ORIGINAL

In the

Supreme Court of the United States

STATE OF CALIFORNIA,
Plaintiff,

v.

STATE OF TEXAS,
Defendant.

No. 76, Original

Washington, D.C.
March 29, 1978

Pages 1 thru 50

Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

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v.	:	No. 76, Original
STATE OF TEXAS, Defendant.	:	

Washington, D. C.

Wednesday, March 29, 1978

The above-entitled matter came on for argument at 10:10 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN P. STEVENS, Associate Justice

APPEARANCES:

JEROME B. FALK, Jr., ESQ., Howard, Prim, Rice, Nemerovski, Canady & Pollak, 650 California Street, Suite 2900, San Francisco California 94108, for the Plaintiff.

JOHN L.HILL, Esq., Attorney General of Texas, Austin, Texas, for the Defendant.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in State of California against State of Texas in an original jurisdiction case.

Mr. Falk, you may proceed whenever you are ready.

ORAL ARGUMENT OF JEROME B. FALK, JR.,

ON BEHALF OF THE PLAINTIFF

MR. FALK: Thank you, Mr. Chief Justice, and may it please the Court: I should like to begin by identifying four of the factors which prompted California to invoke this Court's jurisdiction, for these same considerations in our judgment make the exercise of that jurisdiction appropriate and indeed imperative.

The first consideration was the technical basis for jurisdiction under Texas v. Florida, a point which, of course, I will be elaborating upon throughout this argument, namely, that the tax claims which have been asserted by the various taxing entities exceed the available assets of the estate. For the moment, suffice it to say that once we determined that this was a situation in which the tax claims did have that quality, we had a very practical and real concern that if California were successful in its own courts, the judgment it obtained might not be collectible.

QUESTION: Is it a fact that the tax claims do exceed the assets of the estate?

MR. FALK: Yes. We assert that in our pleading, and I think --

QUESTION: But I mean has that been established at all? Is it agreed to?

MR. FALK: I think it is not agreed to, Mr. Justice Brennan, by Texas. And I am prepared to discuss the reasons why we think that it is demonstrably so that they do. Just as an arithmetical matter, the tax rates total 101 percent on all -- the major portion of the estate.

QUESTION: Do we know the size of the estate? Does anyone know?

MR. FALK: Well, the estate has filed a return, and we have attached to our pleading an Appendix A, which sets forth calculations of the taxes under the various Federal and State rates based on the return filed by the estate on their own agreed value.

The problem becomes exacerbated if the amount of the estate is greater. But even on those rates, there is a shortfall of many millions of dollars.

QUESTION: This is a Federal estate tax return that has been filed?

MR. FALK: A Federal estate tax return. And also the California IT-22.

QUESTION: Are the California assets -- and you do have real estate in the Los Angeles area, the estate does,

doesn't it?

MR. FALK: No, the estate does not, Mr. Justice --

QUESTION: Summa Corporation does.

MR. FALK: Summa does, but unless it's an alter ego, we can't reach it.

QUESTION: Are those assets sufficient to pay the California death taxes if it's determined that Mr. Hughes was not a California domiciliary?

MR. FALK: No, because we can't reach the assets of Summa unless it is proven to be an alter ego of Mr. Hughes.

QUESTION: That's in litigation, is it not, in Delaware?

MR. FALK: I don't believe it's in litigation in Delaware.

QUESTION: Could it be?

MR. FALK: I don't believe it could be in Delaware. I suppose we could -- we certainly could contend, and I think would if compelled to, but it's far from clear that such a contention would be accepted.

QUESTION: Has Texas intervened in the Delaware litigation?

MR. FALK: Texas has been named as a party in the Delaware litigation and contends, and I must say I think rightly, that it cannot be made a party there for reasons of sovereign immunity, and I think for reasons of due process it

is not. It has not voluntarily appeared, as I understand it. They made a motion to quash and that motion is pending.

QUESTION: California has made no appearance.

MR. FALK: California has made no appearance and intends to make no appearance.

QUESTION: Mr. Falk, don't you suppose there may be some controversy over the value submitted in the Federal estate tax return?

MR. FALK: I fully expect that there will. I believe that all of the taxing authorities will contend that the values are greater.

QUESTION: For example, Summa Corporation.

MR. FALK: Summa Corporation being the main asset. And there is an Internal Revenue Service investigation under way and the States are doing likewise.

I think it's quite unlikely that the values will be less. The values that were reported, to put it mildly, were conservative we think, and we think the values will be larger. But it would take a dramatic cut, which I think is inconceivable --

QUESTION: I wonder on the issue before us how that bears on whether or not we ought to accept original jurisdiction.

MR. FALK: I think there was really no realistic possibility. Texas doesn't contend that the values are less.

And there is really no realistic possibility that the values would be such that lower rates of tax would apply. So we are in a situation in which I think it is safe to say that the tax rates combine to 101 percent, and that problem is exacerbated by a couple of factors that are mentioned in our brief. One, that some of the items which are expenditures by the estate, for example, litigation expenses, which are awful here, are not deductible under California law. As a result, although they are losing the money in the form of these expenses, it doesn't reduce their California taxes. And again it only exacerbates the shortfall.

The second problem is that Summa has encountered really staggering losses in the years since Mr. Hughes died. $29 million of operating loss in 1976, and I think the figure was $169 million, if I recall correctly, reduction of net book value in that same year. 1977 isn't formalized. We have been advised informally that the figure will be somewhere in the neighborhood of $15 million.

QUESTION: Is there any controversy over whether all of the assets of Mr. Hughes have been marshaled?

MR. FALK: I am not aware of any. I think they have pretty much been identified and are subject of administrations in several States.

QUESTION: Mr. Falk, the amount of money, is that book value or just actual money?

MR. FALK: Well, the estate tax return was based on an appraisal of the value, not on book value, and that will be the basis on which tax will be calculated. There is a pending controversy as to whether that appraisal is an appropriate one.

QUESTION: For purposes of our evaluating whether this is or is not an appropriate case for original jurisdiction, in your view would it make any difference whether the total of all the taxes would consume 95 percent of the entire assets or whether they would be 105 percent?

MR. FALK: Mr. Chief Justice, in my view it would not, but I think under Texas v. Florida the 100 percent mark has special significance. I don't think I have to persuade you of my alternative view, but I might in response to your question suggest to you briefly what it is. It starts with Massachusetts v. Missouri, 308 U.S., where the Court refused to entertain a suit to prevent Missouri from imposing a tax on a trust that had been established by a Massachusetts domiciliary with a Missouri trustee, or trustees. The Court distinguished Texas v. Florida in that case, but on grounds which to me suggest that the 100 percent figure is not the end of the case. After noting that the trust assets of the Missouri trust were sufficient to pay the taxes of both States, the Court went on to say -- I am going to quote from it -- it was shown that the tax claims of the two States are mutually exclusive and that, to the contrary -- again quoting -- the

validity of each claim is wholly independent to that of the other. In other words, it wasn't a central issue of domicile.

From this, we think that there is jurisdiction in a suit between States in this area where two things are shown: First, that two or more States each seek to levy a tax on a mutually exclusive ground, as there was in Texas v. Florida and as there is here, domicile. And, secondly, that the claim of the defendant State in some concrete way, some real way, injures the plaintiff State.

Now, in Texas v. Florida that second element of concrete injury was shown by the fact that the tax claim exceeded 100 percent. So you had a classic in the nature interpleader situation.

Even if that were not here, we believe that our pleadings show another kind of concrete injury that satisfies the standing in case or controvery requirement. That is this: We found ourselves with an inheritance tax claim which we and the estate mutually desired to compromise and to thereby avoid years of costly litigation. The pendency of the Texas claim was all that stood in the way of California and the estate totally resolving the inheritance tax matter. It was the pendency of that claim which prevented the estate from unconditionally agreeing to settle this case, and for very understandable reasons. If they agreed to pay a large tax to California and then were liable to Texas for a 16 percent

tax, the result would be devastating. They were unwilling, and understandably so, to agree.

This is the problem with any situation of an interpleader type where you can't get all of the parties into one court.

QUESTION: But there really is never a basis for the classic interpleader, is there?

MR. FALK: No. It's not. I don't contend that it's an interpleader. I say if you were forced to conclude that the taxes didn't exceed 100 percent, there would still be a controversy between California and Texas, but not in the classic interpleader mold, but simply because Texas is asserting an inconsistent claim, inconsistent with California, that would prevent California from resolving its major controversy with the estate.

QUESTION: You say Texas is asserting an inconsistent claim and then you say that because of the assertion of that claim, California is unable to settle with the estate. Those are two separate assertions you make and both of them would have to be upheld in order to support your alternative theory.

MR. FALK: Factually upheld.

QUESTION: Well, survive the pleading stage.

MR. FALK: Yes. Now, I do want to stress that this is not our primary submission. It arises and is necessary only if we are mistaken and the tax claims do not exceed 100 percent.

I am absolutely satisfied that they do, but in response to the Chief Justice's question, I wanted to develop that point.

QUESTION: Let me begin by asking you this. What if Texas asserted that the decedent had been a domiciliary of Texas at the time of his death and asserted a Class A tax claim successfully based upon that jurisdictional fact against all his intangible property that amounts to, say, 40 percent. And let's say that California asserted in appropriate litigation that the decedent had been a domiciliary of California at the time of his death and based upon that jurisdictional finding asserted a tax claim that amounted to another 40 percent of the decedent's estate. What possible Federal question would be involved?

MR. FALK: I don't think there is a Federal question.

QUESTION: None. And no lawsuit between those two States.

MR. FALK: I do disagree with the second --

QUESTION: No controversy between those two States.

MR. FALK: Well, the controversy that I perceive in that situation is not a Federal question, but it is a controversy. Both States can't be right, although --

QUESTION: Certainly they can be.

MR. FALK: I think both States can successfully

get judgements, but as a conceptual matter one cannot have two domiciles. That was the point of Texas v. Florida that only one of the four States could --

QUESTION: The point of the Dorrance case was just the point implied in my question.

MR. FALK: I think the point, Mr. Justice Stewart, of the previous cases, including the Dorrance litigation is that although one can have but one domicile, that --

QUESTION: Texas is entitled to determine that he is domiciled in Texas. California is entitled to determine he was domiciled in California.

MR. FALK: I agree.

QUESTION: Those two inconsistent determinations create no Federal question of any kind.

MR. FALK: I agree, they do not. And that, of course, is why Texas v. Florida arises because there is no solution to the problem where the taxes exceed 100 percent save for an action in this Court. There is no other way to get a unitary adjudication.

QUESTION: What law does this Court apply in such cases?

MR. FALK: I think in Texas v. Florida, and I think it would be true here, that the Court will have no choice of law problem because there is no difference in the law --

QUESTION: What if there were?

MR. FALK: I do not know from any decision of this Court. I assume it would have to apply its own principles of domicile.

QUESTION: What if Texas had one set of criteria for determining domicile and California had quite a different set.

MR. FALK: If that were the law, Mr. Justice Stewart, one aspect of Texas v. Florida would not be present and that was emphasized in the Court's opinion that the law was the same in all four States.

QUESTION: Why is that significant?

MR. FALK: As I understand the interpleader concept, or in the nature of interpleader concept, it is that you have inconsistent claims, and if the laws of the two States were substantially different so that it would be possible under the laws of both States for both States to be right, I am not sure in my own mind if the Court would then appropriately exercise jurisdiction.

QUESTION: What law should the Court apply?

MR. FALK: If it were to entertain jurisdiction, it would have no basis for choosing between the two other than to pick the law that made the most sense.

QUESTION: We would be free to do that, would we?

MR. FALK: I think you are as part of your original jurisdiction.

I want to stress that I don't believe Texas contends that that's the case here. The law of the two States -- really, the law of the nation --

QUESTION: What is it, some sort of Federal -- not Federal common law because this is an equitable action -- Federal equity?

MR. FALK: I think it's the law of the States here, of all 50 States, I believe, that define domicile in the same way.

QUESTION: Mr. Falk, following through on Justice Stewart's question, it has always been assumed that inheritance taxes follow domicile. Do you think in our jurisprudence we have gone beyond that point, or are about to and maybe individual States can rest on something other than common law notions of domicile?

MR. FALK: I think there would be no due process objection to other bases for taxation. And I think there are cases that support that statement. However, the laws of Texas and California that have been invoked by our respective States do not assert taxes on any other basis. The basis for taxation in Texas and the basis for taxation in California that brings us here is domicile. So I don't think you have to reach that question. That's not what we are attempting to do.

QUESTION: Mr. Falk, aren't there decisions in these original jurisdiction cases where this Court has fashioned a

rule of law?

MR. FALK: Yes, I think there have been many.

QUESTION: When we do that, what are we doing?

MR. FALK: I think you are fashioning a Federal rule. I assume that --

QUESTION: What is unique about our doing that in this situation?

MR. FALK: Only that I don't have to because there is no conflict between --

QUESTION: Why do you suppose in Mr. Justice Stone's opinion for the Court in Texas v. Florida he emphasized the fact that the laws of the four States there involved were basically identical with respect to domicile? Why was that of any importance at all?

MR. FALK: I think it demonstrates that it's inappropriate in the nature interpleader action because the claims are identical. You have two claims, they can't both be right as an independent matter, and therefore it's inappropriate --

QUESTION: You don't think it might also be read as making it easy to fashion that rule as a Federal rule applicable to the resolution of dispute among --

MR. FALK: I do think that if you were confronted with a situation in which the laws of the States were different --

QUESTION: But maybe Mr. Justice Stone's emphasis on the fact that all four were the same just made it easier to fashion a Federal rule.

MR. FALK: I think that's the answer. I think the escheto cases following Western Union v. Pennsylvania are a perfect example of a case in which the Court made a decision which has to be Federal in its origin as to which rule of eschete would govern the resolution of those several-State controversies.

QUESTION: Dividing interstate river waters is another rule.

MR. FALK: I think that is the same.

QUESTION: Do you contend here that there is a Federal constitutional principle which says that a State may impose an inheritance tax or an estate tax only on one particular set of criteria?

MR. FALK: I have not contended that, and I don't think it's necessary to do so because the laws of the two States base their tax on that ground. We are not challenging the basis for the Texas tax other than its factual basis.

I mentioned Western Union there.

QUESTION: May I just question the proposition? I am intrigued by my Brother Stewart's question. You say the law of the two States is identical. Maybe the black letter law is the same, but we all know there are all sorts of

gradations when you apply a rule. Maybe in Texas they attach greater weight to the place of birth in determining what the ultimate conclusion is, and in California they may attach greater weight to some other fact. There are shadings which may produce inconsistent results which one could describe as differences in the laws of the two jurisdictions, could they not?

MR. FALK: I think that is not so. I am not expert on Texas law, but I have followed their domicile trial here and of course have read Texas v. Florida. That case was initiated by Texas and it seems to be the same as the other three States, and I read the papers there and I understood it to be that Texas law then and I think now is in agreement with the common law of the 50 States of the union on domicile. I am really aware of no --

QUESTION: If the law of the two States is really completely identical, can't we be confident that the two States will reach the same result on the same set of facts?

MR. FALK: I am confident that -- at least we know this. We know the jury in Texas has rendered a verdict that is inconsistent with the position California asserts. Now, we are --

QUESTION: That California asserts as a litigant.

MR. FALK: I can't tell you what the California courts will do any more than Texas could in Texas v. Florida.

That litigation, of course, came here before any litigation had occurred in any State, and the Court rejected Justice Frankfurter's suggestion that it was premature.

I had mentioned the first of the considerations, and the second one has to do with Western Union. I think Western Union is an important case here. In our view, for reasons set forth in our papers in some detail, we think Western Union took Texas v. Florida one more step and made the exercise of this Court's jurisdiction mandatory and not simply optional in cases where -- and they are rare -- where two or more States seek to tax the estate beyond the point of confiscation.

I have read and reread Texas' reply on that point, and I don't understand it. They seem to contend that Western Union is distinguishable because it involved a dispute over property, the location of which was in question, whereas here and in Texas v. Florida the propery is located within the borders of Texas unless it has exclusive in rem jurisdiction over it. The property for the most part that is in this estate consists of stock in a corporation which will be taxed in the place of domicile. So Texas' position assumes the answer to the question that has to be litigated. That really is the same problem as there was in Western Union, and the Court said in that case that Pennsylvania lacked jurisdiction as a matter of Federal constitutional law, lacked jurisdiction

to proceed because it could not assure Western Union that it would not be liable inconsistently to the eschete demands of other States.

I think one passage in the Court's opinion on that point is quite significant. The Court said, "The situation here -- in Western Union -- is in all material respects like that which caused us to take jurisdiction in Texas v. Florida." So as we read Western Union and as we read it today, that decision obliged us, and indeed obliged Texas, to come to this Court rather than to proceed in our own State courts, once it became clear that tax claims were being asserted in excess of the amount of the Estate.

Finally, another factor that I want to mention just briefly that brought us here and I think is important for this Court's exercise of jurisdiction was our own sense of fairness. To have proceeded independently to litigate the tax claim in our own courts, as Texas sought to do, even if we could do so, Western Union notwithstanding, simply did not comport with our notion of a fair and appropriate process. It seemed to us that it would be incredibly inefficient to generate multiplicitous litigation which would only degenerate into what really would be a three-ring circus without a ringmaster. There would be litigation in California, Texas, Nevada, Delaware, all proceeding without any --

QUESTION: Mr. Falk, you are familiar with George

Canning's statement, "Save oh save me from the candid friend."

MR. FALK: Mr. Justice Rehnquist, I don't pretend to have been looking out for the welfare of the heirs. We were here and acted, of course, in the interest of the taxpayers of California. But it does seem to us that it is appropriate for governmental officials, taxing officials, to be concerned with the fairness of their conduct. After all, we are accountable to that set of standards as well. And it seemed to us that all the decisions that are relevant to this Court and all the literature in the last four years since Texas v. Florida condemned a process by which an estate can be wiped out by inconsistent domicile litigation in several States. That strikes me as unfair. I think it ought to strike the Court as unfair. I think it would strike the public as unfair. And we chose not to do it for all of the reasons that I have suggested, and I don't mean to be sanctimonious about it. I think it was an appropriate factor for us --

QUESTION: Are you going to address the argument of Texas that the impact of the agreement you made and the estate made --

MR. FALK: Yes, I am. The position of Texas, as I understand it, is that our agreement demonstrates in some fashion that we are here assuming on behalf of private citizens and not on behalf of a State. And that makes relevant the small number of cases, New Hampshire v. Louisiana,

Oklahoma ex rel. Johnson v. Cook, which disentitled a State to do so really on the ground of the 11th Amendment and it's a limitation on the Court's jurisdiction. That position of Texas is both factually and legally unsound. There are two cases on that point that I want to call to the Court's attention. One is cited in our reply brief, South Dakota v. North Carolina, where the Court distinguished those earlier cases in a situation in which a small number of bonds of a state had been assigned to South Dakota and they had been assigned unconditionally. The motive of the donor was perfectly apparent from writings that are cited in the Court's opinion. He made that donation for reasons of his own. The Court said the motive of the donor is irrelevant. South Dakota is suing for interests, however small, of its own and the action can be maintained.

Another case not cited in our brief, but I do want to call to the Court's attention is North Dakota v. Minnesota in 263 U.S. at 365, and then in another opinion at 584. There a suit was brought by one State complaining of flooding caused by the acts of a neighboring State. The loss caused by the flooding did millions of dollars of damages to private lands in the plaintiff State and something like $5,000 in damages to the State's own bridges and highways, as I recall. The Court allowed the action even though the interest of the State was rather small, and even though it noted in the second

of the two opinions that the landowners of the plaintiff State who were then affected by the flooding, and I quote, "raised a fund to conduct the litigation." So I think it's apparent in that case the State was induced to act by the private citizens who stood to benefit.

Thus, as I read the cases, a State may sue in this Court notwithstanding that private citizens are benefited, and even though private citizens induced the lawsuit.

Now, having said all that, I want to say that's not what happened. The record before this Court, and I refer to an affidavit that I had filed at the time of the application for preliminary injunction, shows that the decision to file the suit was made several weeks before we had any conversation whatever with the estate on the subject of settlement. In fact, as General Hill I am sure will acknowledge, I personally told him in a meeting I had with him in Austin, Texas, on October 21, three weeks before the settlement and before we had any conversation with the estate whatsoever that we had intended to initiate suit in this Court, that we had drafted the papers and so forth.

So I think the suggestion that we are here carrying the bag for the estate actually for his benefit is just plainly false as a factual matter.

I have just a few moments left, and I would like to save that time for rebuttal, if the Court has no further

questions of me at this time.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Falk.

Mr. Attorney General.

ORAL ARGUMENT OF JOHN L. HILL ON BEHALF OF DEFENDANT

MR. HILL: Mr. Chief Justice and may it please the Court: Let me first quickly address the few questions that were raised by the Court before I get into my prepared remarks.

First, it is not agreed that the tax fees will exceed the estate, the combined taxes. There has been no brief as to the value of the estate. There has been one appraisal by Merrill Lynch which is highly in dispute. We think it is ridiculously low. California can collect if it pierces the corporate veil, and that has been done every time it has been tried within PWA litigation or RKO litigation. You can pierce a similar veil. And if they do that, they can get $112 million in land by the airport and running along the beach, highly valuable, even if they don't establish domicile.

QUESTION: That is California land.

MR. HILL: That is the tax -- yes, sir -- the state rule would allow them regardless of domicile.

QUESTION: Right.

MR. HILL: And there is a controversy as to whether every asset has been marshaled. Our Comptroller, State Comptroller, is working on that diligently now.

And Summa's inability to make money and prosper is, we think, highly exaggerated, and certainly is not the kind of speculation this Court can indulge in to determine whether there is actually going to be more taxes than the estate could stand.

And then, finally, Texas v. Illinois does require clearly that our inconsistent claim be such that it would impair California's right to collect on its own formula if it had a meritorious claim, and that case obviously does not require or contemplate that our inconsistent claim be such that it would simply impair California's ability to get this estate settled on some basis that they would consider favorable. That's not a right which this Court's jurisdiction is available to protect, and they said that Texas was all that was in their way. All that was in their way to get a settlement is what he forgot to add and not in their way to try their case, not in their way to assert their claim or the merits of their claim, not in their way to impair their ability to collect on taxes, but in their way to get a favorable settlement of a claim that they are very reluctant to try on its merits. That's what Texas is in the way of.

Justice Stevens' question is correct in suggesting that we should be confident that the courts in both States would reach the same results on the same facts. And certainly I have respect for the State courts in their proceedings.

We should at least not indulge in the opposite presumption in order to try to obtain original jurisdiction here.

He speaks of "our own sense of fairness" being the only thing that brought us here. Then why did they wait 19 months after we began our litigation to suddenly emerge in the atmosphere of sweetness and light and fairness. And why didn't they try then, urge, to come here, and why when they come don't they come on the strength of their own claim? If fairness is the standard, why did they come here tendering the limited issue and the only issue to this Court, and that is Texas domicile.

Now, it's Texas' position that the agreement that was entered into on November 10, 1977, the day before this motion for leave was filed, entered into between the estate's administrators, certain Hughes heirs, and California amounts really to the estate and the heirs agreeing to pay California for money and services to bring this case, and that therefore this Court is prohibited both by the letter and the spirit of the United States Constitution for entertaining any suit arising in your original jurisdiction concept under these kinds of circumstances.

We say the holding here must be that in no case -- in no case -- involving and invoking or undertaking to invoke your original jurisdiction based on Article III, section 2 in 28 U.S.C., section 1251(a)(1), suit between

States, in no case will that jurisdiction be extended where an agreement has been executed prior to that suit providing that the seeking State is granted the right to recover State death taxes regardless of the merits of its own case and where the petition has stated --

QUESTION: Do I understand this, Mr. Attorney General, is this an argument that in fact California is fronting for the heirs?

MR. HILL: No question about it.

QUESTION: Is that what it is?

MR. HILL: Yes.

QUESTION: Well, I thought this agreement guarantees California the sum of $2 million, doesn't it?

MR. HILL: Two percent even if Texas wins.

QUESTION: Was it 2 percent?

MR. HILL: We are not afraid to litigate the matter before you.

QUESTION: Your argument is we ought not to take this case in original jurisdiction because, if California is merely fronting for the heirs, that creates a kind of 11th Amendment problem that Mr. Falk referred to.

MR. HILL: Absolutely. Absolutely. See, they can recover pursuant to this agreement solely if the Court takes jurisdiction and takes action regardless of the quality of their claim. It's a barter for the jurisdiction of this Court

pure and simple.

In short --

QUESTION: Is it that the heirs comes out better, at least inheritance taxwise under this California agreement than perhaps they are going to come out if Texas can claim?

MR. HILL: See, Annette Lummis' co-administrator is Will Lummis in the administration in Texas.

QUESTION: I am sorry, I don't know these names.

MR. HILL: Annette Lummis is his mother.

QUESTION: Who?

MR. HILL: Annette Lummis is Will Lummis' mother. And under Nevada law and California law in case of intestacy, she would be the sole heir. Under Texas law, if Texas is the domicile, it opens up the possibility of heirship to some 400 people who have filed in that court.

In short, the rule must be, we believe, that if a State comes here under Article III, Section 2, it must come clearly and unequivocally and under its own statute or law on which its claim is based and unfettered by an agreement to come here for benefits to be bestowed regardless of the merits of the underlying claim.

QUESTION: Mr. Attorney General, if the agreement had not been made, do you think the State of Nevada would be in here?

MR. HILL: They are not a taxing State.

QUESTION: I know, but would they be in here?

MR. HILL: Well, I don't think so. I have no reason to believe that the Attorney General of Nevada would have entered into this agreement.

QUESTION: No interest.

MR. HILL: He would have no interest at all, had shown no interest any more than California did until the eve of our trial. That's when they got this agreement and started showing an interest. If they were really interested, why didn't they come here, why did they permit us to spend hundreds of thousands of dollars, put in thousands of man-hours out in the wide open, most of it in letters sent out in California with California counsel assisting us, travel all over the world and take 50-odd depositions, and discover hundreds of thousands of documents out of three or four million documents that we were actually both sides working with pretrial, preset the trial, January 1977 to set the trial in September of 1977, all of which they knew about, and let us go ahead and proceed and go to all that trouble and work in our own court and have a fair and square trial with overwhelming evidence --I can't obviously retry it here, but it's a case that will be won wherever it is heard -- and then come here and ask on behalf of the estate really, "You relitigate the Texas domicile issue. And that is all we want to tender to you, that very limited issue."

QUESTION: Is that, as you see it, what the issue would be if this complaint is filed, whether or not the decedent lived in Texas? Is that going to be the question, or is the question going to be where did he live at the time of his death?

MR. HILL: They won't tender anything else. Their motion tenders only to this Court the question of Texas domicile. You see, they simply want this Court to take it, give it to a master and hope they can gang up on us and get the master to find --

QUESTION: What will the issue be before the master?

MR. HILL: Whether Texas was not the domicile.

QUESTION: Whether or not Texas was the domicile of the decedent at the time of his death. If not, where was the domicile of the decedent at the time of his death.

MR. HILL: In fact, they win when you cut us out.

QUESTION: Quite different, therefore, from Texas v. Florida.

MR. HILL: Oh, you can't track it with radar.

Using this Court, or undertaking to, for an inequitable and unjust purpose clearly violates the provisions of the 11th Amendment as a suit which in reality is for the benefit of private litigants. It would also bring this Court's equitable jurisdiction into play without due regard to, first, the necessity of the Court's participation. It would invoke

it without due concern for the possible abuse of the Court's jurisdiction in other cases without first requiring California to utilize its own courts to determine the underlying merits of its claim, without due regard to the fact that Texas had already obtained a domicile verdict in its own courts --

QUESTION: That's a point, Mr. Hill, if a master were appointed, he couldn't ignore that Texas proceeding, could he? He would have to go into it, wouldn't he?

MR. HILL: We would certainly claim that he couldn't. But I tell you the jurisdiction once taken here, and a master is appointed, so often I find that in some cases it just seems to wipe out a lot of things that have happened before. They say, "We just want jurisdiction for a little purpose," but once you have --

QUESTION: What could the master do to that?

MR. HILL: He could conceivably find that Texas was not the domicile State.

QUESTION: Then we would have a real conflict, wouldn't we?

MR. HILL: You would have a honey of a big --

QUESTION: And that's a matter of fact, perhaps, or in any event if it's a matter at all of law, it's a matter of State law, isn't it?

MR. HILL: Clearly. They are asking you to come in here without regard to requiring California to come and present

a hard and concrete case.

QUESTION: General Hill, there is a Federal statute on the books apropos of my Brother Marshall's question that says Federal courts must give full faith and credit to the decrees of State courts. Do you think that binds this Court as a Federal court in a case under its original jurisdiction?

MR. HILL: We will certainly take that position.

QUESTION: Do you have any reason to take it other than you think it helps your case?

MR. HILL: Obviously for that reason, until another --

QUESTION: You don't need to take that position the way the case is lined up here, do you?

MR. HILL: Really not. Really not because we just have considerations here that haven't been brought out.

This Court -- and I know I need not cite your own opinions, but this is so relevant to what I am trying to convey from the Texas standpoint, is your statement recently made in Arizona v. New Mexico -- and may I please quote it: "We recently reaffirmed that our original jurisdiction should be invoked sparingly in Illinois v. City of Milwaukee where we additionally stated we construed 28 U.S.C. section 1251(a)(1) as we do Article III, Section 2, to honor our original jurisdiction, but to make it obligatory only in appropriate case , and the question of what is appropriate concerns the Court, the seriousness and dignity of the claim. Yet beyond that it

necessarily involves the availability of another forum where there is jurisdiction over the main parties where the issues tendered may be litigated and where appropriate relief may be had. We employ sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer."

Nearly 40 years ago in Massachusetts v. Missouri, to which Counsel Falk alluded, this Court said: "In the exercise of our original jurisdiction so as to truly fulfill the constitutional purpose, we not only must look to the nature of the interest of the complaining State, the essential quality of the right asserted, but we must also inquire whether recourse to that jurisdiction is necessary for the State's protection."

Now, then, with that in mind, the narrowness of the issue tendered by California, that is, a negative finding against Texas, is proof enough that the quality of the interest attempted to be provided to California, that is, an 18 percent interest by itself which it may not be entitled to under any merit, is not of a kind to be entertained here by this Court in invoking that solemn jurisdiction. If California really wants to litigate its entitlement, that issue of domicile can and should be under the circumstances here presented litigated in California. If California is successful there on that issue, it can repetition here if in fact facts

and information show that there is more taxes that they can't get there, their taxation, and then you decide whether to take the case or let it be heard in a Delaware forum where the question of Summa Corporation exists and where any problems that do in fact ever occur, not pursuant to some settlement agreement but pursuant to honest claims being --

QUESTION: Mr. Attorney General, are you willing to litigate in Delaware?

MR. HILL: When we get to the position --

QUESTION: Well, the answer is no right now.

MR. HILL: No, not now, we clearly are not and we do not anticipate it. If California does try --

QUESTION: Of course, it might be a forum, if both of you agreed, that could solve the entire matter.

MR. HILL: That's true.

QUESTION: Would the Delaware forum, as you call it, have jurisdiction over a lawsuit between the State of Texas and the State of California?

MR. HILL: It could only come up, and I don't want to be bound by this, I don't think it is necessary to get into it in this proceeding, but as I see it, the only way it could possibly -- I underscore possibly -- come up would be if California in fact secures a favorable finding in this Court on the merits and then the proof shows that it was impossible for us to get this matter disposed of or that harm of 120

percent and these sort of figures that I think are ridiculous and never will come to pass--at most I think you are looking at 101, with a going concern able to pay it out in 10 years. But in any event, if all those speculated problems finally came to rest, then you would have the one piece of intangible property to which all would be looking and that's the Summa stock. As you know, there is only one stockholder. There are 75,000 shares of stock but only one stockholder. It is presently being held and voted by Mr. Will Loomis under their order. I think they would have the -- if that would then be a forum where you could determine between us how we tax the intangible.

QUESTION: And that forum would have jurisdiction, would it --this is my question -- over a lawsuit between the sovereign State of Texas and the sovereign State of California.

MR. HILL: If we are asserting, if we come in there and assert that we want to get at the intangible stock asset, which is sited in Delaware, that being the corporate base --

QUESTION: Whatever the lawsuit was about, I am talking about any kind of a lawsuit between those two parties and I am talking about jurisdiction.

MR. HILL: I think, Mr. Justice Stewart, that would be an election, I think, for these States to make.

QUESTION: It would have to be voluntary, wouldn't it?

MR. HILL: I think so.

QUESTION: Neither can compel the other to go to the Delaware court, could it?

MR. HILL: No.

QUESTION: It would be a matter of two or more States filing competing claims to the same property.

MR. HILL: Right.

And then let me just close by --

QUESTION: To a Delaware asset that is clearly within the jurisdiction of the Delaware court.

MR. HILL: I think all these questions about Delaware, if I might say--I don't go further here than is obviously necessary to decide what we are here about -- is simply to say that that question can be addressed if it ever becomes proper to be addressed, and this Court will have an opportunity to look at that if that ever becomes germane.

QUESTION: General Hill, a little while ago you said that California should go about its business and proceed in its own courts and so forth and then come here when certain things were established. Would you be opposing original jurisdiction at that time also?

MR. HILL: I don't know. It would just depend on if they had a case at that time stated without reference to agreements under Texas v. Illinois and I thought Texas v. Illinois applied, I would then have to make a determination as to whether --

QUESTION: At least the agreement --

MR. HILL: You don't have to deal with it here. I might want to ask you to deal with it.

QUESTION: At least the agreement --

MR. HILL: And this Court might want to reconsider it.

QUESTION: General Hill, at least the agreement accomplished the elimination of Nevada as a possible party. This is one thing it accomplished. After all, you are in a position here representing a State which itself brought the Texas v. Florida litigation. Now you are representing a State which denies the original jurisdiction of this Court. You are hung with it, but there it is.

MR. HILL: No, I am not. General McGraw 45 years ago came into this Court with a lot of other attorney generals pretty much by agreement. The Court wouldn't let them in until they could go out and resolve the fact of what the taxes were going to be so that the master wouldn't have all that foolish work to do, and then when they came back in practically in an agreed situation, the Court took it. Justice Frankfurter didn't think much of it, but that's neither here nor there. They did take it. And they heard it. And they resolved it. And Texas who brought it lost. And I think General McGraw were he here today would be applauding what I'm doing and believe that it's totally consistent with what I should be doing and it's an entirely different situation. This is not in any

sense a Texas v. Florida case.

QUESTION: I take it at a later time your first question would be that the matter of domicile would not be open for any kind of reconsideration, because it has been determined in the Texas court.

MR. HILL: Yes. Clearly. I would certainly be derelict in --

QUESTION: And that would be true later if you all thought you should go to Delaware and try to --

MR. HILL: Exactly.

QUESTION: You would say that everything might be open but not domicile.

MR. HILL: Those are exactly the attitude --

QUESTION: Would it be reviewable by this Court or any other Federal court? It's not a question of Federal law, is it?

MR. HILL: No, not at all.

So I conclude by reminding that if there is the slightest doubt about why we are here and that I say we are here out of the estate's worry over the Texas domicile finding not only for estate tax purposes but for other purposes, that it ought to be perfectly clear when you look at this agreement that's why we are here because in addition to giving them the 2 percent guarantee, they come back and say, "We will give you all of the lawyers you need." Some of them are here today

in court. "We will work with you hand in glove and we will give you all of our depositions. We will give you all of our work product and maybe together we can do Texas in."

QUESTION: Mr. Attorney General, a while ago you said that the figure of 120 percent, that is, referring to the aggregate amount of taxes, is absurd, ridiculous, something like that, and that in any event it wasn't more than 101 percent.

Now, for the purposes of this case what is the difference whether the taxes are 101 percent of all the assets or 190 percent of all the assets?

MR. HILL: I think for today at least for the purpose of this hearing, the answer would be that if it's 101 -- we don't know, but let's just assume for the purpose of your question it is -- then California is petitioning here to get you to vitalise an agreement which would harm them 68 percent of what they say they are entitled to under their figure, and yet they want you to do it under the authority of the case that would say we are going to protect you from 1 percent harm. Under this agreement it just simply is immaterial inquiry now as to whether it is 101 percent, ends up being 98 percent. It's not the basic inquiry before this Court because the fundamental bias in their case is this agreement. You can't get away from it. Will Lummis -- and it's in our brief -- used the words -- I have them written down somewhere -- where he said in effect that we are here pursuant to this agreement.

That's his sworn testimony given in December.

Now, there cannot be any doubt about that. We are here pursuant to that agreement, and that is the full answer, a complete answer, a total answer to the denial of this motion for leave to file and invoke this Court's original jurisdiction. Never should this Court tolerate that kind of a situation. And you would rue the day if you did and open the gates for this kind of trading around between high estate tax States which we claim to try to get negative findings against 16 percent States with good claims.

QUESTION: General Hill, what is the present status of the Texas litigation?

MR. HILL: We obtained a jury verdict and we will have a judgment entered on April 4.

QUESTION: I suppose there are motions to set the verdict aside pending, are there?

MR. HILL: There is a motion for judgment which we have filed. I will have to ask my associates whether they have filed. I have not seen the pleadings recently. I would not want to misstate. If they have filed a motion to set it aside, I would be most surprised. They argued the case about 30 minutes although they had several hours to argue, because when all the evidence was in they didn't have much to talk about. And there is plenty of evidence to support the verdict. The case was cleanly tried. It is going to stand up without

any question.

QUESTION: Whatever the accuracy of your prediction, there will be an opportunity of an appeal, will there, in the State courts?

MR. HILL: They can go through our appellate process. I am sure under the circumstances like we are faced with, that is something we can contemplate.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Mr. Falk, do you have anything further?

REBUTTAL ARGUMENT OF JEROME B. FALK, JR. ON BEHALF OF PLAINTIFF

MR. FALK: Yes, I do, Mr. Chief Justice.

First of all, let me say there is no doubt I agree with some of the implications, some of the questions. There is no other forum. If California and Texas each secure a judgment and we find ourselves in the situation that General Hill contemplates, there is no possibility, absent consent of both States, of litigating that in the Delaware courts. They have no jurisdiction to decide controversies between States. Only this Court does. And as to everybody else, those two State judgments are entitled to full faith and credit as Texas v. Florida and the previous cases made clear.

QUESTION: Mr. Falk, if your complaint is filed and an answer is filed and the matter is referred to a master,

what will the issue be, issue or issues?

MR. FALK: Justice Stewart, I suppose the Court could go beyond the pleadings and resolve the question of where he was domiciled. It is true that the pleading only asks the Court to determine whether or not the Texas claim is a valid one. And the reason for that is, as someone on the Court commented a moment ago, that we have settled with the estate the controversy vis-a-vis Nevada, the Bahamas, Mexico --

QUESTION: So Nevada certainly is not now and presumably will not be a party.

MR. FALK: That's correct.

QUESTION: And yet as I understand the facts from reading these papers and from reading newspapers, the decedent spent, insofar as he lived in the United States, resided, was physically in the United States of America in his last years of his life, most of those years were in Nevada, weren't they?

MR. FALK: No. He spent about 38 years in California.

QUESTION: I am talking about the final years of his life.

MR. FALK: I am sorry. The last three or four years --

QUESTION: The last years of his life, insofar as he was in the United States, he was in Nevada most of the time, wasn't he?

MR. FALK: Suffice it to say that the parties recognize a very complex controversy --

QUESTION: Generally in an adversary system of justice you have parties litigating and the theory is from that litigation emerges the truth. But if Nevada is not even going to be in this lawsuit, how can a very accurate assessment of tax be made?

MR. FALK: I don't think the Court has to adjudicate this to finally resolve --

QUESTION: Generally a lawsuit isn't destined to determine a negative, that somebody did not live in a certain State.

MR. FALK: But the problem here was that we were facing a very complex litigation with many alternatives. We undertook to settle that litigation. We could have settled all of it, but Texas wasn't a party to it and didn't choose to be. We settled all that we could and we had this remaining part of the problem --

QUESTION: Why don't you think that to answer the question you have put in your prayer aren't you going to have to decide where he was domiciled?

MR. FALK: I think we are going to put on evidence that will make it possible for the --

QUESTION: Make it possible. How can you say -- aren't you going to have to prove that he was domiciled somewhere else and therefore he wasn't domiciled in Texas?

MR. FALK: I think we are going to show he was

domiciled in California for at least 30 or 40 years of his life. Whether it is necessary to go on and disprove the contention that in 1966 when he moved to Las Vegas he then changed his domicile to Nevada, I don't know that we have to do that. Once we have disproved the Texas domicile, I think we will have done enough.

QUESTION: Do you think it's sufficient to show that he was domiciled in California up until 1966 and then left California and never returned and spent the rest of his life in Nevada?

MR. FALK: It wouldn't be sufficient but for the fact that the estate has agreed to pay us a tax if we can make that showing.

QUESTION: Mr. Falk, the truth of the matter is that Nevada and the Bahamas and everybody else came in and California (sic) wouldn't come in, which it had a perfect right not to come in, and that's why you filed the lawsuit.

MR. FALK: I'm sorry, I didn't follow your question, Mr. Justice Marshall.

QUESTION: You said a minute ago before my brother White asked you a question that Nevada, Bahamas, and everybody else came in to California and joined in this agreement, but Texas did not.

MR. FALK: Not as taxing authorities. The estate agreed to pay us a tax, and in effect it abandoned its

defense --

QUESTION: To the State of California.

MR. FALK: To the State of California.

QUESTION: Unfortunately it wasn't to you personally.

MR. FALK: I'm sorry that it wasn't, Mr. Justice Stewart.

To pay California a tax if we can establish that they are not also liable to Texas, and in so doing abandoned the defense that they otherwise had available that he was a Bahamian or a Mexican or a citizen of the world or a citizen of Nevada, the domiciliary.

QUESTION: Did you ask Texas to do the same thing?

MR. FALK: We in fact did. That's why I went to Texas --

QUESTION: Texas said no.

MR. FALK: They said no.

QUESTION: Which he had a right to.

MR. FALK: So he did.

QUESTION: So then you filed this lawsuit.

MR. FALK: That's correct.

QUESTION: So Texas is right the reason for this lawsuit is the failure for them to join this agreement.

MR. FALK: No. No, they are not, Mr. Justice Marshall. We decided to bring this lawsuit, had the papers prepared before the settlement --

QUESTION: Would you have brought the lawsuit if Texas had come in? Of course you would not.

MR. FALK: Then we would have had a settlement.

QUESTION: That's right.

QUESTION: If the theory, Mr. Falk, is that a neutral forum is the only place for a controversy of this kind to be settled, why should not your prayer have been to determine what you say now is the de facto issue where was the domicile of Mr. Hughes at the time of his death instead of just attacking it on terms of Texas?

MR. FALK: Mr. Chief Justice, if jurisdiction turns on that question, we are quite prepared to amend our pleading to ask the Court to do just that. And we were originally planning on doing just that. Papers were drafted that asked the Court to do that. Papers had even been sent to the printer asking the Court to do that, without discussion of a settlement because none had been discussed. And we then entered into negotiation with the estate and narrowed the issue. That's what happened.

I fail to see how that can alter the need to have a unitary adjudication. So this is the only place to go for that adjudication.

QUESTION: Mr. Falk, if a master were appointed to determine this and he were to determine that domicile was Nevada at the time of Mr. Hughes' death, do I understand there

is no inheritance tax in Nevada?

MR. FALK: That's correct, Mr. Justice.

QUESTION: What, then, would be the effect of that determination, that he was domiciled in Nevada, upon the State's claims to inheritance taxes?

MR. FALK: But for the settlement, we would be entitled to collect no domicile-based tax.

QUESTION: But under the agreement California would still have at least $2 million, is it?

MR. FALK: No, under the agreement, if Nevada were found to be the domicile, the estate has in effect settled that controversy with us and has agreed to pay us an 18 percent tax notwithstanding that. So that would be --

QUESTION: California would lose if the Master were to conclude that Nevada was the domicile.

MR. FALK: We compromised our rate of 24 percent.

QUESTION: I know, but I am right, am I not?

MR. FALK: Yes, you are right.

QUESTION: And California would not but Texas would.

MR. FALK: If we found Nevada, Texas would, of course, not recover either, and that reflects a compromise from 24 percent to 18 percent.

QUESTION: The only one who would lose would be the United States because then the credit against the Federal estate tax would apply. Without the agreement there would be no

credit for estate taxes paid.

MR. FALK: That is true. Of course, that is always true in a domicile controversy, and probably Nevada and the other --

QUESTION: Well, it isn't true --

MR. FALK: -- are here with a very --

QUESTION: It isn't true with respect to Nevada domiciliaries.

MR. FALK: If they are found to be Nevada --

QUESTION: If Nevada was determined to be the domicile and the estate nevertheless paid you $16 million -- what was it?

MR. FALK: Eighteen percent.

QUESTION: -- 18 percent, which is how many million?

MR. FALK: We don't know the value of the estate. It's substantial.

QUESTION: Would the payment from the estate of that 18 percent be an estate taxes paid deduction?

MR. FALK: I'm not really qualified to say. I suppose the IRS has the final say on that. I think the answer is yes. The estate and we have agreed to resolve that part of the controversy, and we have compromised --

QUESTION: Yes, but then one party of the controversy files a lawsuit as part of which it is essential to determine domicile, and it's determined contrary to the claims of the

party filing the suit.

MR. FALK: I think that kind of situation can happen in settlements. For example, if you settle a lawsuit with several parties involved and some settle out, that settlement is valid even though other parties do not settle, the litigation proceeds, and there is an adverse determination --

QUESTION: Wouldn't the estate, Mr. Falk, be in the same position as the executors in the Dorrance estate where they volunteered payment to Pennsylvania and then New Jersey interposed a claim and established domicile and collected $18 million against Pennsylvania's $16 million and then when the executors tried to get back the $16 million from Pennsylvania they were told no, that was a voluntary payment.

MR. FALK: They would have no remedy.

QUESTION: Wouldn't that be the same?

MR. FALK: I think that's correct. I think they would have no remedy and they would be in that position because they made a decision to ask for a lower tax rate and to abandon defenses that were otherwise available to them. I think that was a choice that they made knowingly and they will have to pay the consequences if that is what it turns out.

QUESTION: Of course, you recall the Dorrance executors were surcharged for that.

MR. FALK: I didn't know that, Mr. Justice.

QUESTION: I just wonder here, if it were determined

that Nevada after all, where there is no inheritance tax, was the domicile, what about the estate paying California, a State with inheritance taxes.

QUESTION: Of course, it wouldn't be entirely baseless, assuming that you can pierce the Summa Coproration veil, because you have some substantial taxes due to California because of your real estate.

MR. FALK: Some. It's not the bulk of the estate, but there are substantial assets in California.

QUESTION: Mr. Falk, are you a full-time attorney general for the State of California?

MR. FALK: No, Mr. Justice, I am in private practice. I am special counsel for the State of California.

QUESTION: Did you ever represent any other party to this case, other than the State of California?

MR. FALK: Absolutely not. And I have filed a sworn affidavit with this Court, which was presented to Mr. Justice Powell, and I think referred to the entire Court, in which I said under penalty of perjury that this decision was made, and I will go farther and say the papers were prepared and ready to be filed, or almost ready to be filed, they were at the printer, before we got into any discussion whatever with the estate on the subject of settlement.

So the charge is just false.

QUESTION: Except this complaint doesn't ask the

Court to determine where the decedent was domiciled, whether Nevada or the Bahamas or Mexico or where, simply that he was, on the date of his death, not a domiciliary of Texas, period.

MR. FALK: That's correct. As I say, if we thought it were necessary, if the Court finds it necessary, we are prepared to amend it and to take our chances with the broader question.

I see no purpose to be served by that. The estate has made its decision, and we have agreed to accept the lower rate of tax in settlement of that aspect of the case, and it seems to us that it serves the benefit of everyone to narrow the issue. We have really only one problem left. I thought that was a constructive thing to do.

QUESTION: It may well be.

MR. FALK: Your statement is absolutely correct, Mr. Justice.

QUESTION: We have to reach our decision on the basis of the pleadings as they are now before us.

MR. FALK: Yes, I think that is true.

QUESTION: Not on the basis of some possible amendment that you may have in mind.

MR. FALK: I think that's a fair statement, Mr. Chief Justice.

QUESTION: Thank you gentlemen. The case is submitted.

(Whereupon, at 11:15 a.m., the oral argument in the above-entitled matter was concluded.)