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Recent Developments and Tendencies in the Taxation of Intangibles

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RECENT DEVELOPMENTS AND TENDENCIES IN THE TAXATION OF INTANGIBLES

In the decision of *Union Refrigerator Transit Co. v. Kentucky*[1] the Supreme Court of the United States in 1905 definitely set at rest the proposition that tangible personal property having acquired a permanent situs in another state is not subject to taxation in the state of the owner's domicile.[2]

Since that time comparatively little difficulty has been encountered in the taxation of tangibles, though it was not until 1925 that the full scope of this doctrine was applied to inheritance taxation as distinguished from property taxes in the case of *Frick v. Pennsylvania.*[3]

The maxim *mobilia sequuntur personam,*[4] having thus been definitely circumscribed with reference to its application to tangibles, remained in its complete vigor as applied to intangibles.

Two problems in this connection have given rise to considerable difficulty. First, when is property to be classed as intangible, or, to state it differently, may documentary evidence of property acquire the status of tangibles for purposes of taxation? Second, may intangibles be taxed otherwise than at the domicile of the owner? Additional difficulties arose over possible distinctions between the application of property taxes and inheritance or succession taxes.

Until very recently the courts seemed to be pointing in the direction of an affirmative answer to both of the above questions, particularly in the case of transfer taxes.

The decision of the United States Supreme Court in the case of

1. 199 U.S. 194, 26 S.Ct. 36, 50 L.Ed. 150. The Union Refrigerator Transit Co., a Kentucky corporation, owned various items of rolling stock permanently employed in other states. Kentucky, applying the maxim *mobilia sequuntur personam,* levied a tax upon all such cars. The tax was held invalid as a tax on property not within the jurisdiction of the state and in violation of the due process clause of the Fourteenth Amendment.

2. See also Louisville & Jeffersonville Ferry Co. v. Kentucky, 188 U.S. 385, 23 S.Ct. 463 47 L.Ed. 513 (1903); Delaware, Lackawanna & Western Ry. Co. v. Pennsylvania, 198 U.S. 341, 25 S.Ct. 669, 49 L.Ed. 1077 (1905).

3. 268 U.S. 473, 45 S.Ct. 603, 69 L.Ed. 1058. Frick died domiciled in Pennsylvania leaving a large estate, part of which consisted of tangible personal property permanently kept in New York and Massachusetts. The tax of Pennsylvania on the succession to the tangible property with an actual situs in other states was held invalid as a violation of the due process clause of the Fourteenth Amendment.

4. The maxim *mobilia sequuntur personam,* meaning *moveables follow the person,* is ordinarily taken to mean that the situs of personal property is at the domicile of the owner. For its general application to matters of taxation see 2 COOLEY, TAXATION (4th ed. 1924) 440.

5. 233 U.S. 434, 34 S.Ct. 607, 58 L.Ed. 1030 (1914). A non-resident of New York had died leaving in a safe deposit box in a New York bank certain promissory notes made by a resident of Chicago, secured by mortgages of Chicago land to Illinois trustees. New York levied a transfer tax under a statute purporting to impose a tax with respect to "property within the state." The Court took the position that municipal bonds were recognized as being so far tangible as to be taxable where found and that promissory notes were of the same character; that it was proper for the state to treat the debts and mortgages as "property within the state" with-

Wheeler v. Sohmer[5] upholding a New York transfer tax with respect to promissory notes kept in New York merely by virtue of the presence of the paper evidence within the state, the owner being a non-resident, together with numerous state cases of a somewhat similar tenor,[6] had seemed[7] to go far toward establishing the doctrine that bonds, notes, and other forms of commercial paper are not merely evidences of property but may be so far regarded as property in themselves as to be treated as tangibles, and as having the ability to acquire for purposes of taxation a situs of their own apart from the domicile of their owner. Numerous cases appeared to regard the doctrine as established that state and municipal bonds may have a situs of their own apart from the domicile of their owner,[8] and it was asserted that the same doctrine, in conformity with the business man's conception,[9] should be applied to promissory notes, other commercial paper, and money on deposit. At the same time that these doctrines were being adhered to by the Supreme Court, the doctrine of business situs by virtue of which credits may be given a situs for purposes of taxation at the place where they are employed in a continuous business, though the domicile of the owner be elsewhere, had become well established.[10]

in the meaning of the statute solely by virtue of the presence of the paper representation, and that in so doing the due process clause of the Fourteenth Amendment was not violated.

6. *In re* Waldron's Estate, 84 Colo. 1, 267 P. 191 (1928); Blain v. Irby, 25 Kan. 499 (1881); Matter of Whiting, 150 N.Y. 27, 44 N.E. 715 (1896); People ex rel. Burke v. Wells, 184 N.Y. 275, 77 N.E. 19 (1906); In re Gibb's Estate, 60 Misc. Rep. 645. 113 N.Y.S. 939 (1908); *In re* Tiffany's Estate, 143 App. Div. 327, 128 N.Y.S. 106 (1911); State v. Fidelity & Deposit Co. of Maryland, 35 Tex. Civ. App. 214, 80 S.W. 544 (1904); Hall v. Miller, 102 Tex. 289, 115 S.W. 1168 (1909). "Promissory notes and bonds, being things of value in themselves, salable in the market and passing freely from hand to hand, have a real situs and are taxable in any state in which they are permanently located . . . ." Beale, *Jurisdiction to Tax* (1919) 32 HARV.L. REV. 587, 598. Beale, *Progress of the Law: Taxation* (1925) 38 HARV.L.REV. 281, 287.

7. In many or most of the state cases giving lip service to the doctrine of Wheeler v. Sohmer a careful examination will reveal that the decision might well have been based on other grounds. "*Obiter* statements are not infrequently found, especially in the more recent cases, indicating a tendency on the part of the courts to regard bonds, notes, and other forms of commercial paper as constituting not merely evidence of property, but as property itself, thus assimilating them to tangible chattels susceptible of an actual situs determined by their physical locality. [citing and quoting from numerous cases] . . . . Notwithstanding these statements and others which might be referred to, it is believed that few, if any, cases can be found in which the result necessarily depended upon the ascription of an independent situs for property taxation to commercial paper . . . ." Note, L.R.A. 1915C 919, 920.

8. State Tax on Foreign Held Bonds, 15 Wall. 300, 21 L.Ed. 179 (1873); New Orleans v. Stempel, 175 U.S. 309, 20 S.Ct. 110, 44 L. Ed. 174 (1899); Blackstone v. Miller, 188 U.S. 189, 23 S.Ct. 277, 47 L. Ed. 439 (1902); Wheeler v. Sohmer, *supra* note 5; and many others.

9. Blackstone v. Miller, *supra* note 7, at 206; Wheeler v. Sohmer, *supra* note 5, at 439.

10. Catlin v. Hull, 21 Vt. 152 (1849); Goldgart v. People, 106 Ill. 25 (1883); Hutchinson v. Board of Equalization of the City of Oskaloosa, 66 Iowa 35, 23 N.W. 249 (1885); Finch v. York County, 19 Nebr. 50, 26 N.W. 589 (1886); Marshall Wells Hdw. Co. v. Multnomah County, 58 Ore. 469, 115 P. 150 (1911); Billinghurst v. Spink County, 5 S.D. 84, 58 N.W. 272 (1894); New Orleans v. Stempel, *supra* note 8; Bristol v. Washington County, 177 U.S. 133, 20 S.Ct. 585, 44 L. Ed. 701 (1900); State Board of Assessors v. Comptoir National d'Escompte, 191 U.S. 388, 24 S.Ct. 109, 48 L.Ed. 232 (1903); Metropolitan Life Ins. Co. v. New Orleans, 205 U.S. 395, 27 S.Ct. 499, 51 L.Ed. 853 (1907); Liverpool & London & Globe Ins. Co. v. Board of Assessors of Parish of Orleans, 221 U.S. 343, 31 S.Ct. 550, 55 L.Ed. 762 (1910).

If bonds and notes be recognized as having the capacity to acquire a situs of their own as chattels, and if choses in general may acquire a business situs, may all still properly be subjected to the taxing power of the state of the owner's domicile? There seemed little occasion, in view of the cases, to question the correctness of an affirmative answer to this query, though as a matter of policy some states declined to apply such a tax.[11]

The net result was double, and sometimes triple, or even quadruple taxation of intangibles. This was widely viewed as undesirable and unsound economically, but the courts repeatedly asserted that such so-called double taxation violated no provision of the federal constitution,[12] and the only solution seemed to be left to a matter of legislative determination.

The decision of *Frick v. Pennsylvania,* which definitely ended the evil practice of two states taxing the transfer of the same tangible property, though asserting that intangibles stood on a different basis and were to be distinguished,[13] certainly gave a decided impetus to the contention that ways and means should be devised whereby to reach the same result with respect to intangible property. Little progress was made by the courts, however, in that direction during the following three years, while the evils of the above mentioned system of so-called double taxation became ever more pronounced and the necessity for relief ever more pressing. With the decision in 1928 of *Blodgett v. Silberman* [14] sustaining a tax by the decedent owner's domicile on the transfer of bonds kept in another state the United States Supreme Court approached somewhat nearer to a solution of this

11. Wilcox v. Ellis, 14 Kan. 588 (1875); Fisher v. Commissioners of Rush County, 19 Kan. 414 (1877); Buck v. Board of Commissioners of Miami County, 103 Kan. 270, 173 P. 344 (1918); State v. Harrington, 68 Mont. 1, 217 P. 681 (1923); People v. Gardner, 51 Barb. (N.Y.) 352 (1868); People *ex rel.* Jefferson v. Smith et al, 88 N.Y. 576 (1882); Poppleton v. Yamhill County, 18 Ore. 377, 23 P. 253 (1890). See Mackay v. San Francisco, 113 Cal. 392, 45 P. 696 (1896); Mackay v. San Francisco, 128 Cal. 678, 61 P. 382 (1900); Estate of Fair, 128 Cal. 607, 61 P. 184 (1900); Stanford v. San Francisco, 131 Cal. 34, 63 P. 145 (1900); Re Borden, 208 Ill. 369, 70 N.E. 310 (1904); Hunter v. Board of Supervisors, 33 Iowa 376 (1872). For cases holding that such a tax at the owner's domicile would be unconstitutional see Commonwealth v. West India Oil Refining Co., 138 Ky. 828, 129 S.W. 301 (1910) and Commonwealth v. B. F. Avery & Sons, 163 Ky. 828, 174 S.W. 518 (1915).

12. "Personal property, as this Court has declared again and again, may be taxed, either at the domicil of its owner, or at the place where the property is situated, even if the owner is neither a citizen nor a resident of the state which imposes the tax." Bristol v. Washington County, *supra* note 10, at 145. "No doubt it would be a great advantage to the country and to the individual states if principles of taxation could be agreed upon by which taxation of substantially the same property in two jurisdictions could be avoided. But the Constitution of the United States does not go so far." Kidd v. Alabama, 188 U.S. 730, 732, 23 S.Ct. 401, 47 L.Ed. 669 (1903). See also Tappan v. Merchant's National Bank, 19 Wall. 490, 499, 22 L.Ed. 189 (1873); Savings and Loan Society v. Multnomah County, 169 U.S. 421, 427, 18 S.Ct. 392, 42 L.Ed. 803 (1897); Blackstone v. Miller, *supra* note 8, at 205; Union Refrigerator Transit Co. v. Kentucky, *supra* note 1, at 205; Hawley v. Malden, 232 U.S. 1, 13, 34 S.Ct. 201, 58 L.Ed. 477 (1914); Bullen v. Wisconsin, 240 U.S. 625, 631, 36 S.Ct. 473, 60 L.Ed. 830 (1916); Fidelity and Columbia Trust Co. v. Louisville, 245 U.S. 54, 58, 38 S.Ct. 40, 62 L.Ed. 145 (1917); Cream of Wheat Co. v. County of Grand Forks, 253 U.S. 325, 330, 40 S.Ct. 558, 64 L.Ed. 931 (1920); and many other cases.

13. *Supra* note 3, at 494.

14. 277 U.S. 1, 48 S.Ct. 410, 72 L.Ed. 749 (1928).

problem. The full significance of the decision was not apparent, however, at the time.

As the law stood prior to the decision by the United States Supreme Court of the recent cases of *Safe Deposit and Trust Company of Baltimore v. Virginia,*[15] *Farmers Loan and Trust Co. v. Minnesota,*[16] and *Baldwin v. Missouri*[17] taxes on intangible property or inheritance taxes upon its transfer could be levied frequently in two, three, or even more jurisdictions with the consequent injustice of subjecting the same economic interest to the burdens of more than one tax.

The *Union Refrigerator Transit Co.* case had specificially exempted intangible property from its doctrine denying the application of the maxim *mobilia sequuntur personam* where the property had acquired a permanent situs in another jurisdiction.[18] Likewise in *Frick v. Pennsylvania,* extending the doctrine of the *Union Transit* case to its logical conclusion and applying it to inheritance taxes, a similar exemption of intangibles was specified.[19] . This left the maxim in its full application to intangibles at the same time that states other than the domicile were permitted to tax on different and more or less inconsistent principles. The difficulties in this connection leading to especially objectionable double taxation had been particularly emphasized since the decisions in *Blackstone v. Miller,*[20] upholding a transfer tax by New York upon a deposit in a bank in that state on the death of the non-resident depositor, based on the control of the state over the debtor by virtue of its domicile therein, and in *Wheeler v. Sohmer,* upholding a similar tax upon promissory notes kept in New York merely by virtue of the presence of the paper evidence, though owned by a non-resident. In neither case did the prospect of two states taxing the transfer of the same property at the same time affect the result or appear to raise in the mind of the Court any serious constitutional problem.[21] While these

15. 280 U.S. 33, 50 S.Ct. 59, 74 L.Ed. 180 (1929).

16. 280 U.S. 204, 50 S.Ct. 98, 74 L.Ed. 371 (1930).

17. 281 U.S. 586, 50 S.Ct. 436, 74 L.Ed. 1056 (1930).

18. After holding that the same rule as applied to land should govern the taxation of tangible chattels the Court said: "Respecting this, there is an obvious distinction between tangible and intangible property, in the fact that the latter is held secretly; that there is no method by which its existence or ownership can be ascertained in the state of its situs . . . . So if the owner be discovered, there is no way by which he can be reached by process in a state other than that of his domicil, or the collection of the tax otherwise enforced. In this class of cases the tendency of modern authorities is to apply the maxim *mobilia sequuntur personam,* and to hold that the property may be taxed at the domicil of he owner . . . and also . . . in the state where the property is retained . . . ." *Supra* note 1, at 205.

19. *Supra* note 3, at 494.

20. *Supra* note 8.

21. "No doubt this power on the part of two states to tax on different and more or less inconsistent principles leads to some hardship. It may be regretted, also, that one and the same state should be seen taxing on the one hand according to the fact of power, and on the other, at the same time, according to the fiction that, in succession after death, *mobilia sequuntur personam* and domicile governs the whole. *But these inconsistencies infringe no rule of constitutional law.*" (Italics the writer's) Blackstone v. Miller, *supra* note 8, at 204, 205. "It would be an extraordinary deduction from the Fourteenth Amendment to deny the power of a state to

cases dealt specifically with transfer taxes, the language used was broad enough to apply to property taxes as well.[22] The application of the doctrine of these cases, together with that of business situs, while there continued to be recognized a jurisdiction on the part of the domicile of the owner to tax by virtue of the fiction *mobilia sequuntur personam,* constituted the chief sources of multiple state taxation of intangibles, though certain other doctrines were also recognized which gave rise to similar difficulties.[23]

On the basis of the above a tax on the same economic interest in as many as four different jurisdictions at the same time was quite possible.

Suppose that *A,* a resident of state 1, has an agent in state 2 with headquarters in a city near the border of state 3 conducting for him a business of lending money on real estate mortgages and collecting and reinvesting the money. Suppose that the agent makes loans both to residents of state 2 and to residents of state 3 across the border who come to his office for that purpose. Then suppose that for convenience these notes and mortgages when obtained are sent to another agent of *A* in state 4 for safe keeping. Under these facts, let us suppose that *A* dies and the various states involved seek to collect an inheritance tax. State 1, being the domicile of *A,* the owner or creditor, apparently would be permitted by all courts to tax all of the credits in accordance with the maxim *mobilia sequuntur personam* as it has been uniformly applied in the past. State 2, where the agent is conducting the business, would seem to be entitled to tax the transfer of all of the credits on the basis of business situs.[24] The fact that the notes are not kept in the state where the business is carried on would be immaterial.[25] The fact that some of the notes come from persons residing

adopt the usages and views of business men in a (tax) statute on the ground that it was depriving them of their property without due process of law." Wheeler v. Sohmer, *supra* note 5, at 439.

22. Keeping in view the distinction then adhered to between the nature of and requisities for a property tax and a transfer tax, Wheeler v. Sohmer is not to be taken as authority for the proposition that the mere presence of the notes gave jurisdiction for a property tax, which was not necessary to a decision, though Mr. Justice Holmes appeared to be willing to go that far. However, the broad language of Mr. Justice Holmes was concurred in by only three other members of the court. Mr. Justice McKenna concurred in a separate opinion basing his decision solely on the distinction between a property tax and a succession tax and declining to support any doctrine by which a property tax would be sustained under the circumstances of the case in question. With this opinion Mr. Justice Pitney concurred. The remaining three justices dissented on the ground that there was not a sufficient basis for a property tax, that the thing of value was the debt or obligation, of which the note was merely evidence and not a thing of value or property in itself, and that there was therefore nothing within the jurisdiction upon which to impose a property tax, and that no distinction should be made between a property tax and a succession tax.

23. For example, the taxation of a mortgagee's interest in realty at the same time that the debt is taxed to the creditor at his domicile as in Savings and Loan Society v. Multnomah County, *supra* note 12; the taxation of shares of stock both by the domicile of the shareholder as in Hawley v. Malden, *supra* note 12; and by the domicile of the corporation as in Corry v. Baltimore, 196 U.S. 466, 25 S.Ct. 297, 41 L.Ed. 556 (1905).

24. *Supra* note 10.

25. Bristol v. Washington County, Metropolitan Life Ins. Co. v. New Orleans, both *supra* note 10.

across the line in state 3 would not seem to prevent state 2 from being the business situs of those credits. It has been suggested, however, that in all cases of application of the business situs doctrine the jurisdiction taxing on that basis has been the domicile of the debtor.[26] State 3 would clearly be permitted to tax the credits represented by notes given by its residents on the basis of *Blackstone v. Miller,* which permits a tax solely on the basis of the state being the domicile of the debtor and being therefore the jurisdiction which will compel the obligor to pay and to whose courts the creditor will likely be compelled to resort if the debtor refuses to pay. Finally state 4, to which all of the notes and mortgages have been sent and in which they are being kept more or less permanently, apparently could tax the transfer of all the credits on the basis of *Wheeler v. Sohmer.* In addition to all these it might be suggested that if a resident of state 3 had given as security for his note a mortgage on land in state 5, and had state 5 had a statute requiring that the interest of the mortgagee be taxed as realty, this state also might have levied a tax on the basis of the doctrine of *Savings & Loan Society v. Multnomah County.*[27]

Thus some of the credits in the above stated situations might conceivably be subjected to a tax by four or even five different jurisdictions at the same time. When one contemplates the results of such a situation, the need for some method, judicial or statutory, of getting relief from multiple state taxation becomes a very pressing one. There is little difficulty in agreeing with the Court that "such a startling possibility suggests a wrong premise."[28] Such was the status of the taxation of intangibles when the first of the three recent cases above mentioned[29] came up for consideration.

Two conceivable methods of striking at the undoubted evils which inhere in such a situation suggest themselves. First, statutory action by the states by means of which some uniformly accepted doctrine can be established, or universal reciprocal exemption laws be adopted. Second, judicial denial of the power to tax under some of the situations here involved.

For several years the various states have been making some effort through means of reciprocal exemption laws to eliminate these evils, but with only a limited degree of success. Particularly have the efforts in this direction been noteworthy since the decision of the *Frick* case in 1925 eliminated effectively multiple state taxation as to tangibles.[30]

26. Powell, *The Business Situs of Credits* (1922) 28 W.VA.L.Q. 89, 104. Mr. Powell further suggests (p. 108) that the place where the business is conducted should alone control. See Hutchinson v. Board of Equalization of City of Oskaloosa, *supra* note 10, where no distinction was made between loans made in the state and loans made to residents of another state.

27. *Supra* note 12. For a statement of the case see *infra* note 125.

28. Farmers Loan & Trust Co. v. Minnesota, *supra* note 16, at 209.

29. Safe Deposit & Trust Co. of Baltimore v. Virginia, *supra* note 15; Farmers Loan & Trust Co. v. Minnesota, *supra* note 16; and Baldwin v. Mo., *supra* note 17.

30. For an account of the progress made in this work see Brady, *Statutory Solution of Multiple Death Taxation* (1927) 13 A.B.A.J. 147; Nossman, *The Fourteenth Amendment in its*

Remedy by the second suggested method is calculated to be much more effective if there is sufficient basis for such judicial determination. It is uniformly well recognized that no state may tax anything over which it has no jurisdiction without violating the due process clause of the Fourteenth Amendment.[31] "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property, and business."[32] ". . . cases like *Union Refrigerator Transit Co. v. Kentucky* and others have gone far toward establishing the proposition that tangible personal property cannot, conformably to due process of law, have a situs for taxation in more than one state at a given time, not because the specific constitutional provisions against double taxation apply to such a case, but because the facts necessary to give the property a situs for taxation in one state necessarily negative the requisites of a situs for taxation in another."[33]

In dealing with intangible property, however, great difficulty is encountered in determining which state has and which state has not the requisite jurisdiction. Such property interests, it is clear, can have no actual physical situs of their own in the same sense that a tangible chattel has such a situs. After the decision of *Blackstone v. Miller,* and particularly beginning with *Wheeler v. Sohmer,* much was said about chattelized choses and the ability of the paper evidence of a debt to acquire the character of a tangible for purposes of being given an independent situs of its own as a basis for taxation.[34] Whether this was ultimately to result in destroying the power of the state of the domicile to tax, or whether both were to continue to tax, appeared to be highly uncertain.

The decision of the *Frick* case in 1925, restricting taxation of the transfer of tangibles to a single jurisdiction, as above mentioned, was expressly limited in its application to tangibles, no effort being made to overturn the established principles by means of which intangibles, or their transfer, were frequently taxed in two or more jurisdictions at the same time. Nevertheless, the contention was frequently set up after this decision, on the basis of Mr. Justice Holmes' assertion in *Wheeler v. Sohmer* that "It is well set-

Relation to State Taxation of Intangibles (1930) 18 CALIF. L.REV. 345, 362n.; PRENTICE-HALL, INHERITANCE TAX SERVICE (1930) 701; Note (1930) 69 A.L.R. 949. It is stated in the Farmers' Loan & Trust Co. case that "perhaps two-thirds of the states have endeavored to avoid the evil by resort to reciprocal exemption laws." *supra* note 16, at 209.

31. State Tax on Foreign Held Bonds, *supra* note 8, at 319; Louisville & Jeffersonville Ferry Co. v. Kentucky, *supra* note 2, at 396, 398; Delaware, Lackawanna & Western Ry. Co. v. Pennsylvania, *supra* note 2, at 358; Union Refrigerator Transit Co. v. Kentucky, *supra* note 1, at 204; Frick v. Pennsylvania, *supra* note 3, at 492; and many other cases.

32. State Tax on Foreign Held Bonds, *supra* note 8, at 319; "The power of taxation by any state is limited to persons, property, and business within its jurisdiction." Tappan v. Merchant's Nat'l Bank, *supra* note 12, at 499; New York, Lake Erie & Western Ry. Co. v. Pennsylvania, 153 U.S. 628, 646, 14 S.Ct. 952, 38 L.Ed. 846 (1894).

33. *Situs, as Between Different States or Countries, of Personal Property for Purposes of Property Taxation,* L.R.A. 1915 C. 903, 906.

34. *Supra* notes 6 and 7.

tled that municipal bonds are in such tangible concrete form that they may be taxed where found, etc.," and that notes should be treated the same, that such bonds and notes should now be treated as completely chattelized and taxable only where found as had become the case with ordinary chattels. This attempt to attribute tangibility to the paper evidence of such a property interest, in so far as it may have been hoped by some to establish a situs for taxation on the same basis as tangibles under the doctrine of the *Frick* case, was definitely exploded and set at rest by the unanimous decision of the United States Supreme Court in the case of *Blodgett v. Silberman.* There were involved, among other items of property, certain United States bonds and treasury certificates of indebtedness of the United States kept in New York but belonging to a decedent domiciled in Connecticut. In upholding a transfer tax in Connecticut, the Court definitely repudiated the notion contended for to the effect that such bonds, payable to bearer and transferable from hand to hand, had lost their character as choses in action and taken on the qualities of physical property and could be taxed only where found. The decision in this case constituted a very definite step in the general direction of ending multiple state taxation of intangibles, though its effect was not to be fully appreciated until the determination of the later cases of *Farmers Loan & Trust Co. v. Minnesota* and *Baldwin v. Missouri.* It announced no new doctrine, but it served to allay any possible doubt as to the continued taxability of bonds and other credits represented by paper evidence as intangibles at the domicile of the owner, regardless of what theory of tangibility of such paper evidence might be applied by the state in which the paper evidence chanced to be held.[35] It appeared to be the definitely approved doctrine of the Supreme Court by this case that all such obligations evidenced by bonds or other negotiable instruments are primarily choses. Despite any popular conception, business usage,[36] or historical tradition,[37] they are still choses and taxable at the domicile of the owner on the basis of the maxim *mobilia sequuntur personam* as are other intangibles. Thus if relief from multiple state taxation of intangibles was to be had it seemed that it must be other than the state of the owner's domicile that must yield. The door seemed definitely closed to any extension of the doctrine of the *Frick* case in this direction.

35. "It is not enough to show that the written or printed evidence of ownership may, by the law of the state in which they are physically present, be permitted to be taken in execution or dealt with as reaching that of which they are evidence, even without the presence of the owner. While bonds often are so treated, they are nevertheless in their essence only evidences of debt." Blodgett v. Silberman, *supra* note 14, at 14, citing Kirtland v. Hotchkiss, 100 U.S. 491, 25 L.Ed. 558 (1879).

36. Holmes, J., in Wheeler v. Sohmer, *supra* note 5, at 439.

37. *Ibid.* 438; Blackstone v. Miller, *supra* note 8, at 206.

RECENT SUPREME COURT DECISIONS

The first of the group of recent tax cases, which are among the most epoch-making decisions by the Supreme Court in the history of tax litigation in this country, is that of *Safe Deposit and Trust Company of Baltimore v. Virginia*.[38] The court there used language which indicated very forcibly a determination to establish limitations upon the multiple state taxation of intangible property.

"Tangible personal property permanently located beyond the owner's domicile may not be taxed at the latter place [citing *Union Transit* and *Frick* cases] .... The reasons which led this court ... [in those cases] to deny application of the maxim *mobilia sequuntur personam* to tangibles apply to the intangibles in appellant's possession. They have acquired a situs separate from that of the beneficial owners. The adoption of a contrary rule would 'involve possibilities of an extremely serious character' by permitting double taxation, both unjust and oppressive, and the fiction of *mobilia sequuntur personam* was intended for convenience, and not to be controlling where justice does not demand it .... It would be unfortunate, perhaps amazing, if a legal fiction originally invented to prevent personalty from escaping just taxation should compel us to accept the irrational view that the same securities were within two states at the same instant and because of this to uphold a double and oppressive assessment."[39]

While the decision in this case did not overturn any past decisions or fundamentally change existing law, it served to indicate the purpose of the Court and paved the way for the more far-reaching decisions soon to follow.

The decision in *Farmers Loan and Trust Co. v. Minnesota*,[40] in denying to Minnesota the right to tax the transfer of its state and municipal bonds owned by a decedent domiciled in New York and kept in that state, and in squarely and expressly overruling *Blackstone v. Miller*,[41] marks a most

38. *Supra*, note 15. A resident of Virginia transferred to the Safe Deposit and Trust Co. of Baltimore, Maryland, certain stocks and bonds to be there held in trust for his two sons, also residents of Virginia, to be divided betwen said sons upon arrival at stated ages. The donor reserved a power of revocation in himself but died without exercising it. The Virginia Special Court of Appeals had sustained a property tax upon the entire trust estate assessed under a Virginia statute to the trustee. This decision the United States Supreme Court reversed, Mr. Justice Holmes dissenting. The Court dealt solely with the question whether the corpus of the trust had a situs in Virginia for tax purposes, on the basis of the beneficial owners being domiciled there, and held that its situs was with the trustee in Maryland and that the Virginia tax violated the due process clause of the Fourteenth Amendment.

39. *Ibid.* 93, 94.

40. *Supra* note 16. One Taylor died domiciled in New York. He owned and kept in New York negotiable bonds and certificates of indebtedness issued by the state of Minnesota and the cities of Minneapolis and St. Paul. Some were registered, others were payable to bearer. All passed under his will probated in New York and were subjected to a transfer tax by New York. A tax by Minnesota upon the transfer was upheld by the State Supreme Court (In re Estate of Taylor, 176 Minn. 634, 222 N.W. 528, 1928), relying upon Blackstone v. Miller. The Minnesota Court at first held the tax invalid (175 Minn. 310, 219 N.W. 153, 1928), treating the bonds as tangibles and by

significant step in the curtailment of multiple state taxation and in the elimination of the pre-existing evils. The court repudiated entirely the contention that the obligations, being those of the state of Minnesota and its municipalities, created by its law, subject to its control, given validity, protected and enforced by its law, must be subject to its taxing power. "In this court" we are told, "the presently approved doctrine is that no state may tax anything not within her jurisdiction without violating the Fourteenth Amendment."[42] With an undoubted purpose to bring the intangible property here involved within the same limitations of the constitution as previously had been applied to tangibles, the Court asserted:

"While debts have no actual territorial situs, we have ruled that a state may properly apply the rule *mobilia sequuntur personam* and treat them as localized at the creditor's domicile for taxation purposes. Tangibles with permanent situs therein, and their testamentary transfer, may be taxed only by the state where they are found. And, we think, the general reasons declared sufficient to *inhibit taxation of them by two states* apply under present circumstances with no less force to intangibles with taxable situs imposed by due application of the legal fiction."[43]

While the court based its denial of the power of the debtor state to tax in this case upon the due process clause of the Fourteenth Amendment, no doubt the desire or determination to cope with the ever increasing evil of multiple state taxation in such cases, as a matter of policy and fairness, was to a considerable extent responsible for the holding that *Blackstone v. Miller* must be overruled, and that a state has no right to tax merely by virtue of being the debtor's domicile. Such a decision did not come as a surprise. The doctrine of the *Blackstone* case had never attained anything like universal approval, had always been subjected to criticism, and certainly reached a highly undesirable result by adding to the already too great possibilities of so-called double taxation. Courts had frequently held theretofore, as a matter of statutory construction, that the mere fact that the debtor was a resident of the state did not bring an indebtedness due to a non-resident, or his estate, within the provision of a statute calling for a tax upon all prop-

application of the doctrine of the Frick case taxable only where found. After the decision of Blodgett v. Silberman the court took the position that the bonds were mere choses, and as debts owned by Minnesota and its municipalities were subject to its control, its laws gave them validity, protected them, provided the means of enforcement, and thus the state could tax.

41. Blackstone had died domiciled in Illinois leaving property consisting of a debt of $10,000 owned by a New York firm and a deposit of $4,000,000 in a New York trust company. The transfer was taxed at the domicile in Illinois and again by New York under a statute imposing such a tax with respect to "any property within the state." The United States Supreme Court upheld the latter tax in an opinion by Mr. Justice Holmes, emphasizing primarily the control over the debtor at his domicile as being a proper basis on which to tax. The Court said, at 205, "But it is plain that the transfer does depend upon the law of New York, not because of any theoretical speculation concerning the whereabouts of the debt, but because of the practical fact of its power over the person of the debtor."

42. *Supra* note 16, at 210.

43. *Ibid.* 211. (Italics the writer's)

erty within the state or upon the transfer of such property.[44] And while those cases did not generally assert the lack of constitutional power to so tax, it was no doubt thought to be a matter not entirely free from doubt despite the *Blackstone* case.[45] This case is even stronger than the ordinary case of an attempt to tax at the domicile of the debtor, by virtue of the fact that the debts here in question were represented by negotiable bonds and certificates of indebtedness issued by the state of Minnsota and its municipalities. Some of the bonds were registered and a transfer would apparently involve a transfer on the books of registry within the state. Furthermore, the debtor in this case was not only within the jurisdiction of the state seeking to tax but was the state itself, the very power which created and gave validity and enforceability to the debt. Also unlike the case of an individual debtor who may be sued wherever he can be found, suit to collect on these obligations could only be brought in the state of Minnesota. This, however, was not thought to be a sufficient basis on which to sustain the tax. The Court makes the very definite and very important assertion that under present conditions the reasons thought to be sufficient to prevent multiple state taxation of tangibles as held in the *Union Transit* case and the *Frick* case likewise require the abandonment of similar multiple state taxation of intangibles. The further assertion is also made that since such intangibles are held to be taxable at the owner's domicile, they are taxable there only.[46] The Court also says, "taxation is an intensely practical matter and laws should be construed and applied with a view to avoid so far as possible unjust and oppressive consequences." This indicates that the Court is deeply concerned with the matter of policy, which it ordinarily disclaims any right to consider.[47] And while that reference, were it standing alone, might be con-

44. Chambers v. Mumford, 187 Cal. 228, 201 P. 588 (1921); Walker v. People, 64 Colo. 143, 171 P. 747 (1918); People v. Blair, 276 Ill. 623, 115 N.E. 218 (1917); Gilbertson v. Oliver, 129 Iowa 568, 105 N.W. 1002 (1906); Dodge County v. Burns, 89 Nebr. 534, 131 NW. 922 (1911); Matter of Fearing, 200 N.Y. 340, 93 N.E. 956 (1911); *In re* Lowell's Estate, 208 App. Div. 201, 202 N.Y.S. 312 (1924); Tax Commission of Ohio v. Farmers' Loan & Trust Co. of New York City, 119 Ohio St. 410, 164 N.E. 423 (1928); Fuller *et al* v. South Carolina Tax Commission, 128 S.C. 14, 121 S.E. 478 (1924); McLaughlin *et al* v. Cluff, 66 Utah 245, 240 P. 161 (1925); Commonwealth v. Huntington, 148 Va. 97, 138 S.E. 650 (1927). See State *ex rel.* American Automobile Ins. Co. v. Gehner et al, 320 Mo. 702, 8 S.W. (2d) 1057 (1928); State ex rel. American Central Ins. Co. v. Gehner et al, 320 Mo. 901, 9 S.W. (2d) 621 (1928).

45. See notes (1926) 42 A.L.R. 354, 357; (1930) 65 A.L.R. 1008.

46. "We have determined that in general intangibles may be properly taxed at the domicile of their owner, and we can find no sufficient reason for saying that they are not entitled to enjoy immunity against taxation at more than one place similar to that accorded to tangibles." Farmers' Loan & Trust Co. v. Minnesota, *supra* note 16, at 212.

47. Calder v. Bull, 3 Dall, 386, 399, 1 L.Ed. 648 (1798); Bennett v. Boggs, 3 Fed. Cas. (C. C.N.J.) 221, 227, 228, Fed. Cas. No. 1319 (1830); Booth v. Illinois, 184 U.S. 425, 431, 432, 22 S.Ct. 425, 46 L.Ed. 623 (1902); Otis and Gassman v. Parker, 187 U.S. 606, 608, 609, 23 S.Ct. 168, 47 L.Ed. 323 (1903); McCray v. United States 197 U.S. 27, 54, 24 S.Ct. 769, 49 L.Ed. 78 (1904); Jacobson v. Massachusetts, 197 U.S. 11, 31, 25 S.Ct. 358, 49 L.Ed. 643 (1905); McLean v. Arkansas, 211 U.S. 539, 547, 548, 29 S.Ct. 206, 53 L.Ed. 315 (1909); Chicago, Burlington & Quincy Ry. Co. v. McGuire, 219 U.S. 549, 569, 31 S.Ct. 259, 55 L.Ed. 328 (1911); German Alliance Ins. Co. v. Lewis, 233 U.S. 389,

strued as having application only to the matter of statutory construction, considerations of policy were no doubt important factors in influencing the mind of the Court in this case. Also the Court said, comparing with and quoting from the *Union Transit* case, "and certainly existing conditions no less imperatively demand protection of choses in action against multiplied taxation [than tangibles in the *Union Transit* case] whether following misapplication of some legal fiction [as *mobilia sequuntur personam* in the *Union Transit* case] or conflicting theories concerning the sovereign's right to exact contributions." This would seem to indicate clearly that a desire to avoid double taxation was an important if not the controlling factor.

Significant as was the decision in the *Farmers Loan and Trust Co.* case, it was soon to be followed by a decision of more far-reaching consequence. In the case of *Baldwin v. Missouri* there were involved deposits in Missouri banks, coupon bonds issued by the United States and kept in Missouri, and notes executed by residents of Missouri, secured by mortgages upon Missouri land and kept in Missouri, all owned by a decedent domiciled in Illinois. The power of Missouri to tax the transfer of this property was denied.

If, after *Farmers Loan & Trust Co. v. Minnesota,* there was anything left of *Blackstone v. Miller* on the theory that money in the bank is like money in the pocket and so to be treated as a tangible,[48] it is clearly destroyed by *Baldwin v. Missouri,* where the identical situation with respect to bank deposits was involved and the Court held that such deposits, or their transfer,[49] could not be taxed in Missouri where deposited. Such a result is certainly highly desirable as a practical means of avoiding double taxation, and in so far, at least, as it might be applied to a property tax, it is, perhaps, quite sustainable as well. Such a deposit is clearly a debt owing from the bank to the depositor. It is an intangible and nothing more, and there appears to be no reason for treating it differently from other intangibles which, on the application of the maxim *mobilia sequuntur personam,* are taxable at the domicile of the owner. To treat such a deposit otherwise would seem to lose sight of its fundamental character as a debt.

The case also carries the converse of the situation in *Blodgett v. Silber-*

414-417, 34 S.Ct. 612, 58 L.Ed. 1011 (1914). "Questions of policy are not submitted to judicial determination . . . . With the wisdom of such legislation and the soundness of the economic policy involved we are not concerned. Whether it will result in good or harm it is not within our province to inquire." Green v. Frazier, 253 U.S. 233, 240, 40 S.Ct. 499, 64 L.Ed. 878 (1920). See also, Mr. Justice Holmes' dissent in Lochner v. New York, 198 U.S. 45, 75, 25 S.Ct. 539, 49 L.Ed. 937 (1905); Mr. Chief Justice Taft's and Mr. Justice Holmes' dissents in Adkins v. Children's Hospital of the District of Columbia, 261 U.S. 525, 562 and 570, 43 S.Ct. 394, 67 L.Ed. 785 (1923).

48. One basis upon which Mr. Justice Holmes' opinion purported to sustain the tax was that cash on hand would be tangible and taxable and the mere fact of its having been deposited in a bank should not make any difference; that according to the business man's conception money in the bank is the same as money in the pocket and that the practical similarity has largely obliterated the legal differences.

49. The tax involved was one upon the transfer by inheritance.

man with respect to bonds[50] to its logical conclusion by holding that bonds and notes, or their transfer, cannot be taxed merely by virtue of their presence on any theory of attributing to them a character of tangibility, but are taxable and only taxable at the domicile of their owner. This gives the added significance to the case of *Blodgett v. Silberman* previously referred to as not being fully apparent until the decision of these later cases. It also appears to have the effect of completely overruling the case of *Wheeler v. Sohmer,* though curiously enough, that case was not even mentioned by the majority.[51] The doctrine, repeatedly asserted by way of dictum,[52] that government bonds are in such concrete tangible form as to be treated as ordinary chattels and taxed where found, seems to be definitely relegated to the judicial scrap heap.

These cases have gone far to eliminate the evils of multiple state taxation of intangibles, and from the practical standpoint of reaching a just, fair, and highly desirable result the Court deserves the highest commendation.

The doctrine of *Blackstone v. Miller* with respect to bank deposits, whether from the standpoint of being debts and taxable at the domicile of the debtor, or of money in the bank being assimilated in the popular mind to money in the pocket and taxable as a tangible where found, it is submitted, never rested on a very sound basis. In so far as the deposit is likened to money in the pocket, it is based on an entire misconception of the legal relation existing between banks and their depositors and would not seem to be a sufficient justification for such a tax. From the standpoint of taxing at the domicile of the debtor perhaps more can be said for the tax. However, it is clear that it is the credit, not the debt, that is being taxed.[53] It is property only in the hands of the creditor,[54] and, according to the well established doctrine, the tax can be sustained only if there be jurisdiction over the person or the property. There is obviously no jurisdiction over the person of the creditor in such a case. As to whether jurisdiction over the credit exists at the domicile of the debtor there is more room for difference of opinion. Clearly the credit has no actual physical situs as has a chattel. Absent the consideration of business situs, it must have its legal situs at the domicile of the creditor or the debtor. Since there is no *res* upon which the tax can be levied or which can be made liable for its payment, the tax is in its nature a personal one and the creditor's domicile alone has jurisdiction over the person. The thing of value appears to rest with

50. There a tax at the domicile of the owner was sustained despite the claim that bonds should be treated as tangibles and taxable only where found in accordance with the doctrine of the Frick case.

51. Whether or not the facts were identical with those in Wheeler v. Sohmer is not entirely clear. It appears highly probable, however, that the notes and bonds were being kept more or less permanently in Missouri and if that be true no basis for distinguishing the two cases would seem to exist.

52. *Supra* note 8.

53. Goldgart v. People, *supra,* note 10, at 29; Buck v. Miller, 147 Ind. 586, 589, 45 N.E. 647 (1896).

54. State Tax on Foreign Held Bonds, *supra* note 8, at 320.

the creditor at his domicile. He deals with it, may transfer it, and no part of the asset seems to exist with the debtor. The mere fact that the creditor may find it necessary to invoke the aid of the courts of the debtor's domicile, which may or may not be the jurisdiction in which and under whose laws the obligation was incurred, in order to collect would not seem to be controlling. Likewise, he may invoke the aid of the courts in any other jurisdiction in which he may find the debtor and such surely could not give that state a basis upon which to tax. The further fact that the domicile of the debtor may have jurisdiction for certain other purposes, for example, garnishment, would not seem to add measurably to the plausibility of the contention that it should also have the power to tax. The power to tax rests on a fundamentally different basis from that of garnishment. Any state, whether it be his domicile or not, wherein the debtor may be found, however temporarily, may exercise the control necessary for garnishment,[55] but obviously enough should not be permitted to tax. As one writer suggests, "The situs of a debt for garnishment may move about from day to day as the debtor migrates. The situs for taxation stays at the domicile of the creditor however far he wanders from his own fireside."[56]

Perhaps little more can be said by way of justification for the doctrine of *Wheeler v. Sohmer* as a practical matter, at least in so far as a property tax might be concerned. The Court rested its decision in that case largely upon the analogy existing between notes and government bonds and relied upon property tax cases. Mr. Justice Holmes, in upholding the tax on the transfer of notes solely upon the basis of the paper evidence being within the state, quoted as authority for his position from the opinion of the Court in *New Orleans v. Stempel* [57] to the effect that "It is well settled that bank bills[58] and municipal bonds are in such concrete, tangible form that they are subject to taxation where found, irrespective of the domicile of the owner. . . . Notes and mortgages are of the same nature . . . . We see no reason why a state may not declare that, if found within its limits, they shall be subject to taxation." The first part of this statement with respect to bonds was pure matter of dictum, there being no bonds involved in the case,[59] and

55. Harris v. Balk, 198, U.S. 215, 25 S.Ct. 625, 49 L.Ed. 1023 (1905).

56. Powell, op. cit. *supra* note 26, at 91.

57. *Supra* note 8, at 322, 323.

58. No question seems to arise as to bank bills. While in last analysis they are only promises to pay, choses in action, they constitute a medium of exchange and circulate as money and are regarded the same as coin. Blodgett v. Silberman, *supra* note 14, at 18.

59. The Court in New Orleans v. Stempel relied on State Tax on Foreign Held Bonds, *supra* note 8, quoting in this connection: "It is undoubtedly true that the actual situs of personal property which has a visible and tangible existence, and not the domicile or the owner, will, in many cases, determine the state in which it may be taxed. The same thing is true of public securities consisting of state bonds or bonds of municipal bodies and circulating notes of banking institutions; the former by general usage have acquired a character of, and are treated as, property in the place where they are found, though removed from the domicile of the owner . . . ." There again the matter of taxing bonds where found was not before the court for decision. The issue was merely whether the obligor corporation's domicile could tax, the

the latter part with respect to bills and notes had to do with a case in which the instruments in question had acquired a business situs,[60] and the case has always been taken to rest on the business situs basis.[61] All of the other cases cited in the same connection for this proposition are clearly business situs cases.[62] It is further stated in the opinion that "it has been asserted or implied again and again, that the states had power to deal with negotiable paper on the footing of situs."[63] No doubt such assertions by way of dictum can be found in plenty but few if any well-considered decisions.[64] Certainly this is true in so far as the levy of a property tax is concerned. The language of the Court would seem equally as applicable in the case of a property tax as in that of a transfer tax, though only the latter was there involved, and the Court by its reference to *Buck v. Beach*[65] indicated that it then considered a distinction might be taken between the two and a succession or transfer tax upheld in cases where the levy of a property tax would not be sustained. It is also to be noted that the broad general doctrine of Mr. Justice Holmes which appeared to be intended to apply to both types of taxes alike was approved by only a minority of the Court.[66] If it is now true, as the Court seems to indicate, that there is no difference in the jurisdictional basis requisite for a succession tax and a property tax,[67] and the problem is to be approached from the standpoint of a property tax, there appears to be every reason from the practical standpoint to agree with the decision of the Court in the *Baldwin* case. After all, the property interest, the thing of value, is the credit and not the note or bond by which it is evidenced. True it is that the note or bond may be negotiable and pass from hand to hand even without indorsement. The conception of the ordinary man may be that when he has the paper evidence he has the thing of value.[68] However, it is well recognized that the paper evidence may be

bonds being held outside the state at the domicile of their owners. The assertion has only the force of dictum.

60. The notes in question were given by residents of New Orleans, secured by mortgages upon New Orleans realty, and kept in New Orleans by an agent of the non-resident owner. The agent collected the interest and principal when due and deposited it and apparently reinvested the money in further loans.

61. The Court throughout relied upon and quoted from business situs cases and emphasized the reinvestment feature. The case has since been considered one of the leading businss situs cases.

62. Bristol v. Washington County, State Assessors v. Comptoir National d'Escompte, and Metropolitan Life Ins. Co. v. New Orleans, all *supra* note 10.

63. Wheeler v. Sohmer, *supra* note 5, at 439.

64. *Supra* notes 8 and 59.

65. 206 U.S. 392, 27 S.Ct. 712, 51 L.Ed. 1106 (1907). The Court said, p. 440: "A distinction was taken [in Buck v. Beach] between the presence sufficient for a succession tax like that in this case, and that required for a property tax such as then before the court, and the only point decided was that the notes had no such presence in Indiana as to warrant a property tax."

66. See note 22, *supra*

67. This problem is discussed *infra*. p. 47ff.

68. Mr. Justice Holmes, in Wheeler v. Sohmer, p. 438, 439, after referring to the argument that the reason for taxing bonds where found was "due to the survival of primitive notions that identified the obigations with the parchment or paper upon which they were written" suggests that, "It is not primitive tradition alone that gives their peculiarities to bonds, but a tradition laid hold of, modified and adapted to the convenience and understanding of business men. The same convenience and understanding apply to bills and notes."

lost or destroyed and yet the amount of the debt with interest may be recovered.[69] The thing of value remains despite the destruction of its paper representation. That being true, there seems little justification for saying that credits represented by such paper evidence have become chattels and must be treated accordingly. They are primarily intangibles, whether they be represented by notes or bonds, and are properly treated like other intangibles as having their existence with their owner at his domicile. If a note or bond kept elsewhere than at the owner's domicile were accidentally destroyed, the obligation would still remain and be collectable. It is contended that before the destruction it should be taxable where kept. After destruction, certainly it could no longer be contended that it would be taxable at the former resting place of the paper evidence. Its nature as a thing of value to the obligee or payee would remain unchanged, a chose and intangible before as well as after the destruction. The mere existence or destruction of the paper evidence would neither seem to affect its nature nor change its location for tax purposes from one jurisdiction to another.

It is sometimes suggested[70] that a refusal to permit a tax where the paper evidence may be found, or where the debtor is domiciled, or where bank deposits are kept, may result in the property interests involved escaping taxation altogether and that this danger of escape more than counterbalances any injustice in double taxation which may result from an opposite holding.[71] Such a contention does not appear to be plausible. Every tax must rest upon its own bottom, and if one state has not the requisite jurisdiction to sustain an exercise of its taxing power in a particular case the mere fact that the state which does have jurisdiction fails to tax because of secretion by the owner or otherwise will not confer a power where it did not exist before.[72]

There would seem to be little disposition to dispute the entire desirability of the position taken by the majority of the Court in these cases. The dissent of Mr. Justice Holmes on constitutional grounds, however, is not entirely without foundation. Particularly may it so appear if one view the situation from the earlier notion of a transfer tax being on an entirely different basis from that of a property tax. However desirable the result of these cases may be from the standpoint of policy and as a practical solution of the difficulties of double taxation, it is to be borne in mind that not

69. Kirtland v. Hotchkiss, *supra* note 35, at 498.

70. Baldwin v. Missouri, *supra* note 17, at 593, 594; also Mr. Justice Stone's dissent, at 598.

71. "If this occasionally results in double taxation, it much oftener happens that this class of property escapes altogether. In the case of intangible property, the law does not look for absolute equality, but to the much more practical consideration of collecting the tax upon such property, either in the state of the domicile or the situs." Union Refrigerator Transit Co. v. Kentucky, *supra* note 1, at 205.

72. *Cf.* Schlesinger v. Wisconsin, 270 U.S. 230, 46 S.Ct. 260, 70 L.Ed. 557 (1926); Commonwealth v. West India Oil Refining Co., *supra* note 11, at 834.

only are they important decisions with respect to matters of taxation but with respect to certain problems of constitutional law as well. By their holdings a very definite step is taken by way of limitation upon the power of the states.[73]

Under our system of government the states have such powers as are not denied to them. No question of encroachment upon any federal power is involved in this situation. The question then must be whether or not the state in claiming the power to exact a tax in the various situations involved in these cases is acting so far arbitrarily that the exaction constitutes a deprivation of property without due process of law in violation of the Fourteenth Amendment. It has been too long held, to be successfully disputed now, that a tax without jurisdiction violates the due process clause.[74] But what determines the existence or non-existence of jurisdiction in these cases? Frequently such intangible property interests occupy such a relation to more than one state as to seem to justify a tax by each. Jurisdiction cannot be made to depend upon the finding of an actual physical situs as in the case of tangibles. By application of the fiction *mobilia sequuntur personam* the courts have given them a situs at the domicile of their owner. But, however widely recognized and universally acquiesced in, it is only a fiction, and the courts so recognize.[75] Since a debt, for example, in the very nature of things, can have no actual physical situs in the same sense that a tangible has such situs, the technical or legal situs, so far as one is to

73. "It seems to me that the result reached by the court probably is a desirable one, but I hardly understand how it can be deduced from the Fourteenth Amendment." Mr. Justice Holmes' dissent in Union Refrigerator Transit Co. v. Kentucky.

"I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the states. As the decisions now stand I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions. Yet I can think of no narrower reason that seems to me to justify the present and the earlier decisions to which I have referred [Safe Deposit & Trust Co. v. Virginia, and Farmers Loan & Trust Co. v. Minnesota]. Of course the words 'due process of law' if taken in their literal meaning have no application to this case; and while it is too late to deny that they have been given a much more extended and artificial signification, still we ought to remember the great caution shown by the constitution in limiting the power of the states, and should be slow to construe the clause in the Fourteenth Amendment as committing to the Court's own discretion, the validity of whatever laws the states may pass." Mr. Justice Holmes' dissent in Baldwin v. Missouri, at 595.

74. *Supra* note 31. But see Mr. Justice Holmes' dissent in the Union Transit case, *supra* note 73.

75. "For many purposes the domicile of the owner is deemed the situs of his personal property. *This, however, is only a fiction* [Italics the writer's] from motives of convenience, and is not of universal application, but yields to the actual situs of the property where justice requires that it should." Bristol v. Washington County, *supra* note 10, at 141; Pullman Palace Car Co. v. Pennsylvania, 141 U.S. 18, 22, 11 S.Ct. 876, 35 L.Ed. 613 (1891; State Board of Assessors v. Comptoir National d'Escompte, *supra* note 10, at 404; Union Refrigerator Transit Co. v. Kentucky, *supra* note 1, at 197; Poppleton v. Yamhill County, *supra* note 11, at 382; Endicott, Johnson & Co. v. Multnomah County, 96 Ore. 679, 684, 190 P. 1109 (1920); Union Refrigerator Transit Co. v. Lynch, 18 Utah 378, 386, 55 p. 639 (1898); and many other cases.

be attributed to it, must of necessity be determined by some technical rule, maxim, or theory—by fiction. That being true, can it be said that there is anything purely arbitrary in the action of a state in failing or refusing to give universal application to the fiction *mobilia sequuntur personam?* Who can say that the property in a debt is actually in one state rather than in another? If it is not thus localized is it beyond the constitutional power of a state to adopt a theory, however undesirable it may be from the standpoint of avoiding multiple state taxation, that the presence of the paper evidence in the form of a note or bond within the state, and the state's control over such paper evidence, constitutes as satisfactory a basis for attributing to that intangible a situs as does the more widely adopted fiction, and on that basis assert its right to levy a tax? Particularly may this seem to be true in the case of a transfer tax when the transfer may be effected through ancillary letters of administration in that state, whether it be made in accordance with the will of the testator or the intestate laws of his domicile. The determination that such action on the part of a state is so far arbitrary as to be a denial of due process is perhaps not to be reached without some degree of difficulty.[76]

If it can be said that the requirement that one must pay a tax in two jurisdictions with respect to the same property interest is in itself so far arbitrary as to amount to a denial of due process, then the problem is greatly simplified and the duty devolves upon the Court to determine which jurisdiction has the better basis for a right to tax and thus which state must yield in order to avoid the unconstitutional result. Yet in the case of tangibles the tax in a second state is apparently, if judged by the assertions of the Court, not held bad simply because it results in double taxation and another state has a better basis on which to tax, but rather on the ground that jurisdiction over the property is entirely lacking and that a tax without jurisdiction is a denial of due process.[77] Then if the problem as to intangibles be approached in the same fashion great difficulty is experienced in entirely eliminating any basis for the assertion of jurisdiction in all states save the domicile of the owner, especially as noted above with regard to

76. See Mr. Justice Holmes' dissents, particularly in Baldwin v. Missouri, in which he says: "Very probably it might be good policy to restrict taxation to a single place; and perhaps the technical conception of domicile may be the best determinant. But it seems to me that if that result is to be reached it should be reached through understanding among the states, by uniform legislation or otherwise, not by evoking a constitutional prohibition from the void of 'due process of law' when logic, tradition and authority have united to declare the right of the state to lay the now prohibited tax." See also *supra* note 73.

77. State Tax on Foreign Held Bonds, *supra* note 8, at 319, 325, 326; Louisville & Jeffersonville Ferry Co. v. Kentucky, *supra* note 2, at 396; Delaware, Lackawanna & Western Ry. Co. v. Pennsylvania, *supra* note 2, at 356; Union Refrigerator Transit Co. v. Kentucky, *supra* note 1, at 204; Western Union Telegraph Co. v. Kansas, 216 U.S. 1, 38, 30 S.Ct. 190, 54 L.Ed. 355 (1910); International Paper Co. v. Massachusetts, 246 U.S. 135, 142, 38 S.Ct. 292, 62 L.Ed. 624 (1918); Frick v. Pennsylvania, *supra* note 3, at 489. See *supra* p. 11 and note 33.

transfer taxes where ancillary administration may be employed in completing the transfer. Perhaps it is not so much the lack of jurisdiction in the one state, however, as the desire to get away from double taxation, that has been largely responsible for the holdings, both as to tangibles and intangibles, especially as to the latter. Even in the *Union Transit* case with respect to tangibles, probably the desire to avoid the injustice of double taxation largely influenced the Court.[78] No doubt the same may be said of the decision with respect to a transfer tax on tangibles in the *Frick* case.[79] It is very clear that such property being permanently located within a state, that state may tax the transfer whether it apply its own law or by comity the law of the decedent's domicile in effecting the transfer. Then if the state of the domicile were permitted to tax that would result in certain double taxation. It seems even more clear in the recent cases that the desire to avoid the unjust and unfair results of double taxation had a controlling influence. The Court pointed out in the *Farmers Loan & Trust Co.* case that perhaps two-thirds of the states have endeavored to avoid the evil of multiple state taxation of intangibles by resort to reciprocal exemption laws. As indicative of the fact that matters of policy and conceptions of fairness rather than absence of jurisdiction, as earlier asserted as a basis for unconstitutionality, was the controlling factor, the Court asserts that "certainly existing conditions no less imperatively demand protection of choses in action against multiplied taxation" than is the case with tangible chattels.[80] Further the Court says:

"Taxation is an intensely practical matter, and laws in respect of it *should be construed and applied with a view of avoiding, so far as is possible, unjust and oppressive consequences.* We have determined that in general intangibles may be properly taxed at the domicile of their owner, and *we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles.*"[81]

The determining factor in these cases seems to be the Court's con-

78. *Supra* note 1. In that case the Court said, at 203: "Most modern legislation upon this subject has been directed . . . to the voidance of double taxation." At 207, "But in view of the enormous increase of such property [tangible personalty] since the introduction of railways and the growth of manufactures, the tendency has been in recent years to treat it as having a situs of its own for purposes of taxation, and correlatively to exempt (it) at the domicile of its owner." At 210, "The adoption of a general rule that tangible personal property in other states may be taxed at the domicile of the owner involves possibilities of an extremely serious character." "Clearly, it is the objection to double taxation that lies at the root of the Union Refrigerator Case." Powell, *Extra-territorial Inheritance Taxation* (1920) 20 COL. L.REV. 283, 292, 301. See also, Notes (1930) 16 VA. L.REV. 521, 525; (1930) 78 U. OF PA. L.REV. 532, 536.

79. "But this is not the first, and will, doubtless, not be the last occasion that the Court's decision is controlled more by broad considerations of policy than by technical rules of law." Wickersham, *Double Taxation* (1926) 12 VA. L.REV. 185, 189, discussing the Frick case.

80. Farmers' Loan & Trust Co. v. Minnesota, *supra* note 16, at 211, 212.

81. *Ibid.*, 212 (Italics the writer's)

ception of justice and fairness, matters of policy,[82] rather than technical absence of jurisdiction. The Court sympathizes with the feeling of injustice and unfairness consequent upon the taxation of the same economic interest in two or more jurisdictions at the same time, and realizing the undesirability of continuing that situation calls to its aid the due process clause of the Fourteenth Amendment. It seems that one is driven to the conclusion that the Court is substituting its judgment as to expediency and fairness—matters of policy—for that of the state legislature in order to reach what it considers a just result and eliminate the evils of multiple state taxation, and in so doing finds its justification in the due process clause, though it has heretofore repeatedly asserted that such taxation infringed no provision of the United States Constitution.[83] The Court in so doing certainly reaches a highly desirable result and perhaps its position is not more difficult to sustain on constitutional grounds than in previous cases where matters of policy have appeared to influence its decision.[84] Yet it does seem that to require the application of conceptions of justice and fairness to the extent done by the court in these cases is to inject a new force into the due process clause. As one state court has suggested, perhaps "judical decisions are to be controlled by the changing demands of trade and commerce and considerations of public policy."[85]

Assuming that there is sufficient constitutional justification for the holdings in these cases, one can hardly fail to rejoice that so much has been accomplished in so short a time toward the elimination of the evils of multiple state taxation of intangibles and their transfer. There are, however, numerous other problems of a similar nature to which it would seem the Court must turn its attention at an early date. Among these may be mentioned the application of the doctrine of business situs in conjunction with the maxim *mobilia sequuntur personam*; the future application of the doctrines set forth in such cases as *Cream of Wheat Co. v. County of Grand Forks*[86] and *Adams Express Co. v. Ohio State Auditor*[87] as they result in the taxation of the same intangible property interest by two states at the same time; the taxation of the mortgage interest in realty at the same time that the credit evidenced by a note and secured by the mortgage is taxed in

82. See Wickersham, *op. cit. supra note* 79; Lowndes, *Tendencies in the Taxation of Intangibles* (1930) 17 VA. L.REV. 146, 148, 149; Note (1931) 5 CIN. L.REV. 245, 250.

83. *Supra* note 12.

84. *Supra* note 79. *Ex parte* Jackson, 96 U.S. 727, 24 L.Ed. 877 (1877); Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886); Lockner v. New York, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905); Coppage v. Kansas, 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 441 (1915); Adams v. Tanner, 244 U.S. 590, 37 S.Ct. 662, 61 L.Ed. 1336 (1917; Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920); Adkins v. Children's Hospital, *supra* note 47.

85. The Court of Appeals of Maryland in Susquehanna Power Co. v. State Tax Commission, 151 Atl. 39, 44 (1930).

86. *Supra* note 12.

87. 165 U.S. 194, 17 S.Ct. 305, 41 L.Ed. 683, 166 U.S. 185, 17 S.Ct. 604, 41 L. Ed. 965 (1897).

another jurisdiction; and finally, the taxation of shares of corporate stock. Other situations exist in which similar problems arise but these will suffice for the limits of the present discussion. In most of these situations the difficulties of eliminating multiple state taxation would not seem to be more nearly insurmountable than those encountered and disposed of by the Court in the *Farmers Loan & Trust* and *Baldwin* cases.

BUSINESS SITUS

The doctrine known as that of business situs, by means of which credits may be given a situs for taxation elsewhere than at the domicile of the creditor when such credits become localized by being made incident to a business conducted for a non-resident owner, had been accorded a wide recognition long prior to the determination of the above mentioned recent cases.[88] A familiar example was that of a resident of state one by means of an agent in state two lending money on notes secured by mortgages on real estate in state two with power in the agent to collect and reinvest or relend the money as a more or less continuous business in state two. The credits arising out of such a business were taxable by state two despite the fact that they might also be taxed at the owner's domicile.[89] This was true whether the paper evidence chanced to be kept in state two or elsewhere,[90] and whether the credits were actually evidenced by notes or not.[91] If, however, the element of a more or less continuous business were absent, as where a power of reinvestment was lacking and only the power to collect and transmit was vested in the agent, no business situs was acquired.[92] There seems to be ample justification for sustaining a tax on the basis of business situs. The non-resident, by means of a resident agent, conducts a continuous and profitable business within the State. Such business receives the same protection of the state's laws as a similar business conducted by a resident and there seems to be no reason why it should not be subjected to the same tax.

In view of the very vigorous assertion by the Court in the above mentioned cases that intangibles, like tangibles, are to be subject to only one tax, the question necessarily arises, which the Court did not purport to discuss or decide, as to which jurisdiction shall prevail in such a case—that of the owner's domicile, or that of the business situs. While the Court

88. Safe Deposit & Trust Co. of Baltimore v. Virginia, *supra* note 15; Farmers' Loan & Trust Co. v. Minnesota, *supra* note 16; Baldwin v. Missouri, *supra* note 17.

89. Bullen v. Wisconsin, *supra* note 12, at 631; Fidelity and Columbia Trust Co. v. Louisville, *supra* note 12, at 58.

90. Bristol v. Washington County, and Metropolitan Life Ins. Co. v. New Orleans, both *supra* note 10.

91. Liverpool & London & Globe Ins. Co. v. Board of Assessors of New Orleans, *supra* note 10.

92. Reat v. People, 201 Ill. 469, 66 N.E. 242 (1903). See also Hinckley *et al* v. San Diego County, 49 Cal. App. 668, 194 P. 77 (1920); Myers v. Seaberger, 45 Ohio St. 232, 12 N.E. 796 (1887).

definitely asserts that it has "determined that in general intangibles may be taxed at the domicile of the owner and we find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation in more than one place similar to that accorded to tangibles,"[93] this does not necessarily mean that in all cases of intangibles the domicile of the owner is to control. The Court in these cases definitely recognizes business situs as a basis for taxation. In the *Farmers Loan & Trust Co.* case[94] the court states that "*New Orleans v. Stempel*[95] [together with certain other cases][96] recognizes the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner, if they have become integral parts of some local business." But the Court further states that "the present record gives no occasion for us to inquire whether such securities can be taxed a second time at the owner's domicile" since business situs was not contended for as a basis for tax in this case. The Court had apparently precluded any business situs discussion by its statement at the outset that "none [of the bonds] had any connection with business carried on by or for the decedent in Minnesota." Again the Court in the *Baldwin* case appears to attempt to preclude the necessity of any discussion of business situs and at the same time perhaps to intimate that that matter is not to be affected by its decision therein, when it states that "the record discloses nothing tending to show that the personal property had been given a business situs in that state [Missouri]."[97] The Court also recognizes quite frankly that the control of the owner's domicile is based on fiction,[98] the maxim *mobilia sequuntur personam*. Then while it is the presently accepted doctrine of the Supreme Court that ordinarily that state and only that state may tax, yet if the intangible become so localized as to acquire a definite business situs elsewhere may it not plausibly be argued that the jurisdiction of the owner's domicile should yield and that of the business situs be permitted to prevail? It was thought that a definite decision as to this matter was to be had in the recent case of *Beidler et al. v. South Carolina Tax Commission.*[99] The

93. *Supra* note 81.

94. *Supra* note 16, at 213.

95. *Supra* note 10.

96. Bristol v. Washington County, and Liverpool & London & Globe Ins. Co. v. Board of Assessors of New Orleans, both *supra* note 10.

97. *Supra* note 17, at 590. The Missouri court, State v. Estate of Baldwin, 323 Mo. 207, 213, 19 S.W. (2d) 732 (1929), had said, however, that "it is a reasonable inference that the cash and notes in such large quantities in Missouri, where none of it was held in Illinois [domicile of decedent owner], was retained in this state for the purpose of investment. They may have established a business situs in this state . . . ." In this view of the situation Mr. Justice Stone took the position that the tax should have been upheld, since the burden is always upon the one asserting invalidity to so prove, and further since the Supreme Court may uphold an act on any basis that might have existed, whether or not assigned as the basis on which the state court upheld it; that since it may have had a business situs here, it properly devolved upon the assailants to prove that no such basis existed if they were to get a decision invalidating the tax.

98. Farmers' Loan & Trust Co. v. Minnesota, *supra* note 16, at 209, 211.

99. 282 U.S. 1, 51 S.Ct. 54, 75 L.Ed. 69 (1930).

Court, however, avoided a determination of the matter, saying, "in *Farmers Loan & Trust Co. v. Minnesota* this court reserved the question of business situs . . ." and "a conclusion that debts have thus acquired a business situs must have evidence to support it" and the facts as here set forth "afford no adequate basis for a finding that the indebtedness has a business situs in South Carolina."[100] Clearly the Court in these cases has not so much as intimated that it will not sustain business situs in preference to the owner's domicile when the issue is squarely presented as it would seem it must be in the near future.

The status of the law with respect to certain situations in which tangible property may be found would seem to lend support to the above contention. In the case of tangibles not kept at all times within the state of the owner's domicile it is to be noted that that jurisdiction may nevertheless tax under the holdings in cases like *New York Central v. Miller.*[101] But if such tangibles acquire a situs in another state and are permanently kept there, they are no longer taxable at the owner's domicile.[102] In the case of ship property the state of the owner's domicile may tax after the theory of moveables following the domicile of the owner, even though the ships do not come within the state at any time during the year for which the tax is levied.[103] But if the ship actually acquire a situs within another jurisdiction by being permanently employed there, it at once ceases to be taxable at the owner's domicile.[104] Thus as asserted by the Supreme Court "the right of one state to tax may depend somewhat upon the power of another to do so."[105] Why not say likewise in the case of intangibles ordinarily taxable at the domicile of the owner, if they acquire a definite situs (business situs) in

100. *Ibid.* (51 S.Ct., at 55).

101. New York *ex rel.* New York Central and Hudson River Ry. Co. v. Miller, 202 U.S. 584, 26 S.Ct. 714, 50 L.Ed. 1155 (1906). The state of incorporation was here permitted to tax all of the rolling stock of the corporation though much of it was constantly out of the state. There was no showing, however, that any particular cars had not been within the state at some time during the tax year. Whether such property would still be taxable at the owner's domicile if it had not been within the jurisdiction at any time during the year, but had not acquired a situs for tax elsewhere seems not to have been squarely decided. The court intimates that it probably would be in Southern Pacific Company v. Kentucky, 222 U.S. 63, 74, 32 S.Ct. 13, 56 L.Ed. 96 (1911). The Court said in Cream of Wheat Co. v. County of Grand Forks, *supra* note 11, at 329, "The limitation upon the power of taxation does not apply even to tangible personal property without the state of the corporation's domicile, if, like a seagoing vessel, the property has no permanent situs anywhere." See Lowndes, *op. cit. supra* note 82, at 152; Powell, *op. cit. supra* note 78, at 304, 305.

102. Union Refrigerator Transit Co. v. Kentucky, *supra* note 1.

103. Southern Pacific Co. v. Kentucky, *supra* note 101. Here the ships had not been within the state at any time during the tax year and it was asserted that due to the type of vessel they could not be brought within the state. They had not, however, acquired a situs for taxation in any other state, being engaged in commerce upon the seas.

104. Old Dominion Steamship Co. v. Virginia, 198 U.S. 299, 25 S. Ct. 686, 49 L. Ed. 1059 (1905); Ayer and Lord Tie Co. v. Kentucky, 202 U.S. 409, 26 S.Ct. 679, 50 L.Ed. 1082 (1906); National Dredging Co. v. State, 99 Ala. 462, 12 So. 720 (1893).

105. Farmers' Loan & Trust Co. v. Minnesota, *supra* note 16, at 211, on the authority of Southern Pacific Co. v. Kentucky, *supra* note 101.

"Ordinarily this court recognizes that the fiction of *mobilia sequuntur personam* may be another jurisdiction, that they shall no longer be taxable at the owner's domicile but that it shall give way to the jurisdiction of the situs? As in the ship case it is given a situs at the owner's domicile by way of fiction, a debt having no actual physical situs like tangible property, and also as in the ship case when an actual situs is acquired elsewhere, the jurisdiction of the domicile should yield. As is sometimes stated, the fiction must yield to the fact.[106] Support is given to this position by the assertion of the Court in *Safe Deposit and Trust Co. of Baltimore v. Virginia*[107] to the effect that intangible property may acquire a taxable situs where permanently located, employed, and protected[108] the same as tangible property, and that the same reasons which led the Court in the *Union Transit* and *Frick* cases to deny application of the fiction *mobilia sequuntur personam* to tangibles should likewise be applied to intangibles in order to avoid double and oppressive taxation, pointing out that "the fiction *mobilia sequuntur personam* was intended for convenience and not to be controlling where justice does not demand it."

As tested by the ship cases the fiction *mobilia sequuntur personam* is applied to tangibles where so to do will not result in injustice due to double taxation, but when the tangible becomes taxable in another state the fiction gives way.[109] Likewise the fiction applies generally to intangibles but when some other jurisdiction acquires a better basis on which to tax it should give way to avoid the injustice of double taxation. As suggested by Mr. Powell, "the reasons of policy which require the exemption of chattels from taxation at the domicile of the owner, when they are taxable where they are, would seem at first glance to apply to the exemption of debts under similar circumstances."[110] Clearly as between the two jurisdictions, if only one is to be permitted to tax, the state of the business situs has the better basis. There the business is being carried on on behalf of the owner, there the credit is localized and employed incident to such business, there privileges are enjoyed

applied in order to determine the situs of intangible personal property for taxation (citing Blodgett v. Silberman), but the general rule must yield to the established fact of legal ownership, actual presence and control elsewhere, and ought not be applied if so to do would result in inescapable and patent injustice whether through double taxation or otherwise." (citing as two of four cases State Board of Assessors v. Comptoir National d'Escompte and Liverpool & London & Globe Ins. Co. v. Board of Assessors of Parish of Orleans, both *supra* note 10, both of which are business situs cases). Safe Deposit and Trust Co. of Baltimore v. Virginia, *supra* note 15, at 92.

106. Liverpool & London & Globe Ins. Co. v. Board of Assessors of Parish of Orleans, *supra* note 10, at 354.

107. *Supra* note 15, at 93.

108. Citing New Orleans v. Stempel, Bristol v. Washington County, State Board of Assessors v. Comptoir National d'Escompte, Metropolitan Life Ins. Co. v. New Orleans, and Liverpool & London & Globe Ins. Co. v. Orleans Assessors, all *supra* note 10, all of which are business situs cases.

109. Southern Pacific Co. v. Kentucky, *supra* note 101, at 68. See also *supra* note 78.

110. Powell, *op. cit. supra* note 78, at 304, citing Mr. Chief Justice White's dissent without opinion in Fidelity & Columbia Trust Co. v. Louisville, *supra* note 12.

and protection afforded. These should prevail over the mere application of a fiction at the owner's domicile.

The position taken in this regard, it is submitted, is not inconsistent with the earlier assertion made in connection with the discussion of the claim of the debtor's domicile to tax, that in such a case there is no *res* upon which to levy the tax, that the thing of value has no actual situs of its own and that the tax is in its nature a personal one. Such is its nature in the ordinary situation, but when the creditor so deals with his credits as to localize them in another jurisdiction as incident to a business there being conducted on his behalf, to make them a part of that business in the same fashion as if he were there conducting a business himself, the ordinary situation breaks down and the claim to tax by the creditor's domicile should give way to that of the situs created by the course of dealing. The fact of the owner's domicile being denied the right to tax in such a case would not constitute a very serious interference with its source of revenue, particularly if it may be permitted to levy an income tax upon the profits of such a business conducted on behalf of its residents.[111]

While the Court has repeatedly asserted in the past that taxation at the business situs does not preclude taxation at the owner's domicile,[112] the present attitude of the Court would clearly seem to demand that one or the other must give way. Numerous state cases may be found evidencing a disposition to allow business situs to prevail.[113] While it is true these cases largely represent matters of statutory construction, they are based on the same tests of fairness and policy that lie at the basis of the recent holdings of the Supreme Court and which must ultimately guide that Court in the determination of this issue.

There would seem to be no serious objection to the result herein advocated. The power of the state of the owner's domicile to tax would not be dependent upon the exercise of that power by the state of business situs but upon the existence of such power. If the intangible has acquired a business situs in another state, that of itself, should put an end to the power of the state of the domicile to tax.[114]

111. State v. Gulf, M. & N. R. Co., 138 Miss. 70, 104 S. 689 (1925) and Crescent Manufacturing Co. v. Tax Commission, 129 S.C. 480, 124 S.E. 76 (1924) would apparently permit such a tax. *Cf.* Maguire v. Trefry, 253 U.S. 12, 40 S.Ct. 417, 64 L.Ed. 739 (1920); Cook v. Tait, 265 U.S. 47, 44 S.Ct. 444, 68 L.Ed. 895 (1923); Longyear v. Commissioner of Corporations and Taxation, 265 Mass. 585, 164 N.E. 459 (1928); State *ex rel.* Manitowoc Gas Co. v. Wisconsin State Tax Commission, 161 Wis. 111, 152 N.W. 848 (1915). See Powell, *Due Process Tests of State Taxation 1922-1925,* (1926) 74 U. OF PA. L.REV. 423, 438; Maguire, *Relief From Double Taxation of Personal Incomes* (1923) 32 YALE L.J. 757; Note (1931) 71 A.L.R. 685. See also *infra* note 121. But *cf. In re* Opinion of the Justices, 149 Atl. 321 (N.H.) 1930.

112. *Supra* note 88; 2 COOLEY, *op. cit. supra* note 4, at 467.

113. *Supra* note 11.

114. Commonwealth v. West India Oil Refining Co., and Commonwealth v. B. F. Avery and Sons, both *supra* note 11.

CREAM OF WHEAT AND ADAMS EXPRESS CASES

Somewhat closely associated with the problems of business situs are those arising out of the application of the doctrines set forth in such cases as *Cream of Wheat Co. v. County of Grand Forks*[115] and *Adams Express Co. v. Ohio State Auditor*.[116] The former permits the state of incorporation to tax the whole of the intangible value of the property interests of a domestic corporation though the corporation owns no property and does no business within the territorial limits of the state. By the doctrine of the latter case each state in which tangible property is used and business done may assess its proportionate share of the intangible value attributable to the property and business of a foreign corporation doing a connected business in more than one state. In such a case the market value of its stock may be vastly greater than that of its tangible property, and that excess of intangible value is to be apportioned by each state to the property used therein, business done therein, etc., as deriving its value from such property and business carried on in and protected by such state, and may be taxed accordingly. The intangible value arises not alone from the incorporation of the company in its state of domicile, but has been created by the conduct of the business as a going concern and becomes incident to the tangible property and business done in each state. Each state is permitted to tax that intangible increment of value it has helped to create.

Let us combine the doctrines of these two cases and observe the result by way of facilitating the taxation of the same property interest in two states at the same time. By the doctrine of the former case all of the intangible property value is taxed in the state of the corporation's domicile, even though none of its tangible property is located there and none of its business is done there. At the same time, by the doctrine of the latter case,

115. *Supra* note 12. A statute of North Dakota provided that all domestic corporations should be taxed upon all real and personal property within the state on the same basis as an individual, and in addition that there be assessed against it an amount equal to the aggregate market value of its outstanding stock, less the value of its real and personal property. The Cream of Wheat Company was incorporated in North Dakota and maintained an office within the state but all of its manufacturing, commercial, and financial business was conducted wholly outside the state, and it had not at any tim within the state any real or tangible personal property or any papers by which intangible property was evidenced, such as notes, etc. The tax upon the intangible property of the Cream of Wheat Company was upheld though all of its property had been taxed in other states.

116. *Supra* note 87. An Ohio statute provided for the taxing of express companies on their entire property, tangible and intangible, within the state, the valuation being based on the proportion of the whole capital stock of the company assignabe to the state on a consideration of the real and personal property, gross receipts and mileage within and without the state. It appeared that the company had some $4,000,000 of tangible property, real and personal, some $67,000 of which was within Ohio, and that the market value of its outstanding stock was in excess of $16,000,000, thus making an intangible value of some $12,000,000. The company contended that Ohio should be permitted to tax only to the extent of the $67,000 tangible property within the state. A tax upon an additional proportion of the $12,000,000 intangible value was sustained.

all of the intangible property value is taxed again in the states in which the tangible property of the corporation is located and its business done. Recognizing the possibilities of this situation, the Court in the *Cream of Wheat* case expressed satisfaction with the result and asserted that the limitation upon the power to tax a resident on his property having a permanent situs outside the state "has no application to intangible property even though the property is also taxable in another state by virtue of having acquired a business situs there."[117] For this proposition the Court cited *Fidelity & Columbia Trust Co. v. Louisville,*[118] for which it is not necessarily an authority, though it is frequently so cited. All that was decided in that case was that a depositor in a bank in St. Louis who was a resident of Louisville could be taxed on his deposit at his domicile. The Court conceded, in what amounted to pure dictum, that the deposit could have been taxed by Missouri under former decisions, citing business situs cases.[119] This, however, was not at all necessary to a decision and there was at least room for serious doubt as to whether any business situs existed in Missouri.[120] It does indicate, however, that the Court as then constituted would have permitted a second tax at the domicile though already taxed at the business situs.

It now becomes pertinent to inquire whether or not the doctrine of the *Union Transit* case against taxing property at the domicile which has acquired a situs in another jurisdiction should not be extended to apply to this situation. There would seem to be no greater obstacles to reaching this result than existed in the *Farmers Loan and Trust* and *Baldwin* cases. The result, by allowing the doctrine of the *Adams Express Co.* case to take precedence over that of the *Cream of Wheat* case, would be just one more step in the direction of eliminating the evils of multiple state taxation, which the Court seems to have set out to accomplish. The reasons for the choice here expressed are substantially the same as those involved in the business situs cases. Whether one chooses to label this a case of business situs or not, the intangible increment of value does appear to bear a very definite relation to the tangible property and the business done, to derive its value therefrom, and to be protected by the state wherein the tangible property is located and the business is carried on. The claim of such a state to the right

117. *Supra* note 12, at 329.

118. *Supra* note 12. One Ewald resided in Louisville but continued to conduct through an agent a business in St. Louis where he had formerly lived. Money coming from the business had been deposited in St. Louis banks subject to Ewald's order alone. It was not used further in connection with the business. Such deposits were held taxable in Louisville.

119. Liverpool & London & Globe Ins. Co. v. Board of Assessors of Orleans, and Metropolitan Life Ins. Co. v. New Orleans, both *supra* note 10.

120. The deposits had no further connection with the business in St. Louis, were subject solely to the order of Ewald, the owner, subject to his personal check, and would seem to be the same as any other deposit account. The fact that the source from which the money was originally derived was the local business would not seem to give them a business situs, since they were not used further in the business and had no other connection therewith.

to tax would seem to be a much more real one than that of the domiciliary state by a mere application of the fiction *mobilia sequuntur personam.* Ordinarily the corporation, unlike the Cream of Wheat Company, will have part of its property and business within the state of its domicile. The principles involved as to the taxation of intangible value, however, would be the same. Giving precedence to the doctrine of the *Adams Express Co.* case would still leave the state of the corporation's domicile free to levy a franchise tax, an income[121] or receipts tax in so far as it may not constitute a burden upon interstate commerce,[122] and of course a property tax both with respect to tangibles and intangibles on the same basis as other states where any property is located or business done within its territorial limits.

It may be suggested that perhaps not all states employ business situs as a basis for taxation or that not all will tax the intangible value as in the *Adams Express Co.* case, and that where the state other than the domicile does not so tax, the latter should be left free to do so. It may further be suggested that the jurisdiction or constitutional power of the domiciliary state to tax should not be made to depend upon the accident of whether or not the other state has taxed. Clearly the fact of the other state having taxed or failed to tax can in no way affect the constitutional power of the domiciliary state to tax, but it is submitted that if the intangible has actually acquired a situs for taxation in another state, as it has in the business situs cases or in the *Adams Express Co.* case, that should negative the existence of a right on the part of the domiciliary state to tax. Whether or not it has actually been taxed in the other state is a matter of no importance, just as in the case of tangible property. If a ship, which is admittedly taxable at the owner's domicile until it acquires a situs elsewhere, though never within the domiciliary state, actually acquires a situs in another state the power

121. It may be observed at this point that as to income taxes, either individual or corporate, state statutes quite commonly limit the tax at the domicile to such income as is derived from sources within the state, particularly if such income from other sources is subjected to a tax in the state wherein it arises. Whether the due process clause may be construed to constitute any limitation upon the power of the domiciliary state to tax income arising outside its boundaries, or whether income taxes may come to be treated as purely personal taxes and leviable only by such state (though Shaffer v. Carter, 252 U.S. 37, 40 S.Ct. 221, 64 L.Ed. 445, 1920, allowed such a tax by the non-domiciliary state as to income arising therein) are questions that remain for future determination. No doubt the same reasons which are directing the Court to restrict the taxation of property, both tangible and intangible, to a single jurisdiction may well be expected to lead to a similar result with respect to income taxes. It is not, however, within the proper province of the present article to enter upon a consideration of that problem. For a discussion of this matter see Rottschaefer, *State Jurisdiction of Income for Tax Purposes* (1931) 44 HARV.L.REV. 1075. See also *supra* note 111.

122. United States Glue Co. v. Town of Oak Creek, 247 U.S. 321, 38 S.Ct. 449, 62 L.Ed. 1135 (1918). See 2 COOLEY, *op. cit. supra* note 4, at 892, 893, 894.

123. For a case so holding with respect to business situs, and further holding that a tax by the domicile under such circumstances would be unconstitutional even though the jurisdiction of the situs may have failed to tax, see Commonwealth v. West India Oil Refining Co., *supra* note 11. See Note (1912) 36 L.R.A. (N.S.) 295.

of the owner's domicile to tax comes to an end and the fact that the state of situs may have neglected to tax would seem to be immaterial. The matter of intangible property having a situs at the domicile of the owner is only fiction at best, and when it occupies such a relation to tangible property or to business done in another jurisdiction as to give it a situs there for taxation, the fiction should yield to the fact and the latter state alone should be permitted to tax.[123]

As stated above, a careful study of the cases appears to reveal that one of the principal factors, if not the deciding influence, in causing the Court to arrive at the conclusion, in cases like the *Union Transit* case, that tangible property having acquired a permanent situs in another jurisdiction is no longer taxable at the domicile of the owner, was the aversion to this form of what is commonly called double taxation.[124] If that be true, as it certainly is, and if it be further true, as it also undoubtedly is, that the same sort of aversion now exists to taxing intangible property twice under similar circumstances, there would seem to be no good reason why the Court should not apply the same doctrine to intangible property and no longer allow the state of the domicile to tax when it has actually acquired a situs for purposes of taxation in another jurisdiction.

MORTGAGE INTEREST IN REALTY

In *Baldwin v. Missouri* the notes involved, with respect to which Missouri sought to collect an inheritance tax, were secured by mortgages upon Missouri real estate. In denying the validity of the tax the Court announced no new doctrine but adhered to the well established rule of considering the credit, in the absence of a statute otherwise specially providing, as the thing taxable and not its security. The holding does not, however, weaken the force of cases like *Savings and Loan Society v. Multnomah County*[125] which allow the state in which the land is located to tax to the non-resident mortgagee, not the credit, but his interest in the realty by which the obligation is secured. In the *Baldwin* case no attempt was made to tax the mortgagee's interest in the realty as was done by express statutory provision in the *Multnomah County* case, but only to tax the credits represented by the notes. The majority opinion in the *Baldwin* case asserts, "This cause does not involve the right of a state to tax either the interest which the mortgagee as such may have in lands lying therein [in Missouri], or the

124. *Supra* notes 78 and 79.

125. *Supra* note 12. Residents of Multnomah County, Oregon, made notes payable to the Savings & Loan Society, a California corporation, secured by mrtgages on local land. The mortgages and notes were kept in California. A statute of Oregon provided that such mortgages together with the debts, for purposes of assessment and taxation, should be treated as land or real property. No tax was provided for against the notes or credits as such. A tax against the non-resident mortgagee corporation on its interest in the realty mortgaged was sustained.

transfer of such interest."[126] Thus it would appear that the Court meant to leave the question entirely unaffected by that decision. The question must arise, however, as to whether such a tax, at the same time that the credit is taxed like any other intangible at the creditor's domicile, is inconsistent with the principles set forth by the Court, and if so, which tax has the better claim to be continued.

In a situation such as that involved in the *Baldwin* case with notes given by Missouri debtors, secured by mortgages upon Missouri realty, but owned by a creditor domiciled in Illinois, if Missouri had a statute such as that of Oregon in the *Multnomah County* case, the tax levied by Missouri would not be upon the credit, over which the Court in the *Baldwin* case determined it had not the requisite jurisdiction to tax, but upon the mortgage interest in the realty over which it clearly does have jurisdiction. This is unlike the business situs cases where, by virtue of acquiring such a business situs on the basis of which it may be taxed by a state other than that of the owner's domicile, the latter state is thought to lose its right to tax. Here are involved two distinct property interests. One, the credit within the jurisdiction and subject to the taxing power of Illinois by virtue of its being the domicile of the owner; the other the mortgage interest in the realty within the jurisdiction and subject to the taxing power of Missouri as any other interest in land within the state. Each state may be permitted to tax accordingly. It is to be observed, of course, that in the absence of a special statute such as that involved in the *Multnomah County* case, states quite uniformly disregard the mortgage interest in the realty and treat the property interest merely as a credit taxable only at the domicile of the creditor.[127]

Perhaps it would be desirable, at least from the standpoint of avoiding multiple state taxation of substantially the same economic interest, that no such special statutes should be enacted. Yet no reasonable basis suggests itself upon which such statutes, if enacted, can be held invalid. From the standpoint of the creditor's domicile, the same principles that prevailed in the *Farmers Loan and Trust* and *Baldwin* cases would seem to sustain the tax. The principal thing is the debt, the security is merely incidental, and as the great weight of authority in the past has indicated, it would seem that the state of the owner's domicile may apply the same principles as apply to the ordinary case of intangibles and collect the tax. From the standpoint of the state where the land is located, the logic of the other position seems equally clear. In the case where both the debtor and the creditor are residents clearly no objection can be offered. By special statute no tax

126. *Supra* note 17, at 594.

127. For a discussion of the state of the law on this subject as it has heretofore existed, with a citation of authorities, see Chambers, *State Inheritance Tax on Foreign Held Bonds or Notes Secured by a Mortgage on Land in the State* (1927) 12 CORN. L.Q. 172, 180 ff.; Note (1926) 42 A.L.R. 354, 360.

is levied on the credits as such. Nothing is taxed but the mortgaged realty and that not to a single owner. The tax is levied both on the mortgagor and the mortgagee in accordance with their respective interests in the realty. As asserted by the Court in the *Multnomah County* case, "the state may tax real estate mortgaged, as it may all other property within its jurisdiction, at its full value. It may do this, either by taxing the whole to the mortgagor, or by taxing to the mortgagee the interest therein represented by the mortgage, and to the mortgagor the remaining interest in the land . . . ."[128] Such a system is without doubt fairer than that which prevails in many states of taxing the whole of the value of the realty to the mortgagor regardless of how small his equity may be, and at the same time taxing the mortgagee upon the credit. It would not seem that such a method of taxation could be held to be beyond the power of the state to apply. Perhaps it may be suggested that where such a system is applied something akin to business situs exists and on that basis that the debt should be considered as merged in the security and that this should preclude the possibility of a tax on the credit at the domicile of the mortgagee in the interest of eliminating the evils of double taxation. This, however, unlike the case of business situs, would have the objectionable feature of making the existence of the power to tax on the part of the domiciliary state depend entirely upon, not the existence of a power in another state to tax as in the business situs cases, but the mere chance of whether or not the state in which the land lies has chosen to exercise its power to tax, not the credit, which the state of domicile alone can tax, but the distinct and separate interest of the mortgagee in the realty, which clearly is not subject to tax in the other jurisdiction. The only other solution consistent with this theory of the existence of a power to tax on the part of the state where the land is located would seem to be to overthrow completely the commonly accepted conception and treat the situs of the security as the sole place for taxation in all cases. This would hardly appear to be either desirable or justifiable.

While permitting both states to tax may result in the undesirable subjection of substantially the same economic interest to a tax in two jurisdictions, nevertheless there do exist two distinct and separate property interests which are being taxed, which may serve to distinguish this from other situations dealt with herein. The credit seems properly taxable as other intangibles, whether secured or unsecured, at the domicile of the owner; the mortgage interest in the realty, like any other interest in realty, at the situs of the land.

It is quite possible, however, that the logic of the situation may not be permitted to control and that the Court ultimately may feel compelled as a matter of policy to restrict such taxation to a single jurisdiction. If such

128. *Supra* note 12, at 427.

should be the case, since the domicile of the creditor is being permitted to prevail in other situations, it would not be greatly surprising to see the Court reach the same result here. As comparatively few states provide a tax upon the mortgagee's interest as realty this would not, as a practical matter, constitute any serious interference with the taxing systems of most states. Also since the state may tax the whole value of the land to the mortgagor, at least under present decisions, no restriction upon the state's source of revenue would result.[129] If this result is to be reached it would seem that the Court must frankly admit that it is dictated by considerations of expediency and the desire to avoid the evils of multiple state taxation. To say that the due process clause requires such a holding certainly would be going much further toward reducing that constitutional provision completely to a criterion for measuring policy and desirability than the Court has heretofore been disposed to go.

It is to be noted, of course, that the due process clause is the only reliance available, and such a holding as herein suggested as a possibility would place a new construction upon that provision. It can hardly be contended that either state is so far lacking in jurisdiction, as that term has been understood in the past, as to make its tax a violation of due process. Instead this is a situation in which the same economic interest bears such a relation to two states that each seems to have a valid claim to tax. To reach the result here mentioned it would seem that either, as hereinbefore suggested, it must be held that a tax by two states upon the same economic interest to the same owner at the same time is so far arbitrary as to be a denial of due process and leave the Court only the task of determining which has the better claim, or the position must be frankly taken that the due process clause authorizes the Court to become the final arbiter of questions of policy. Perhaps the Court is not willing to go this far.[130]

SHARES OF CORPORATE STOCK

There has been much speculation since the determination of the *Farmers Loan and Trust* and *Baldwin* cases as to the effect of the present doctrine of the Supreme Court upon the taxation of shares of corporate stock,

129. This would still leave the way open for a tax by two states on substantially the same economic interest, though to different owners, the land being taxed to the mortgagor by one state and the credit to the mortgagee by another, or both by the same state for that matter; but that problem, like other similar situations such as a tax on the property of a corporation while at the same time the shares are taxed to the shareholders, is one beyond the scope of the present article.

130. The languige of the Court, speaking through Mr. Justice Roberts, in the very recent Indiana Chain Store Tax Case (State Board of Tax Commissioners of Indiana v. Jackson, ... U.S. ....,51 S.Ct. 540, 543, 75 L.Ed. 670 (1931) to the effect that, "It is not the function of this Court in cases like the present to consider the propriety or justness of the tax, to seek for motives, or to criticize the public policy which prompted the adoption of the legislation," possibly may be thought to indicate a swing of the pendulum away from the practice of giving consideration to matters of policy.

particularly where the owner is domiciled in a state other than that of incorporation. It seems entirely correct to assert that shares of stock are intangibles, primarily of the nature of choses, do not represent ownership of the actual property of a corporation, but merely a right to share in the corporate profits and in the assests upon final dissolution. There can be no two distinct property interests involved as is conceivable in the mortgage situation just considered. If due process requires the abandonment of multiple state taxation of other intangibles, it would seem to require as much with respect to corporate stock.

No little difficulty is encountered, however, in determining which state should be permitted to tax. Heretofore some support has been given to at least four possibilities, all of which might conceivably tax at the same time, and according to the earlier cases violate no provision of the federal Constitution.[131] These possibilities are:

(a) The state in which the certificates of stock are kept.
(b) The state in which the transfer books are kept.
(c) The state of incorporation.
(d) The state of the owner's domicile.

(a) The bases for the contention that the state in which the certificates of stock are kept should be permitted to tax are substantially the same as those by means of which it was sought to attribute tangible character to other paper evidences, such as notes and bonds, and tax them where found.[132] Always of doubtful soundness, and certainly of questionable desirability, there would seem to be no longer any possible basis for such a tax since the decision in *Baldwin v. Missouri,* having the effect, as it apparently does, of entirely overruling *Wheeler v. Sohmer* as to taxing other intangibles on the basis of the presence of the paper evidence.

(b) As to the state wherein the transfer books are kept, it is submitted that little sound basis has ever existed for sustaining the tax, though some support can be found in the cases[133] and legal literature.[134] In so far as a property tax is concerned, there can be little basis for the claim. Clearly the property interest is not within the state or subject to its control. In

131. For a collection of cases see Note (1926) 43 A.L.R. 686, 698.

132. For a discussion of this point and citation of cases see Note (1919) 7 CALIF. L.REV. 117.

133. See Attorney General v. Higgins, 2 H. & N. 339 (1857); Brassard v. Smith, 1925 A.C. 371; Erie Beach Company Ltd. v. Attorney General for Ontario, 1930 A.C. 161. *Cf.* Lockwood v. United States Steel Corporation, 209 N.Y. 375, 103 N.E. 697 (1913). *Contra*: Dunham v. City Trust Co. of New York, 115 App. Div. 584, 101 N.Y.S. 87 (1906), affirmed in 193 N.Y. 642, 86 N.E. 1131 (1908).

134. Peppin, *The Power of States to Tax Intangibles or Their Transfer* (1930) 18 CALIF. L.REV. 638, 670; Note (1925) 38 HARV.L.REV. 804, 815. *Contra*: Kroeger, *Constitutional Limitations of State Jurisdiction over Property for Succession Tax Purposes* (1929) 14 ST. LOUIS L.REV. 99, 133.

so far as any distinction may be thought to exist between the basis for a property tax and a transfer tax, it may be urged that the latter tax should be permitted. In order to complete the transfer a transfer must be had on the books of the corporation which are within the jurisdiction. But the ultimate control of the matter of transfer would seem to be more nearly with the corporation at its domicile than with the agent in charge of the transfer books. There would seem to be little difference, for purposes of applying the transfer tax, between the transfer of shares of stock on the books of a corporation and the transfer of registered bonds.[135] As to the latter, the Court has expressly denied the power to levy a transfer tax except by the domicile of the owner.[136] It is to be further noted that under the Uniform Stock Transfer Act shares of stock are made transferable by the mere transfer of the certificate.[137] Where that is in effect the corporate books would seem to serve little more than record purposes[138] and all claims for a right to tax in such a state would appear to be entirely without foundation.[139] As in the case of (a) above with respect to taxing where the certificate is kept, this basis for taxation has never been widely accepted, has always been subjected to severe criticism, and its complete passing would certainly not be deeply lamented.

(c) The state of incorporation makes a much stronger bid for approval of its right to tax though the stock be owned by a non-resident. The tendency in the past has been to give very wide recognition to the doctrine that it may be permitted to tax.[140] Two factors especially suggest themselves in this connection, one or both of which are usually relied upon by

135. The Supreme Judicial Court of Massachusetts in Bliss v. Bliss, 221 Mass. 201, 205 ff., 109 N.E. 148, L.R.A. 1916A, 889 (1915), allowed such a tax, and though the bonds involved were bonds of the Commonwealth of Massachusetts and the doctrine of Blackstone v. Miller might have been applied, the Court relied strongly upon the place of registry being within the state. *Contra*: Tax Commission v. Farmers' Loan & Trust Co., 119 Ohio St. 410, 164 N.E. 423 (1929). See Carpenter, *Jurisdiction Over Debts for the Purpose of Administration, Garnishment, and Taxation* (1918) 31 HARV.L.REV. 905, 928; Note (1925) 38 HARV. L.REV. 809, 815 n. 41. See also Benwell et al. v. City of Newark, 10 Dick. Ch., 55 N.J. Eq. 260, 36 Atl. 668 (1897).

136. Farmers' Loan and Trust Co. v. Minnesota, *supra* note 16. At p. 208 the court asserts, "Registration of certain of the bonds we regard as an immaterial circumstance."

137. Section 1, Uniform Stock Transfer Act.

138. Besides providing that title to a certificate of stock may be transferred by delivery properly indorsed or by a separate written assignment, Section 1 of the Act further provides that "The provisions of this section shall be applicable although the charter or articles of incorporation or code of regulations or by-laws of the corporation and the certificate itself, provide that the shares represented thereby shall be transferred only on the books of the corporation or shall be registered by a registrar or transferred by a transfer agent."

139. Note (1925) 38 HARV.L.REV. 809, 815.

140. "That it was rightly determined (by the lower court) that it was within the power of the state to fix, for the purpose of taxation, the situs of stock in a domestic corporation, whether held by residents or non-residents, is so conclusively settled by the prior adjudications of this court that the subject is not open for discussion." Corry v. Baltimore, *supra* note 23, at 474; Hawley v. Malden, *supra* note 12, at 10, 12. See collection of cases in Note (1926) 42 A.L.R. 354, 365; Note L.R.A. 1915C, 903, 944; Peppin, *op. cit. supra* note 134, at 663. But see North Carolina Railroad Co. v. Commissioners of Alamance, 91 N.C. 454 (1884).

the courts as sufficient bases for sustaining either a property tax[141] or a transfer tax.[142] The first is the fact that the state of the corporation's domicile, by creating the corporation, has the power to control it and the relation which shall exist between it and its shareholders, or prescribe the conditions and regulations under which persons may become members[143] of or shareholders in such a corporation.[144] The second is the suggestion contained in many cases that the shareholder acquires an interest in or ownership of the property[145] and business of the corporation, that the business is conducted by the corporation on his behalf, and that the state which controls the corporation and its property and business should be permitted to tax the shareholder upon his interest therein.[146]

As to the first of these suggestions, the mere fact of creating and controlling the corporation and setting forth the regulations controlling its issuance of stock would not seem to constitute any very compelling argument for sustaining such a tax. The mere fact that the state exercises the power of control suggested does not necessarily mean that the intangible prop-

141. Corry v. Baltimore, *supra* note 23; Hawley v. Malden, *supra* note 12; Town of St. Albans v. National Car Co., 57 Vt. 68 (1884).

142. *In re* Culver's Estate (Morrow v. Gould) 145 Iowa 1, 123 N.W. 743 (1909); Greeves v. Shaw, 173 Mass. 205, 53 N.E. 372 (1899); Kingsbury v. Chapin, 196 Mass. 533, 82 N.E. 700 (1907); State *ex rel.* Graff v. Probate Court of St. Louis County, 128 Minn. 371, 150 N.W. 1094 (1915); Gardiner *et al* v. Carter, 74 N.H. 507, 69 Atl. 939 (1908); Dixon v. Russell, 79 N.J.L. 490, 76 Atl. 982 (1910); Matter of Bronson, 150 N.Y. 1, 44 N.E. 707 (1896); Matter of Fitch, 160 N.Y. 87, 54 N.E. 701 (1899). See Baker v. Baker, Eccles and Company, 242 U.S. 394, 401, 37 S.Ct. 152, 61 L.Ed. 386 (1916).

143. "The corporation is the creature of state laws and those who become its members, as shareholders, are subject to the operation of those laws, with respect to any limitations upon their property rights and with respect to the right to assess their property interests for taxation." Matter of Bronson, *supra* note 142, at 9, 10.

"The true nature of a share of stock in a corporation is its conferring of membership in the corporation itself. The stock is a creature of the law that created the corporation, and its ownership depends solely upon the provisions of that law. The right of the owner of the stock is therefore, although intangible, a right especially created and guarded by the law of one state, is always within the power of that law, and must be regarded as within its taxing power. Beale, *op. cit. supra* note 6, at 602.

144. Corry v. Baltimore, *supra* note 23; Hawley v. Malden, *supra* note 12; State v. Travelers' Ins. Co., 70 Conn. 590, 4 Atl. 465 (1898); American Coal Co. v. County Commissioners of Allegahy County, 59 Md. 185 (1882); Town of St. Albans v. National Car Co., *supra* note 141.

145. "If shares of stock represented nothing but that which is intangible, it could with better reason be claimed that they must always follow the domicile of the owner and cannot be taxed elsewhere, but they represent the property of the corporation in which the capital stock is invested. *The owner of the stock is not merely the owner of a right to dividends, but he is owner of a proportionate share of the property of the corporation.* (Italics the writer's) Town of St. Albans v. National Car Co., *supra* note 141, at 98; State v. Travelers' Ins. Co., *supra* note 144; Faxton v. McCosh, 12 Iowa 527 (1861); In re Culver's Estate (Morrow v. Gould) *supra* note 142; American Coal Co. v. County Commissioners of Allegany County, *supra* note 144; Matter of Bronson and Matter of Fitch, both *supra* note 142.

146. Greeves v. Shaw and Matter of Bronson, both *supra* note 142. Perhaps more cases than otherwise merely assume the power to so tax without undertaking to explain the basis thereof. Whitney v. Ragsdale, 33 Ind. 107 (1870); Baltimore v. Baltimore City Passenger Ry. Co., 57 Md. 31 (1881); South Nashville Street Ry. Co. v. Morrow, 87 Tenn, 406, 11 S.W. 348 (1889); Abingdon Bank v. Washington County, 88 Va. 293, 13 S.E. 407 (1891); Union Bank v. Richmond, 94 Va. 316, 26 S.E. 821 (1897). See also Peppin, *op. cit. supra* note 134, at 663 and cases there cited.

erty right belonging to a non-resident shareholder is within that state's jurisdiction so as to justify a tax. The position of the state in this respect is little different from that which it occupies with relation to its municipal corporations. It creates them, it controls completely their organization and functioning, and it sets forth the conditions, restrictions, and regulations under which such municipal corporations may issue bonds, and in much the same sense that it controls the relation of a shareholder to a domestic corporation it controls the relation of the bondholder to the municipality.[147] If we add to this situation, particularly in connection with the application of a transfer or inheritance tax, the further fact that the bonds, be they municipal or state, are registered, and for their transfer there must be a transfer on the books of registry by the proper officer, it would seem that quite as strong a case exists for taxation in the case of the bonds as in the case of the stock.[148] Yet it is not to be contended since the *Farmers Loan and Trust* case that such a state may tax the bonds of a non-resident owner or their transfer. It is true that the relation of a shareholder to his corporation is essentially different from that of the bondholder to the municipal corporation issuing the bond,[149] but that does not alter the analogy in so far as reliance for the power to tax is placed alone upon the state's creation and control over the corporation and its power to issue stock as involved in this first basis, and in so far as the relationship is different it has a bearing on the power to tax only as involved in the second basis asserted.

It is sometimes further suggested in this connection that in order for the shareholder to sustain a claim against the corporation arising out of his ownership of stock, resort must be had to the laws and the courts of the state of the corporate domicile. This argument is not more compelling, however, than in the case of a creditor resorting to the courts of the debtor's state or those of the state in which the landed security is located, neither of which is permitted to control.[150] Furthermore, the compulsion to resort to the courts of the state of incorporation is much less than in the case of the state or municipal bondholder who can never by any chance have his action in another jurisdiction.[151]

As to the second basis, it is submitted that the emphasis upon the ownership of or interest in the property of the corporation is unsound since it is well established that the shareholder does not own the property of the corporation but only has a right in the nature of a chose to participate in the

147. Bliss v. Bliss, *supra* note 135; *cf.* Herbert v. Simson, 220 Mass. 480, 108 N.E. 65 (1915).

148. *Ibid.* 206, 207.

149. For a comment upon the diminishing differences between the bondholder and the stockholder in relation to the corporation see Comment, *Double Inheritance Taxation of Intangibles* (1930), 40 YALE L.J. 99, 104.

150. Farmers' Loan & Trust Co. v. Minnesota, *supra* note 16; Baldwin v. Missouri, *supra* note 17.

151. Bliss v. Bliss, *supra* note 135, at 206; Dissent of Mr. Justice Holmes in Farmers' Loan & Trust Co. v. Minnesota, *supra* note 16, at 218.

surplus earnings, if any, and upon final dissolution, in the assets of the corporation. This position is strengthened by the holding of the Court in *Rhode Island Hospital Trust Co. v. Doughton*[152] denying any right to North Carolina to tax the transfer of shares of stock of a non-resident decedent in a foreign corporation having two-thirds of its property in the state. The Court emphatically repudiated the contention that the shareholder had any such interest in the property of the corporation as would give that state jurisdiction over the shares of stock merely by virtue of having the corporate property within its territorial limits.[153] The holding would clearly have been the same had all the property and all the business of the corporation been within the state. Conversely, no exception has been made in the cases upholding the tax at the domicile of the corporation on the ground that the property and business of the corporation are not within the state,[154] unless such may be said of cases like *Matter of Cooley*[155] where the corporation is incorporated in more than one state and the valuation of the shares for purposes of taxation is prorated among the states of incorporation in proportion to corporate property and business in the respective states. This position is taken, however, not because the property is outside the state, or that its absence from the state would affect the state's power, but be-

152. 270 U.S. 69, 46 S.Ct. 256, 70 L.Ed. 475, 48 A.L.R. 1374 (1926). *Cf.* National Savings & Loan Ass'n v. Gillis, 35 F. (2d) 386 (S.D. Idaho 1928); Oregon Mortgage Company, Limited, v. Gillis, 40 F (2d) 744 (S.D. Idaho 1930).

153. See cases cited *infra* note 174.

154. State v. Gloster Lumber Co., 147 Ark. 461, 227 S.W. 770 (1921). See Welch *et al.* v. Treasurer and Receiver General, 223 Mass. 87, 111 N.E. 774 (1916). Many cases exist in which a substantial part of the corporate property is outside the state and that is held to make no difference and require no reduction in the valuation of the shares. State v. Bodcaw Lumber Co., 128 Ark. 505, 194 S.W. 692 (1917); First National Bank of Junction City v. Moon, 102 Kan. 334, 170 P. 33, L.R.A. 1918 C 986 (1918); First National Bank of Weiser v. Washington County, 17 Idaho 306, 105 P. 1053 (1909); American Coal Co. v. County Commissioners of Allegany County, *supra* note 144; Commercial National Bank v. Chambers, 21 Utah 324, 61 P. 560, 50 L.R.A. 346 (1900). See 3 COOLEY, *op. cit. supra* note 4, at 989. The same holding has been followed where part or all of the capital of the corporation is invested in property exempt from state taxation. Cleveland Trust Co. v. Lauder, 184 U.S. 111, 22 S.Ct. 394, 46 L.Ed. 456 (1902); Roberts v. Automobile Ins. Co. of Hartford, 89 Conn. 181, 93 Atl. 243 (1915); Daniel v. Bank of Clayton County, 154 Ga. 282, 114 S.E. 210 (1922); Des Moines National Bank v. Fairweather, 191 Iowa 1240, 181 N.W. 459 (1921); Peters Trust Co. v. Douglas County, 106 Nebr. 877, 184 N.W. 812 (1921); Mechanics' National Bank of Trenton v. Baker, 65 N.J.L. 113, 46 Atl. 586 (1900); Pullen v. Corporation Commission, 152 N.C. 548, 68 S.E. 155 (1910); Brown v. Hennessey State Bank, 78 Okla. 141, 189 P. 355 (1920); Carolina National Bank of Columbia v. Spigner, 106 S.C. 185, 90 S.E. 748 (1916); Union Bank of Richmond v. City of Richmond, *supra* note 146; County of Sussex v. Jarratt, 129 Va. 672, 106 S.E. 384 (1921). See also 3 COOLEY, *op. cit. supra* note 4, at 989. But see San Francisco v. Mackay, 22 Fed. 602 (C.C. Cal. 1884).

155. 186 N.Y. 220, 78 N.E. 939, 10 L.R.A. (N.S.) 1010 (1906); Kingsbury v. Chapin, Gardiner *et al.* v. Carter, both *supra* note 142; Matter of Thayer, 193 N.Y. 430, 86 N.E. 462 (1908). See Matter of Willmer, 153 App. D. N.Y. 804, 138 N.Y.S. 649 (1912).

156. "It needs no particular illumination to demonstrate that if we take such a view [that the whole value of the shares should be taxed] it will clearly pave the way to a corresponding view by the authorities and courts of Massachusetts [in which the company is also incorporated] . . . . and that a person holding stock should be assessed at the full value of his stock in each jurisdiction . . . . And if the corporation had

> been compelled for sufficient reasons to take out incorporation in six or twenty other states each one of them might take the same view and in-

cause of incorporation in two or more states, for reasons of policy and interstate comity, and to avoid the evils of multiple state taxation necessarily involved in any other holding.[156]

Considerable reliance is to be found in cases upholding the tax here in question upon the analogous situation in the case of *Tappan v. Merchant's National Bank*[157] and other similar cases, taking the position that "in corporations over which the states have control, their legislatures may fix the situs of their stock for purposes of taxation, as Congress has in the case of stock of national banks."[158] While the general reasoning employed in the cases is substantially the same as that used by the United States Supreme Court in the *Tappan* case, the analogy is not at all complete, since without the specific authorization by act of Congress[159] for the states to tax no such tax could be levied at all,[160] and the provision in effect operates not only as an author-

sist upon the same exaction until the value of the property was in whole or large proportion exhausted in paying for the privileges of succession to it. While undoubtedly the legislative authority is potent enough to prescribe and enforce double taxation, it is plain that, measured by ordinary principles of justice, the result suggested would be inequitable and might be seriously burdensome. Double taxation is one which the courts should avoid whenever it is possible within reason to do so. It is never to be presumed . . . . I see nothing in the statute which prevents us from paying a decent regard to the principles of *interstate comity,* and from adopting a *policy* which will enable each state fairly to enforce its own laws without oppression to the subject." Matter of Cooley, *supra* note 155, at 226. (Italics the writer's)

157. 19 Wall, 490, 22 L.Ed. 189 (1873); Corry v. Baltimore, *supra* note 23, the leading case upholding the right of the state of incorporation to tax shares owned by non-residents, relies most strongly upon National Bank v. Commonwealth, 9 Wall. 353, 19 L.Ed. 701 (1870), and Tappan v. Merchants' National Bank, both of which are national bank stock cases.

158. Maxey, *Situs of Personal Property for Purposes of Taxation,* 3 MINN. L.REV. 217, 228; Corry v. Baltimore, *supra* note 23, at 475; Town of St. Albans v. National Car Co., *supra* note 141, at 81.

159. U.S. Rev. Stat. sec. 5219; 12 U.S.C.A. sec. 548.

160. "That shares of stock in a national bank are not subject to taxation without the consent of Congress is conceded" Talbott v. Board of Commissioners of Silver Bow County, 139 U.S. 438, 440, 11 S.Ct. 594, 35 L.Ed. 210 (1891). "It is settled that the relation of the national banks to the United States and the purposes intended to be subserved by their creation are such that there can be no taxation, by or under state authority, of the banks, their property, or the shares of their capital stock otherwise than in conformity with the terms and restrictions embodied in the assent given by Congress to such taxation." Des Moines National Bank v. Fairweather, 263 U.S. 103, 106, 44 S.Ct. 23, 68 L.Ed. 191 (1923).

"Of course, it must be conceded the settled law of the land, as national banks are instrumentalities of government and moneys invested in the shares of stock of such governmental agencies, it is utterly and absolutely beyond the power of the state to tax the same at all, unless thereunto authorized and empowered by the sovereign government." Central National Bank of Topeka, Kansas v. McFarland, 20 F. (2d) 416 (1st D. Kan. 1927). See also People v. Weaver, 100 U.S. 539, 25 L.Ed. 705 (1879); Rosenblatt v. Johnson, 104 U.S. 462, 26 L.Ed. 832 (1881); Mercantile National Bank v. City of New York, 121 U.S. 138, 7 S.Ct. 826, 30 L.Ed. 895 (1887); National Bank v. Owensboro, 173 U.S. 664, 19 S.Ct. 537, 43 L.Ed. 850 (1899); First National Bank of Gulfport v. Adams, 258 U.S. 362, 42 S.Ct. 323, 66 L.Ed. 661 (1922); First National Bank v. Anderson, 269 U.S. 341, 46 S.Ct. 135, 70 L.Ed. 295 (1926); and many other cases. But for a view that power did exist to tax without such authorization and for an extended discussion of the problems involved, see Traynor, *National Bank Taxation* (1929) 17 CALIF. L. REV. 83, and Schweppe, *State Taxation of National Bank Stocks; Uncertainty of its Constitutional Basis* (1922), 6 MINN. L. REV. 219. Whether the Act of Congress serves to authorize a tax that could not otherwise have been levied, or whether as suggested by Schweppe at p. 222 on the basis of Van Allen v. Assessors, 3 Wall. 573, 18 L. Ed. 229 (1865), the power existed but Congress through some theory ization but also as a restriction against discriminatory taxation[161] and against such shares being taxed elsewhere than in the state in which the corporate enterprise is located. The national bank cases stand for the proposition that the government is creating the banks as agencies or instrumentalities for the conduct of certain of its functions, that for that reason and that reason only, states would not be permitted to tax without its authorization and that in giving its consent it may provide the extent to which, and the jurisdictional basis upon which, the states may tax, and provide a reasonable means of restricting that taxation to a single jurisdiction.

In the state cases the state is not restricting the taxation of shares of stock in its corporations to a single state, as Congress is doing as to National bank shares, a thing which the state has no power to do,[162] but is merely asserting that it will tax by virtue of having created the corporation regardless of where the owner of the shares may reside and also regardless of where the corporate enterprise is being carried on.

A denial of the power of the state of a corporation's domicile to tax its shares owned by non-residents would not be inconsistent with a continuation of the existing doctrine with respect to the taxation of shares of stock in national banks.

If the doctrine of singular taxation is to prevail as to both tangible and intangible property, as would appear to be the ultimate goal aimed at by the Court in its recent pronouncements, there seems to be no good reason why an exception should be made with respect to shares of stock. In arriving at a solution of the problems involved, the principal difficulties are encountered in determining which shall prevail, the corporate domicile above discussed, or the domicile of the shareholder.

(d) As in the case of a tax at the corporate domicile, a tax at the domicile of the shareholder is practically universally recognized[163] on the basis of the maxim *mobilia sequuntur personam* as in the case of other intangible property. There is no gainsaying the fact that the property interest of the shareholder is an intangible one in the nature of a chose.[164] It is not sub-

of concurrent power could limit the states' power in that regard, the relation to and power over national banks and their shares by Congress is fundamentally different from that of a state over the corporations it creates.

161. "As Congress was conferring a power on the states which they would not otherwise have had, to tax these shares, it undertook to impose a restriction on the exercise of that power, manifestly designed to prevent taxation which should discriminate against this class of property as compared with other moneyed capital. People v. Weaver, *supra* note 160, at 543.

162. Hawley v. Malden, *supra* note 12, at 12, 13, raises without answering the question whether a state in creating a corporation could fix the situs of its shares for purposes of taxation, by whomsoever owned, so as to exclude taxation by other states in which their owners might reside.

163. See Note L.R.A. 1915C 903, 942 and cases there collected.

164. Hawley v. Malden, *supra* note 12, at 12; Union National Bank v. Chicago, Fed. Cas. No. 14,374, at p. 619 (C.C. N.D. Ill. 1871); Norrie *et al.* v. Kansas City Southern Ry. Co., 7 F. (2d) (S.D. N.Y. 1925) 158, at 159; Herbert v. Simson, *supra* note 139, at 482; I MORAWETZ, PRIVATE CORPORATIONS (2d ed. 1886) 225; 1 COOK, CORPORATIONS (8th ed. 1923) 12.

stantially different from other intangible property, and it appears that the same reasons that prevail with the Court for upholding a tax at the owner's domicile in the case of other intangibles should apply with equal force here. On the contrary, there seems to be no compelling reason for continuing the tax at the corporate domicile when the shares are held by non-residents. Such a state may be shorn of this power and still be left with ample power to tax everything within its jurisdiction. As heretofore suggested it may levy a franchise tax upon the corporation for the privilege of incorporation or of doing business therein, it may tax all property of the corporation within its territorial limits as any other state may do, it may subject to taxation the income or receipts from the business of the corporation, and it may tax such shares of stock as are owned by resident shareholders.

Looking at the recent United States Supreme Court cases decided prior to the *Farmers Loan and Trust* and *Baldwin* cases, some comfort may be found for the advocates of a tax in each jurisdiction. In the *Frick* case the Court recognized the well settled law of the time that both states could tax the transfer of such shares of stock but gave precedence to the tax of the corporate domicile by requiring that Pennsylvania, the state of the decedent shareholder's domicile, first must deduct the amount of the tax paid to the states of incorporation in fixing the value upon which to levy its transfer tax. This might seem to indicate that the Court regarded the claim of the corporate domicile as superior to that of the shareholder's domicile. In the more recent decision in the case of *Blodgett v. Silberman,* the tax at the domicile of the shareholder was sustained, despite a simultaneous taxing at the corporate domicile, without any mention of the matter of making a deduction. It appears, however, that the state court[165] had ruled that such a deduction should be made, and as no such issue was raised before the Supreme Court its failure to mention the matter does not necessarily indicate an inclination to recede from the position taken in the *Frick* case. It does, however, serve to indicate that the Court was still committed to the doctrine of taxability at the shareholder's domicile at a very recent date.

Since the determination of the *Farmers Loan and Trust* and *Baldwin* cases by the Supreme Court, questions have arisen in various states as to the taxation of shares of stock in domestic corporations, or their transfer, when owned by non-residents, and with varying results. In Kentucky the Circuit Court of Jefferson County, on December 13, 1930, held in the case of *Kentucky State Tax Commission et al v. Equitable Trust Co. of New York, etc.,* that Kentucky, the state of incorporation, could not tax the transfer of such shares upon the death of their non-resident owner.[166] Thereafter the Supreme Judicial Court of Maine arrived at the opposite conclusion in

165. Silberman v. Blodgett, 105 Conn. 192 217, 134 Atl. 778 (1926).

166. U.S. Daily, Dec. 22, 1930, at 3219.

the case of *State v. First National Bank of Boston, Administrator of the Estate of Edward H. Haskell,*[167] taking the position that the doctrine of the recent Supreme Court cases has no application to shares of stock. More recently the Supreme Court of Minnesota has upheld such a tax,[168] though the transfer of the shares had already been taxed at the domicile of the decedent shareholder in Wisconsin, relying largely upon *Corry v. Baltimore*[169] and *Frick v. Pennsylvania,* and taking the position that there is nothing in *Farmers Loan and Trust Co. v. Minnesota* or *Baldwin v. Missouri* to indicate that the United States Supreme Court has receded from its holding in the *Frick* case which gave precedence to the tax at the corporate domicile. The court also seemed to place some emphasis upon the fact that the corporate business was being conducted within the state and substantially all of the corporate property was located therein. Rulings of a similar tenor emanating from other official sources have appeared from time to time.[170] The matter of applying a property tax to such shares of a domestic corporation when owned by a non-resident was thought to be due for determination by the United States Supreme Court in the case of *Susquehanna Power Co. v. State Tax Commission of Maryland,*[171] and it was expected that such decision would also settle the matter with respect to the application of a transfer tax as the Court seems inclined to put the two on the same basis. The case has been decided, however, without giving any authoritative answer to the question herein discussed. The tax involved, which was called a capital stock tax and assessed against the corporation in first instance, but with an authorization to charge it against the stockholders, was held valid as a tax in lieu of any other tax on the corporation's personal property and it was held unnecessary to determine the rights of the non-resident stockholders in the matter.[172] It is to be expected that some other

167. U.S. Daily, March 21, 1931, at 172.

168. *In re* Estate of Lund (Benson v. State), U.S. Daily, May 18, 1931, at 652.

169. *Supra* note 23.

170. Attorney General Ward of New York, in response to a request from the State Tax Commission, ruled that notwithstanding the decision of the United States Supreme Court in the Farmers' Loan and Trust Co. case, the state's tax on the transfer of shares of stock in domestic corporations owned by non-residents should be continued. U.S. Daily, May 22, 1930, at 934. A similar ruling was more recently given by Attorney General Parker of Utah, asserting that the decision of the Supreme Court of the United States in the Farmers' Loan & Trust Co. case had no application to corporate stock. U.S. Daily, Dec. 16, 1930, at 3154. In connection with these cases and rulings, cf. Guaranty Trust Co. of New York *et al.* v. State *et al.*, 36 Ohio App. 45, 172 N.E. 674 (1930), sustaining a tax by Ohio upon stock in a national bank in that state owned by a non-resident.

171. 282 U.S. ...., 51 S.Ct. 436, 75 L.Ed. 517 (1931). The Court of Appeals of Maryland, 151 Atl. 39 (1930), had sustained the tax.

172. The Maryland statute provided for a tax on the capital stock of every domestic corporation to be collected from the corporation but which when paid may be charged to the stockholders and made a lien upon their stock. In fixing the value the value of the corporation's real estate, which was otherwise taxed, was to be deducted. There was no separate tax on the personal property of the corporation. In answer to the claim that as a tax on the shareholder, all shares being held by a non-resident, it amounted to a denial of due process as determined by the Supreme Court in Safe Deposit & Trust Co. of Baltimore v. Virginia, and Farmers' Loan & Trust Co. v. Minnesota, the state court, *supra* note 171, at 43, 44, held that

case involving this issue, such as the Kentucky or Maine cases above referred to, will reach the Court soon[173] and that we may have an authoritative determination of the matter at an early date.

In addition to the four possibilities above discussed for the taxation of shares of stock it might be pointed out, as a further exaggeration of the existing evils, that certain other possible taxes are at least conceivable. The contention has been frequently urged in the past that presence of corporate property and the conduct of corporate business within a state should be a sufficient basis for a tax upon the corporate shares or their transfer. Most courts[174] were inclined to look upon the contention with disfavor, however, and since the decision of *Rhode Island Hospital Trust Co. v. Doughton*[175] by the United States Supreme Court, the invalidity of a tax on such basis is well recognized.

It is possible that the doctrine of business situs could be invoked for the purpose of establishing a situs of shares of stock for purposes of taxation,[176] though apparently it has not been done in the past.

Added to all these possibilities as to transfer taxes, there exists the Federal Estate Tax[177] which is applicable to increase still further the enormous burden which may be imposed in such a case and which serves to indicate the importance of restricting state taxation to a single jurisdiction. As the Court has determined in the case of notes, bonds, and bank deposits, that taxation should be restricted to a single jurisdiction, and that the domicile of the owner, it seems the same result should be reached in the case of corporate stock.

The above problems of taxing credits with a business situs and shares of

these cases had no application to shares of stock and upheld the tax in reliance upon Corry v. Baltimore, *supra* note 23. The Supreme Court of the United States, referring to the tax being in lieu of any other tax on the personal property of the corporation and thus valid. said, "The tax was thus sustained on an adequate state ground, and it is unnecessary to consider the objections made to it on constitutional grounds. None of them is directed at the statute viewed, as the state court has construed it, as imposing a tax on the personal property of the appellant (corporation). Nor is it necessary on this record to consider how far any objection made may be availed of by the non-resident stockholder, in the event of an attempted enforcement of the provisions of the statute which authorize the tax to be charged to stockholders, and create a lien upon the stock." *Supra* note 171, 51 S.Ct. at 437, 438.

173. An appeal from the decision of the Maine Court has been filed with the Supreme Court. U.S. Daily, June 29, 1931, at 998.

174. People v. Dennett, 276 Ill. 43, 114 N.E. 493 (1916); People v. Cuyler, 276 Ill. 72, 114 N.E. 494 (1916); People v. Blair, 276 Ill. 623, 115 N.E. 218 (1917); State *ex rel.* Bankers Trust Co. *et al.* v. Walker *et al.*, 70 Mont. 484, 226 P. 894 (1924); Estate of Shepard, 184 Wis. 88, 197 N.W. 344 (1924); Tyler v. Dane, 289 F. 843 (W.D. Wis. 1923); and many other cases. See collection of cases in Note (1926) 42 A.L.R. 413. See also Note (1925) 38 HARV. L. REV. 809, 813, and cases there cited.

175. *Supra* note 148.

176. See State v. Harrington, *supra* note 11. Cf. Stanford v. City and County of San Francisco, 131 Cal. 34, 63 Pac. 145 (1900). See also Kroeger, *op. cit. supra* note 134, at 126; Peppin, *op. cit. supra* note 134, at 670.

177. The provision in the federal Revenue Act of 1926, Sec. 301 (b), allowing a credit to the extent of 80% of the federal tax due for any estate, inheritance, legacy or succession tax paid to a state serves to reduce somewhat the burden that otherwise would be imposed.

corporate stock are perhaps the most pressing of any left in the whole field for the Court's determination. The solution of these problems herein suggested may at first glance appear a bit inconsistent because of the fact that in the latter the maxim *mobilia sequuntur personam* would be permitted to govern while in the former it would not. But the results should be reached, it is submitted, largely aside from matters of fiction and on the basis of fact. The facts in the two situations would seem to demand that the maxim give way in the one case but not in the other.

DOES ANY DISTINCTION REMAIN BETWEEN THE BASIS FOR A PROPERTY TAX AND THAT FOR A TRANSFER TAX?

No effort has been made in this article to carry out any clear-cut distinction in the various situations between the requisites for a property tax and for a transfer or inheritance tax. While once recognized by the cases,[178] the distinction now seems practically to have ceased to exist. In a case like *Baldwin v. Missouri*, where bonds, notes, and bank deposits are involved, it may become necessary to secure ancillary letters of administration in order to complete the transfer. The notes and bonds, for example, in that case were really within Missouri for purposes of such administration and were subjected to its power to that extent. If the tax is not one on the property, but an excise exacted for the privilege of transfer or succession, the contention that a state situated as was Missouri in that case has a proper basis on which to tax is not without some merit. But the result of the recent cases decided by the United States Supreme Court in denying validity to such taxes seems to indicate that there is no longer any difference to be taken between the requisites for jurisdiction to levy a property tax and an inheritance or transfer tax. The assertion of the Court in *Buck v. Beach*,[179] referred to with approval in *Wheeler v. Sohmer*,[180] to the effect that such a distinction exists would seem no longer to represent the law. The Court now cites interchangeably property tax cases and transfer tax cases as being equally authoritative for either type of tax,[181] quite in contrast with the

178. United States v. Perkins, 163 U.S. 625, 16 S.Ct. 1073, 41 L.Ed. 287 (1896); Magoun v. Illinois Trust & Savings Bank, 170 U.S. 283, 18 S.Ct. 594, 42 L.Ed. 1037 (1898); Knowlton v. Moore, 178 U.S. 41, 20 S.Ct. 747, 44 L.Ed. 969 (1900); Eidman v. Martinez, 184 U.S. 578, 22 S.Ct. 515, 46 L.Ed. 697 (1902); Moore v. Ruckgaber, 184 U.S. 593, 22 S.Ct. 521, 46 L.Ed. 705 (1902); Buck v. Beach, *supra* note 65; In re Waldron's Estate, *supra* note 6; State v. Griffith, 245 Ill. 532, 92 N.E. 313 (1910); Matter of Knoedler, 140 N.Y. 377, 35 N.E. 601 (1893).

179. *Supra* note 65, at 408.

180. *Supra* note 5, at 440.

181. The Court in Frick v. Pennsylvania, *supra* note 3, relied completely upon property tax cases. See Seefurth, *Recent Limitations on the Power to Impose Inheritance and Estate Taxes* (1925) 25 COL.L.REV. 870, 873, 874. Reliance by the Court in the Farmers' Loan and Trust Co. and Baldwin cases was strongly upon property tax cases, particularly the Union Refrigerator Transit Co. case.

"The more recent cases, Frick v. Pennsylvania, Blodgett v. Silberman, and Rhode Island Hospitol Trust Co. v. Doughton, are clear in the enunciation of the principle that to measure earlier practice of making a distinction to show that the one or the other type of case was not in point.[182] The doctrine of the Court from the *Frick* case to the present clearly has seemed to be that the property involved by which the tax is measured must be within the state seeking to tax in the same fashion for a transfer tax as for a property tax. As asserted in the *Frick* case, ". . . to impose either tax the state must have jurisdiction over the thing that is taxed . . ."[183] The same idea is expressed by the Court in the *Rhode Island Trust Co.* case where it says, "The tax here is not upon property, but upon the right of succession to property, but the principle that the subject to be taxed must be within the jurisdiction of the state applies as well in the case of a transfer tax as in that of a property tax."[184] The language of the Court appears to substantiate this position and carry the doctrine even further in *Baldwin v. Missouri* with the assertion that "The bonds and notes, although physically within Missouri, under our former opinions were choses in action with situs at the domicile of the creditor . . . As they were not within Missouri for tax purposes, the transfer was not subject to her power."[185]

Taking the position that the jurisdictional basis for the levy of the two taxes is now the same does not mean that one must lose sight of the fact that certain exceptional situations exist where a transfer tax may be sustained but where a property tax would be held invalid. Such holdings are based, not upon any lack of the requisite jurisdiction, but upon the exempt character of the property, or upon implied restrictions for the protection of government instrumentalities, as are involved in the case of a state tax upon the transfer of United States bonds:[186] a federal estate tax upon the transfer of state bonds;[187] a state transfer tax upon property bequeathed to the United States;[188] or a federal estate tax upon bequests made to a state.[189]

a succession tax by property values, there must be jurisdiction over the property, and in those cases succession tax decisions and property tax decisions are interchangeably cited. I submit that it remains only to state definitely, that the privilege character of succession taxation has no further influence in extending the jurisdiction of the state to measure a succession tax by the value of property which it has no power to tax directly." Kroeger, *op. cit. supra* note 134, at 135:

182. Buck v. Beach, *supra* note 65, at 408; Mr. Justice McKenna's dissent in Wheeler v. Sohmer, *supra* note 5, at 446; cases cited *supra* note 178.

183. *Supra* note 3 at 492.

184. Rhode Island Hospital Trust Co. v. Doughton, *supra* note 152, at 80.

185. *Supra* note 17, at 593. It is to be noted that ancillary letters of administration with will annexed were issued by the Probate Court of Lewis County, Missouri, and the Missouri Supreme Court held that the bonds, notes, etc., were properly and lawfully in the custody of the Missouri administrator, and properly within the jurisdiction and control of the probate court in Missouri. State v. Estate of Baldwin, *supra* note 97, at 215.

186. Plummer v. Coler, 178 U.S. 115, 20 S.Ct. 829, 44 L.Ed. 998 (1900).

187. Griener v. Llewellyn, 258 U.S. 384, 42 S.Ct. 324, 66 L.Ed. 676 (1922).

188. United States v. Perkins, *supra* note 178.

189. Snyder v. Bettman, 190 U.S. 249, 23 S.Ct. 803, 47 L.Ed. 1035 (1903).

Aside from exceptional situations such as these, the distinction seems to be no longer recognized and the necessary jurisdictional basis for the one seems to be the same as that for the other.

CONCLUSION

In conclusion, it may be said that while the Supreme Court has by no means entirely ended the evils of multiple state taxation of intangible property or its transfer, it has taken a long stride in that direction in the *Farmers Loan and Trust* and *Baldwin* cases. And while the results of those cases were not arrived at without encountering certain more or less serious constitutional obstacles which the Court avoided rather than overcame by the application of conceptions of justice, economic fairness and policy drawn from its interpretation of the due process clause of the Fourteenth Amendment, no greater obstacles would appear to bar its progress in extending the principles announced so as to eliminate many or most of the remaining evils of multiple state taxation.

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