD: Mr. Chief Justice, and may it please the Court:

Ten years after this Court's decision in Western Union against Pennsylvania in which the Pennsylvania claim was substantially similar to the claim it is making now and more than five years after this Court's decision in Texas against New Jersey, this matter is again before the Court. The holding of that Court in Western Union against Pennsylvania was that in view of the claims made by New York in a situation in which Pennsylvania was saying that the

state of office of origin should control, the Court felt that matters of this kind should be determined by this Court.

In Texas against New Jersey, which dealt with various categories of unclaimed property, including unclaimed checks, owing to creditors some of whose last mailing addresses were unknown--and this is stated in the Court's opinion--the Court granted leave to file the complaint in that case because it had made its determination in Western Union that only one state could escheat particular property. The Court said that since the states separately were without power to settle the controversy, a rule should be adopted by the Court which "will settle the question of which state will be allowed to escheat this intangible property."

Texas in that case argued for the context test. The Court said this kind of rule, a context rule, would leave the question in permanent turmoil and the question should be settled once and for all by a clear rule which will govern all kinds of intangibles like these and to which the states may refer with confidence. Referring again to Western Union against Pennsylvania, the Court said it was faced with the problem of deciding which state had a claim which was superior to all other states. The Court then held that the context test was not workable, that it would--the

context test--require examination of each particular item of property on its peculiar effects and that the context test would be uncertain and would require decision on the basis of continually developing effects.

The Court then said that the state of the debtor's principal office could have a persuasive claim, and I think it should be noted that New York is not making the claim solely because it is the domiciliary state, and I would like to bring this into the context of the termination in Western Union against New Jersey--Western Union against Pennsylvania. I think it should be noted that there are the concurrence of the following facts with reference to New York in this matter.

Number one, New York is the state of corporate domicile. Number two, New York is the situs of the principal office of Western Union. Number three, New York is the situs of the executive offices of Western Union. New York is the place where the books of account are maintained. New York is the place where the Board of Directors meet. New York is the place where management and fiscal policy are determined. And New York is the place where the company treasurer is located and to whom all excess funds are ultimately remitted.

Q If you were talking about a jurisdictional problem in the context of a long arm statute, I would find

all those factors very, very relevant. Why isn't the place of issue--what's your view about the place of origin or issue as the most equitable and practical, laying aside other particulars?

MR. GREENFIELD: In the first place, Your Honor, I think that the place of issuance will frequently differ from the place of origin, and that as an important concept--

Q I'm talking about the place where someone goes in, puts the money on the counter, and gets the money order, whatever name you want to give that place.

MR. GREENFIELD: I think that the record in Western Union against Pennsylvania will perhaps answer that question best. In Western Union against Pennsylvania there was a stipulation between the two parties to that litigation, Western Union and Pennsylvania, in which they stipulated that in many cases the state of office of origin did not coincide with the state of last known address of the creditor. And in the jurisdictional statement filed in that case by Western Union, the following appears.

Q Of course, that's because a lot of the factors in cases of this kind are simply unknowable and the pursuit to get the details in each instance would be too costly to determine. But I am talking about a practical, equitable test.

MR. GREENFIELD: Well, sir, I think it's important

and I'd like to come to this later on, if I may, but in partial answer to your question right now, the records of Western Union are maintained in such a fashion that the application forms are available. It is possible to determine in many of these cases what the last known address of the creditor is, and this isn't merely a matter of the practical application of a search for those last known addresses. I don't think that the question of escheat should depend upon whether or not a particular debtor keeps adequate records.

Q Mr. Greenfield, you say the applications available; are they in New York?

MR. GREENFIELD: They're in Minnesota, sir.

Q From all over the country?

MR. GREENFIELD: Yes, sir.

Q Now I have more trouble with New York.

MR. GREENFIELD: Pardon me?

Q Now I have more trouble with New York if the records are in Minnesota.

MR. GREENFIELD: I think this is a matter of a spatial question. If we were faced with the necessity of proving that there were no last known addresses in a particular group of cases, then we feel that we should bear that burden. But we also feel that the other states should bear their burden of proving that there are last known addresses in particular states.

Q Mr. Greenfield, where are they in Minnesota?

MR. GREENFIELD: This is one of the offices maintained by Western Union for that purpose.

Q More space there?

MR. GREENFIELD: I suppose so.

Q Cheaper space.

MR. GREENFIELD: That probably is one of the reasons.

I would like, Mr. Chief Justice, to refer to the jurisdictional statement because reference has been made by Pennsylvania to the fact that there is some kind of presumption that's available that the state of last known address follows the state of office of origin, and this is the jurisdictional statement which was made by Western Union in the Western Union against Pennsylvania case, and I quote: "Either as to payees who receive drafts at offices of the appellant in Pennsylvania there is no showing and there can be no basis for presuming that they were residents of Pennsylvania at the time of receipt."

Q Isn't that a fairly likely thing to follow if somebody needs money? I am asking, isn't he normally away from home with normal banking connections and the like? What I am trying to find out is the significance of the point you just made.

MR. GREENFIELD: The significance of the point I

made was this, Judge, that Pennsylvania is relying upon the presumption of the state of origin being the state of last known address. The point I'm making is that there is no proof in this record, there is no basis for the presumption in this record before this Court, for such a determination. And the only thing that you have to rely upon is something that is ephemerally referred to as logic in the situation. We must realize that we are dealing with a mobile society and I know that you're fully aware of that and that people do not always or customarily reside in the place where they buy money orders.

Q Mr. Greenfield, in connection with your reference to that record in Western Union v. Pennsylvania, even assuming that the payees are very likely to be away from home, is it more likely perhaps that the senders are closer to home than the payees?

MR. GREENFIELD: There is that possibility, but I simply point out to you, Judge, that on the state of the record before this Court there is no basis for the presumption urged by Pennsylvania.

Q Do you think it's beyond our reach as judicial notice?

MR. GREENFIELD: No, sir, I do not think it is beyond your reach.

Q If it isn't, what do you think we should take

judicial notice of? Do you think it's reasonable or irrational to assume--let's assume I said in my own mind that I think at least 75 percent of the cases the sender will be sending from the place of his address. Do you think that would be an irrational thing for me to--

MR. GREENFIELD: I wouldn't characterize it as irrational, but I would say--

Q You'd say wrong.

MR. GREENFIELD: --that it was unfounded because it was not based upon sufficient information.

Q I agree with you, it isn't in the record, that's true.

MR. GREENFIELD: I am not talking only about the record, Judge. I'm saying that there is nothing that we know of--

Q It's just so changeable that no one can really possibly say, just from your own experience, in what percentage of circumstances senders would be at home or away from home.

MR. GREENFIELD: That's true.

Q But we can assume that a majority of the money did not originate in New York. It never reached New York.

MR. GREENFIELD: I don't know whether that assumption is tenable, Judge.

Q How many offices do you have issuing them?

MR. GREENFIELD: I don't know the answer to that, but I think it--

Q You don't know how many offices you have?

MR. GREENFIELD: Offices of Western Union in New York?

Q In the United States.

MR. GREENFIELD: I don't know the answer to that, sir.

Q Thousands, I would assume.

MR. GREENFIELD: Of course, there are. Of course, there are.

Q So, the odds are that a large majority of that money didn't come in New York.

MR. GREENFIELD: The possibility is that money did not come from New York.

Q Doesn't that come close to a probability?

MR. GREENFIELD: The probability is--does exist. But what I was trying to point out to Your Honor is that New York, being the largest commercial state in the United States and the most active commercial state, that this kind of thing could emanate to a very considerable extent from New York.

Q Most of the Western Union money doesn't come from big commercial people. It comes from little people.

MR. GREENFIELD: That may be so.

Q I can take judicial notice of that.

Q What is the range of the amounts?

MR. GREENFIELD: My understanding is that the amounts range rather small. They are within the twenty-five dollar level.

Q Is there a mean figure in this record?

MR. GREENFIELD: No, there isn't. But I understand that the level would range up to about $25 and perhaps more than that.

Q You're just trying to guess that figure as an average. You're saying what Justice White suggested to you. Isn't that a matter that is so commonly related to ordinary human experience that it could be judicially noticed; whether it's controlling or not is another question. As a fact, couldn't this Court or the Master judicially notice that for the most part people send money orders from home base to some other place, to the son in college, to an impecunious relative, to friends who wire us for some money, or one of your children is on a vacation?

MR. GREENFIELD: The answer to that, Your Honor, I think in part at least when referring to the Special Master's report, is that the Special Master found to the contrary. He found that there was no reasonable basis for this presumption.

Q That there was what?

MR. GREENFIELD: That there was no reasonable basis for this presumption.

Q Then in effect we're to decide the case without having that knowledge or any basis for fair presumptions; is that your position?

MR. GREENFIELD: No, I don't think that's quite the way I would put it. I think that the Court has an obvious right to recognize what it considers to be the ordinary state of facts. What I am saying and what I have continued to say, that in the state of this record there is no basis for that presumption. Furthermore, both of the parties, both Pennsylvania and Western Union, had said in the past that there is no basis for such a determination. In Texas against New Jersey the Court rejected a context test theory and adopted the rule that is well known to this Court, and that is that as to each item of property, the property should go to the state of last known address of the creditor as shown on the books of the debtor corporation; and the secondary rule was that the state of domicile of the corporation would take if that address was not available. I think something has been made by Pennsylvania of the fact that this theory requires that there be a last known street address. I think that the Texas case does not require any such showing but merely requires the showing that the last known address of the creditor was within a particular state.

Q Mr. Greenfield, in this connection, how do you define creditor in that context?

MR. GREENFIELD: This has been defined by the Special Master I think satisfactorily to everybody involved in the case. In the case in which a money order is issued, the person to whom it is issued is the creditor. In the case where a money order is issued to the payee, he is the creditor. In the case where a money order is sent for the benefit of a payee but he doesn't pick it up, the money order is cancelled, provision is made for the sender to be notified that he should pick up the funds. A draft may be issued to him under those circumstances, in which event he is the creditor. But, to answer your question as concisely as I can, the sender is the creditor unless a money order has been issued to the payee, in which event the payee is the creditor.

Reference was made to the Special Master's report insofar as its requirements concerning the burden of proof. I would like again to point out that the Special Master reported that the creditor's last known address is his conscious choice whereas the initiation of a transaction in a particular office of origin might really be a matter of choice or convenience. And the Special Master pointed out too that the sender might have been in that jurisdiction for only an hour or for a day. I don't think it's necessary any

longer to respond to the contentions of Florida in view of the fact that they have now joined the Pennsylvania position. But I would point to the fact that in his conclusion, the Special Master determined that the Texas rule is a simple and workable formula and that it sets an easily administered standard, preventing multiple claims and giving all parties a fixed and reliable rule. To adopt a rule of the kind that is now sponsored by Pennsylvania and its adherents, it would seem to us it brings us into the kind of problem that Mr. Justice Stewart referred to in his two dissents in the Western Union case and in the Texas against New Jersey case--that is, that those cases would cause more problems than they solve. And the point that I'm making by stating that is that if reliance is to be had upon such a thing as a presumption of the office of origin being the state of last known address, then I suggest that the Court is leaving itself in for determinations in every kind of case in which the factual situation differs from Texas against New Jersey.

Q I take it if there wouldn't be any argument about varying from the Texas rule, if Western Union kept its records in this case so that the address of the sender was easily ascertainable--

MR. GREENFIELD: I don't think there would be any problem then. This is a point I was making before, Judge,

that these cases should not depend upon whether or not a particular debtor keeps its records properly.

Q And if Western Union had just happened to have kept its books cumulatively and money came in, it actually had an easily available form, the addresses, then there wouldn't be this argument?

MR. GREENFIELD: I don't think there would be because, as I've said before, we support the Special Master's report which says give it to the state of last known address of the creditor.

Q As shown on the creditor's books.

MR. GREENFIELD: As shown on the creditor's books.

Q And here the creditor does have some books?

MR. GREENFIELD: Yes, he does.

Q But It'll cost a couple hundred thousand dollars to get--

MR. GREENFIELD: I don't know whether that estimate is a reliable estimate. But, as I've said before, New York is prepared to bear its burden in supporting its claim.

Q Mr. Greenfield, this is a question I should have asked Mrs. Wentworth. Florida has changed its position. As I understand it, Arizona's position initially coincided with that of Florida. Do you know, have they also abandoned the Florida position?

MR. GREENFIELD: I don't know, sir, except what Mrs. Wentworth said.

We would suggest that in grafting upon the Texas against New Jersey determination a new category of state taking then--that is, when the records of the debtor corporation are inadequately kept--a presumption should arise that the state of last address is the state of inception of a transaction.

Q Let's assume you went to Western Union's records and you found the application for a money order and the sender gave his name, of course, but didn't give any address. Now, you say applying our prior rule in that case it should escheat to New York.

MR. GREENFIELD: With one possible variation of what you have said, Judge, yes. I think it important to point out that our statute is entirely a custody statute.

Q Anyway, you would say New York is entitled to possession of the money.

MR. GREENFIELD: Yes.

Q It seems to me at that point the argument would make as much force, that when the address isn't shown on the books of the company, arguably you should say the address is at the place of the sender. That's when the argument should really come up.

MR. GREENFIELD: I don't follow what you're saying,

Judge. You say the address is the address of the sender. But you don't have the address of the sender.

Q What you would say is that the address of the sender--the books of the company does show his address when it shows it specifically or it doesn't show it at all, in the sense that there is a presumption that when he doesn't fill in the blank for an address that he lives there.

MR. GREENFIELD: If you accept that presumption.

Q Yes. But still even if you accepted that presumption, it might be that you should actually go through the whole process of looking at those application forms.

MR. GREENFIELD: I think that will be necessary.

Q Mr. Greenfield, you refer to the fact that New York has an abandoned property custody statute rather than an escheat statute. As a practical matter, after a few years have gone by and there has been no private claim, isn't the real problem between possible states claiming escheat rather than the possibility of some unknown claimant will show up, so far as the great majority of the funds held, under New York statutes?

MR. GREENFIELD: I think there are several answers to that, Your Honor. In the first place, our statute is a pure custodial statute. It is never escheated; the property is never escheated. It is always available for claim by the owner. We have had a history of considerable claims for

refunds in many of these situations. The point that you are making, I assume, is that if the funds are not claimed, another state can ultimately come in and say this money belongs to us. But this is exactly what Texas against New Jersey said. Texas against New Jersey says that when funds are paid to the domiciliary state in the absence of a last known address on the books of the debtor corporation, it is subject to reclamation by another state upon a showing that the last known address was in that state.

Q If New York has custody of the money and has the benefit of a rule which prevents any other state from coming in and showing a superior rule, New York has pretty well got an escheat, hasn't it, so far as the benefit of the money is concerned?

MR. GREENFIELD: As I said before, Judge, I don't think that it is fair to characterize that as an escheat because we have a history of considerable amounts of claims made after property has been paid into our abandoned property fund.

Q What is to prevent the New York Legislature from adopting an escheat statute tomorrow?

MR. GREENFIELD: There is nothing to prevent the New York State Legislature from adopting such a statute, but I would simply call to your attention that the preamble to our abandoned property law, which I believe was one of the

forerunners of all of the abandoned property laws in this country is that these funds are to be used for the benefit of the public at large while protecting the interests of the persons to whom--who are entitled to these funds. And I know of no movement in the State of New York to turn this statute into an escheat statute.

I would call the attention of the Court to the fact, as I did before, that this Court did not close its eyes as to the Western Union situation when it determined Texas against New Jersey. Indeed, I've already noted the Court based its determination in Texas that leave should be granted to file a complaint because it had held in Western Union against Pennsylvania that the due process clause prevented any one state from escheating a given item of property. Thus, when the Court decided Texas against New Jersey, it had already been confronted with the factual situations with which we are confronted here today. And, accordingly, it was thoroughly aware of those facts when it formulated the unqualified Texas rule for disposition of intangibles of all kinds.

As I have indicated before, the Pennsylvania assertion that the predominant right of the state where the transaction or purchase occurred is not really based upon such statutes as the uniform disposition of unclaimed property act which, it is said, has been adopted by a number of states.

And I might call to the Court's attention that when a uniform act is adopted by the various states, it is uniform generally only to the word "uniform." The uniform statute, the revised uniform disposition of unclaimed property act, does not provide for taking by a state, which is the office of origin. It provides for taking by a state in which the written instruments are issued. And then significantly the uniform act also provides that the state in which that act is adopted will not claim the money if another state in which the last known address resides, takes the property, and has a reciprocal provision with the other state.

If the Pennsylvania proposal is to be considered, then it would seem to us that other and equally and perhaps more compelling material alternatives should be considered by the Court. For example, and I think this is pointed up by at least one decision by this Court, Connecticut Life Insurance against Ward. Should you not be considering such things as the place of residence of the sender when he died and the place where the sender was last known to reside or the place of a proved later or longer residence of the sender or the state of actual domicile of the sender or the state of actual delivery of the draft or the state in which the funds were maintained for satisfaction of the draft or the state in which the sendee died or the state in which the sender was last known to reside or the state of a

proved later residence of the sendee or the state of actual domicile of the sendee?

The reason I have gone into this long statement of the various alternatives is that all of these alternatives were rejected by the Texas court. The context test is not really a workable test at all. And the test that suggests that the Court should examine the circumstances surrounding each particular item of escheatable property on its particular facts and then try to make a difficult, often quite subjective decision as to which state's claims seem stronger than another, it seems to us intolerable. You would have perhaps hundreds of cases of this kind before you.

Consequently, this Court should refuse to adopt the rule which results in treating this subject on a case-by-case basis, and we submit that the rule adopted in Texas against New Jersey is fully applicable here and that the proposed decree of the Special Master should be adopted.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Greenfie

Mr. Rosenberger, do you have anything further?

REBUTTAL BY MR. ROSENBERGER

MR. ROSENBERGER: Mr. Chief Justice and Members of the Court:

I will try not to burden you with too much

additional time. First of all, Mr. Greenfield indicated the Special Master had found that there was no rational basis for the presumption which has been incorporated in the statutes in four states and is implicitly incorporated in the uniform disposition of unclaimed property act. In fact, at page 18 of his report, the Master found--the Master stated, and I quote: "Frequently, perhaps usually, this office and his domicile would coincide, but it is clear that money orders must frequently be bought away from home."

I think the record of the '63 survey, which is before the Court, the Court can consider that, shows that in fact it is much more than usually that the two offices coincide and that this comports with common experience.

With respect to the application forms, Mr. Greenfield indicated that these application forms are available. Stipulation indicates or contains as an exhibit a letter from Western Union in which it is stated that these application forms range from poor to fair condition. And as the '63 survey indicated, in at least one-third of the cases no address is given on the application forms.

At Exhibit 16 to the stipulation there is a listing of the records which are available by division, and generally the Court will find that there is a variance of between 20 and 30 years concerning the distance to which the ledger records go back to and the distance to which the application

forms are available. With particular respect to the eastern division of Western Union, which would include Pennsylvania, Connecticut, New York, the ledger records are available from January, 1916. The application forms are available from December of 1941. So that if in fact we are forced to try to determine the last known address in each of these situations, there will be a considerable number of situations where it will not be possible to do so. And, in any event, it will require needless expense on the part of the states and on the part of Western Union.

Arizona, Mr. Justice Blackmun, has also abandoned its position, as it advised the parties by letter, which was circulated to all the parties. It joins Florida and the other states.

Q Did they let us know?

MR. ROSENBERGER: No. They have not officially advised the Court.

New York stress the preamble of its custodial taking statute which says that these funds shall be used for the public good and concern. The question and the equitable question here is, Why should these funds originating from all over the country and assorted jurisdictions be used for the public good of the State of New York?

The fact of the matter is, as Mr. Johnson stated in the Connecticut Insurance Company case, it's a modern

reality that the various states attempt to take custody of these funds not simply as conservative, although this is certainly a valid purpose, to conserve property that may be due its citizens, but also as a source of public revenue. And the Court very well treated that matter in Texas v. New Jersey in devising a rule which would equitably distribute these monies across the country. It is Pennsylvania's position, and New York to the contrary, where they say there is a hundred possible situations where we could argue some variance from Texas v. New Jersey. I still believe there are only two basic situations, and that is where the creditor ordinarily for commercial reasons keeps the address on his record and the present situation where we are dealing with issuers of bearer obligations where there is absolutely no reason, and the cost would be great if not prohibitive, to maintain such records. Because of that, because of the fact there is no equity in New York's position that adoption of the Master's Report in that respect could not be acceptable to the great majority of the states, I urge the Court to find consistently with the position that the state of last known address as shown by the records, and that would be the state; and New York has agreed that Texas v. New Jersey only required some indicia which would show the state, and this indicia is shown by Western Union's ledger records, that that state would take

in all instances, except where a draft had been issued to a sendee, in which situation the sendee state would take.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Rosenberger.

Thank you. The case is submitted.

[Whereupon, at 1:40 o'clock p.m. the case was submitted.]

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