tax is non-discriminatory, government employees should sustain the same burden of taxation borne by everyone else.[26] The importance of the problem demands that the whole relation of federal and state taxation should be re-examined, and unless a practical solution is made, a tax-sensitive public will raise the cry of "share the tax" which promises to be much more widespread and formidable than "share the wealth."

J. L. A.

TAXATION—JURISDICTION TO TAX RESIDENTS ON INCOME DERIVED FROM RENTS OF LAND IN ANOTHER STATE—[Federal].—In a recent case the United States Supreme Court decided that a state could constitutionally tax a resident upon income received from rents of land located without the state and from interest on bonds also physically without the state, secured by mortgages similarly situated.[1]

The contention of the relator seeking to recover taxes so paid was that the tax in substance and effect was a direct tax on real estate and tangible property located without the state. If this contention had been sustained, the taxing act would have deprived the relator of "due process of law," because a state has no jurisdiction to tax land or tangible personal property which is physically located outside its territorial limits.[2]

The court, in rejecting the relator's contention, declared that domicile itself, afforded sufficient basis for jusisdiction to tax income from whatever source derived.[3] The state of domicile protects the recipient of the income in his person, in his right to receive the income and in his enjoyment of it when received. The enjoyment of the privilege of residence is insparable from the responsibility for sharing in the costs of the government which

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26. As stated by Mr. Justice Holmes, "As long as the Supreme Court sits, the power to tax is not the power to destroy." Dissenting opinion in Panhandle Oil Co. v. Mississippi, 277 U. S. 218, 223, 48 S. Ct. 451, 72 L. ed. 857 (1928). For a discussion of unfriendly discrimination, see Mr. Justice Cardozo's dissenting opinion in Schuylkill Trust Co. v. Pennsylvania, 296 U. S. 113, 56 S. Ct. 31, 80 L. ed. 91 (1935). Cf. United States v. Constantine, 296 U. S. 287, 56 S. Ct. 287, 80 L. ed. 233 (1935), where a special excise of $1,000.00 on persons engaged in the liquor business in violation of state law was held an unconstitutional invasion of the state's power.

1. People of New York ex rel. Cohn v. Graves et al., — U. S. —, 57 S. Ct. 466, 81 L. ed. 409 (1937), two judges dissenting; aff'd New York ex rel. Cohn v. Graves, 271 N. Y. 353, 3 N. E. (2d) 508 (1936); comment, 22 Iowa L. Rev. 166 (1936). N. Y. Tax Law (1935) sec. 359 (Consol. Laws, ch. 60), as amended by N. Y. Laws (1935) ch. 933; Cahill's Consol. Laws 1935 supp. c. 61, sec. 359, defines taxable income specifically to include rent from real property located outside the state.

2. Senior v. Braden, 295 U. S. 422, 55 S. Ct. 80, 79 L. ed. 1520, 100 A. L. R. 794 (1935); Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83, 50 S. Ct. 59, 74 L. ed. 180, 67 A. L. R. 386 (1929); Union Refrigerator Transit Co. v. Kentucky 199 U. S. 194, 26 S. Ct. 36, 50 L. ed. 150 (1905); 26 R. C. L. 267.

3. Cf. Lawrence v. State Tax Commission, 286 U. S. 276, 52 S. Ct. 556, 76 L. ed. 171, 87 A. L. R. 374 (1932). See anno. 87 A. L. R. 380.

affords it. An income tax is apportioned according to the ability of the taxpayer to pay it. Such a tax bears a direct relationship to those rights and privileges which attach to domicile within a state and to the equitable distribution of the tax burden. Hence, since neither the privileges enjoyed nor the protection afforded by reason of domicile or residence within a state is affected by the character of the source of the income, such income is not necessarily clothed with the immunity from taxation enjoyed by its source.

A state may tax its residents upon net income from a business whose physical assets are located wholly without the state.[4] It may tax the net income from bonds held in trust and administered in another state.[5] It may tax the net income from operations in interstate commerce although forbidden to tax the commerce itself.[6] Analogously, Congress may lay and collect a tax on the income derived from the business of exporting merchandise in foreign commerce[7] although an export tax on the articles themselves is prohibited by art. 1, sec. 9, cl. 5 of the Constitution.

Is an income tax based on rents derived from land a tax on the land itself?[8] Relator's main reliance in the instant case was placed on the case of *Pollock v. Farmer's Loan and Trust Co.*,[9] which held that a federal tax on incomes derived from rents of land was a direct tax requiring apportionment under Art 1, sec. 2, cl. 3 of the Constitution. The court declared that this decision was not based upon the ground that the tax was a tax on the land itself, or that it was subject to every limitation the Constitution imposes upon property taxes. It determined merely that for purposes of that section of the Constitution there were similarities in the operation of the two kinds of taxes which made it appropriate to classify both as "direct" within the meaning of the constitutional requirement of apportionment.[10]

This "hedging" of the decision in the *Pollock* case effectively removed the last barrier to the establishment of domicile as sufficient of itself to confer jurisdiction upon a state to tax the incomes of its residents from whatever source derived.

A possible exception to this rule may be found by analogy to the reasoning which extends to the income itself, the immunity of income producing

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4. Idem.
5. Maguire v. Trefrey, 253 U. S. 12, 40 S. Ct. 417, 64 L. ed. 739 (1920).
6. United States Glue Co. v. Town of Oak Creek 247 U. S. 321, 38 S. Ct. 499, 62 L. ed. 1135, Ann. Cas. 1918E 748 (1918).
7. Peck & Co. v. Lowe, 247 U. S. 165, 38 S. Ct. 432, 62 L. ed. 1049 (1918); Barclay & Co. v. Edwards, 267 U. S. 442, 447, 45 S. Ct. 348, 69 L. ed. 703 (1925).
8. Cf. Anno. 11 A. L. R. 313, 25 A. L. R. 758, 70 A. L. R. 468; Ludlow-Saylor Wire Co. v. Wollbrinck, 275 Mo. 339, 205 S. W. 196 (1918); Glasgow v. Rowse, 43 Mo. 479, 491 (1869); Bacon v. Ranson, 331 Mo. 985, 56 S. W. (2d) 786 (1932); 4 Cooley, *Taxation* (4th ed. 1924) sec. 1743 et seq.; In Re Income Tax Cases (State ex rel. Bolens v. Frear), 148 Wis. 456, 134 N. W. 673, L. R. A. 1915 B, 569, 606, Ann. Cas. 1913 A, 1147 (1912).
9. 157 U. S. 429, 15 S. Ct. 673, 39 L. ed. 759 (1895).
10. Brushaber v. Union Pac. R. R. Co., 240 U. S. 1, 36 S. Ct. 236, 60 L. ed. 493 (1916).

instrumentalities of one government, state or national, from taxation by the other.[11] This immunity is not allowed because of the proposition that a tax on the income is a tax on the source, but because it was thought that such a tax, whether upon the instrumentality itself or the income produced by it, would equally burden the operations of government.

The only criticism that can be leveled upon the decision in the instant case is that it adds one more instance of double taxation.[12] It is generally conceded that the state in which the land is situated may also tax the income therefrom, regardless of the residence of the owner.[13] However, double taxation is common in the income tax field and its eradication, if thought desirable, is a subject for legislation, not judicial decision.[14]

M. B.

TORTS—DUTY OF DRIVER OF VEHICLE TO GRATUITOUS GUEST—STATUTORY MODIFICATIONS OF COMMON LAW—[Texas].—A Texas statute bars actions for injuries or death of a gratuitous automobile guest unless the accident was intentional or caused by the operator's gross negligence or reckless disregard of the rights of others.[1] In a recent case the above-mentioned statute was declared constitutional.[2]

In the absence of legislative enactment the gratuitous automobile guest generally enjoys the status of a licensee at common law. It is therefore the duty of the driver to use ordinary care neither to create new dangers nor to increase those already existing.[3] The Texas doctrine represents a wide-

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11. Cf. Collector v. Day, 11 Wall. 113, 124, 20 L. ed. 122 (1871); Gillespie v. Oklahoma, 257 U. S. 501, 42 S. Ct. 171, 66 L. ed. 338 (1922).

12. Cf. People of New York ex rel. Whitney v. Graves et al., — U. S. —, 57 S. Ct. 237, 81 L. ed. 195 (1937), comment, 50 Harv. L. Rev. 704, which held that the state of New York had jurisdiction to tax the profits realized by a non-resident upon the sale of his interest in a membership in the New York Stock Exchange. This recent decision is indicative of the general disregard of the possibility of double taxation in determining what is jurisdiction to tax income. The case proceeded on the "business situs" doctrine.

13. Lake Superior Mines v. Lord, 271 U. S. 577, 581, 582, 46 S. Ct. 627, 70 L. ed. 1093 (1925); Shaffer v. Carter, 252 U. S. 37, 40 S. Ct. 221, 64 L. ed. 445 (1920).

14. An advisory opinion contra to the result in the instant case was handed down by the Supreme Court of New Hampshire in the Opinion of the Justices, 84 N. H. 559, 573, 149 Atl. 321 (1930), based on the holding in Pollock v. Farmer's Loan and Trust Co., supra, note 9. See also Note, 23 Va. L. Rev. 196 (1936), and Rottschaefer, State Jurisdiction to Tax Income (1937) 22 Iowa L. Rev. 292.

1. Tex. Ann. Civil Stat. (Vernon, Supp. 1935) art. 6701b.

2. Paschall v. Gulf C. & S. F. Ry. Co., 100 S. W. (2d) 183 (Tex. 1936).

3. 1 Berry, *Automobiles* (6th ed. 1929) 581; Harper, *Torts* (3rd ed. 1933) sec. 81; 3 Cooley, *Torts* (4th ed. 1932) 524; Restatement, *Torts* (1934) sec. 323 (1); Collected cases in 20 A. L. R. 1014; 26 A. L. R. 1425; 40 A. L. R. 1338; 47 A. L. R. 327; 51 A. L. R. 581; 61 A. L. R. 1252.