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MULTIPLE TAXATION BY THE STATES —
WHAT IS LEFT OF IT?

UNTIL very recently it was never supposed, at least by the courts, that there was any general rule that the same property could not be taxed by more than one state. The fact that the same property was subjected to such a double or more than double tax burden was generally recognized as somewhat unfortunate; but it was not regarded as a situation where the courts could properly interfere. The position of the Supreme Court in the matter is well typified by the bland statement of Mr. Justice Brandeis in answer to the argument that the tax sustained by the court resulted in the same assets being taxed in two states: "To this it is sufficient to say that the Fourteenth Amendment does not prohibit double taxation."¹

But these happy days for the states are gone — and apparently forever. No longer is the Court indifferent to such multiple taxation; in fact, the present situation is that all taxation of the same property by two or more states is regarded as at least presumptively contrary to the Fourteenth Amendment. It is the purpose of this article to review briefly the steps in this very radical change, and then to seek to ascertain whether any such multiple taxation of the same property can still run the gauntlet of the Court's present interpretation of this vague but perhaps too useful provision of the Federal Constitution.

As for tangible property the problem is substantially solved. As early as 1905, in *Union Refrigerator Transit Co. v. Kentucky*,² the Court held definitely that tangible property permanently situated outside the state of domicile of the owner is subject to taxation only in the state where so permanently located, and not by the state of the owner's domicile. The ruling was extended to inheritance taxation twenty years later in *Frick v. Pennsylvania*,³ where the state of domicile of a decedent was forbidden to impose an inheritance tax on tangible personal property permanently located outside that state, because such property was outside the taxing

¹ *Cream of Wheat Co. v. Grand Forks County*, 253 U. S. 325, 330 (1920).

² 199 U. S. 194.

³ 268 U. S. 473 (1925).

jurisdiction of the state of domicil for any purpose. Since there has never been any serious contention that real estate can be taxed directly or indirectly by any other jurisdiction than that in which it is located, these cases seem to have definitely ended multiple taxation of tangible property.⁴

Not so early nor so easily was multiple taxation of intangible property restricted. The reason for this is fairly obvious. Tangible property always has an actual though not necessarily a permanent location, but a debt is a mere relation between the parties and has no such location in fact. The same rule applies to a considerable degree to all other forms of intangible property. To speak then of the location or *situs* of intangible property for taxation or any other purposes, as the courts indeed very frequently do, is to indulge in mere fiction or at the most a distinctly conventional and unrealistic use of that word.

Nevertheless, it has for a long time been thoroughly settled that a debt is normally to be taxed at the domicil of the creditor rather than that of the debtor.⁵ Various exceptions to that rule are, or have been at one time, recognized, but each involves at least a possibility of double taxation of the same debt, since there has seldom been any doubt of the power of the taxing jurisdiction where the creditor is domiciled to tax the debt. This means multiple taxation of intangible property. And yet, when the Supreme Court invalidated multiple taxation of tangible property, it did not immediately follow suit with respect to intangibles, the obvious reason being the lack of any real *situs* for the latter kind of property. In recent years, however, the Court has changed its view. It has purported to do so by discovering a *situs* for these intangibles under the hoary but absurd maxim, *mobilia sequuntur personam*, that is to say, intangible property is situated at the domicil of its owner and is taxable there.

To much of the reasoning in these cases there is, as the Court itself has recognized, but one answer: the maxim is only a means to an end.⁶ The truth is that the Court has come to feel that multiple

⁴ Such slight remnants as may still exist will be mentioned in the discussion which follows.

⁵ *State Tax on Foreign-Held Bonds*, 15 Wall. 300 (U. S. 1872); *Kirtland v. Hotchkiss*, 100 U. S. 491 (1879). But see *Wheeler v. Sohmer*, 233 U. S. 434 (1914).

⁶ This is clearly indicated by Mr. Justice Sutherland, in *First Nat. Bank of Boston v. Maine*, 284 U. S. 312, 328 *et seq.* (1932).

taxation of intangible property is just as objectionable from an economic standpoint as if the property were tangible. It is, therefore, tending to reach the conclusion that only one tax will be allowed, and also that the jurisdiction permitted to impose the tax shall be that of the domicil of the creditor or other owner of the intangible property — not really because the intangible is situated there but simply as a matter of policy.

The first of these recent cases⁷ to show definitely the change in attitude as to the taxation of intangibles is *Farmers Loan & Trust Co. v. Minnesota*.⁸ Here it was held that Minnesota could not impose an inheritance tax upon the transfer of bonds issued by the state itself and by certain of its municipal corporations, which bonds had belonged to a decedent domiciled in the State of New York, the bonds being kept at his domicil. The Court rejected the argument that Minnesota was entitled to tax the transfer of these bonds because its law was necessary to give them validity, and held that only New York could impose an inheritance tax with respect to them.

The doctrine of this case was carried still further in *Baldwin v. Missouri*,⁹ in which Missouri was not allowed to tax the transfer by death of Missouri bank accounts, securities issued by Missouri citizens, and other securities, all kept in Missouri, but owned by a decedent domiciled in Illinois. The Court thus adhered to its previous position that securities are to be treated for taxation purposes as mere evidences of indebtedness rather than as themselves tangible property.¹⁰

*Beidler v. South Carolina Tax Comm.*¹¹ followed. A resident of Illinois had owned all the stock in a South Carolina corporation doing business in that state and had made very large advances to that corporation in order to enable it to carry on its business. No attempt was made by the representatives of his estate to resist a South Carolina tax upon the transfer of the stock of this corpora-

⁷ For a more general discussion of these cases, see Lowndes, *The Passing of Situs — Jurisdiction to Tax Shares of Corporate Stock* (1932) 45 HARV. L. REV. 777. See also Lowndes, *Spurious Conceptions of the Constitutional Law of Taxation* (1934) 47 HARV. L. REV. 628.

⁸ 280 U. S. 204 (1930).

⁹ 281 U. S. 586 (1930).

¹⁰ *Buck v. Beach*, 206 U. S. 392 (1907); *Blodgett v. Silberman*, 277 U. S. 1 (1928).

¹¹ 282 U. S. 1 (1930).

tion. They did contend, however, that the transfer of the indebtedness owed by the corporation to the decedent was not taxable by South Carolina, and this contention was sustained by the Federal Supreme Court, holding that such transfer was taxable only by Illinois.

The last of this series of cases, and in some respects the most important, is *First Nat. Bank of Boston v. Maine*.¹² The Court invalidated a tax by the state of incorporation upon a transfer of stock by a nonresident decedent, upon the ground that such transfer could be taxed only by the state of his domicil. The Court recognized that while corporate stock is not exactly a chose in action, it is closely analogous to it, and that the objections to multiple taxation of credits are likewise applicable to stock. It was conceded that all such intangible property has no actual *situs*, and though quoting the maxim, *mobilia sequuntur personam*, the Court plainly realized that it was deciding a question solely of policy.

It may perhaps be urged that the still more recent case of *Burnet v. Brooks*¹³ represents a change of view by the Court toward again permitting such multiple taxation, but it is not believed that this is the case. Here a nonresident alien, now deceased, had kept foreign and domestic bonds, also stock of a foreign corporation, in the United States. It was held that these securities were all to be included in the measure of the federal estate tax. The Court, speaking through Mr. Chief Justice Hughes, said that Congress must have intended to tax these securities, since it was commonly supposed at the time the taxing act was passed that they were within the taxing power of the jurisdiction where they were kept, and that such supposition was justified by previous decisions of the Court then in apparently good standing. But one would still assume that such tax would, under the decisions of the Court just discussed, be contrary to the Fifth Amendment just as similar taxes by the states had been held to be contrary to the Fourteenth Amendment. The Court held, however, that the limitations of the powers of the states were not applicable to the national government, which, unlike the states, is a sovereignty in the international sense.¹⁴

¹² 284 U. S. 312 (1932).

¹³ 288 U. S. 378 (1933), Note (1933) 47 HARV. L. REV. 307.

¹⁴ Compare the doctrine of *Cook v. Tait*, 265 U. S. 47 (1924).

Whatever may be thought of this distinction,¹⁵ it is clear that the Court did not intend in any way to modify the decisions previously discussed as to the limitations upon the power of the states. The Court made this intention explicit:

"The decisive point is that the criterion of state taxing power by virtue of the relation of the States to each other under the Constitution is not the criterion of the taxing power of the United States by virtue of its sovereignty in relation to the property of nonresidents. The Constitution creates no such relation between the United States and foreign countries as it creates between the States themselves.

"Accordingly, in what has been said, we in no way limit the authority of our decisions as to state power. We determine national power in relation to other countries and their subjects by applying the principles of jurisdiction recognized in international relations. Applying those principles we cannot doubt that the Congress had the power to enact the statute. . . ." ¹⁶

It may be contended that all the cases just discussed, since they involve inheritance or estate taxes, are not applicable to property taxes. This argument cannot, however, be sustained. Any governmental unit may properly use as a measure of an inheritance tax, property which is within its taxing jurisdiction for property tax purposes, and *vice versa*. When the Court decides that a state may not impose an inheritance tax measured by certain property, it is necessarily deciding that such property is not subject to direct taxation by the same jurisdiction. While there are one or two previous intimations by the Court that the same rules as to jurisdiction do not apply to property and inheritance taxes,¹⁷ yet any such idea was definitely repudiated in *Frick v. Pennsylvania*,¹⁸ where the Court pointed out that inheritance and property taxes are both dependent upon jurisdiction of the property. Indeed, *First Nat. Bank of Boston v. Maine*¹⁹ clearly announced the same proposition, citing the *Frick* case as conclusive on the point.

The Court is therefore definitely committed to the proposition that only the domicil of the creditor may tax the transfer of securities or the securities themselves. That this represents a

¹⁵ See Note (1933) 47 HARV. L. REV. 307, 310-11.

¹⁶ 288 U. S. at 405.

¹⁷ *Buck v. Beach*, 206 U. S. 392 (1907). See also Mr. Justice Stone, concurring, in *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204 (1930).

¹⁸ 268 U. S. 473 (1925).

¹⁹ 284 U. S. 312 (1932).

change of view from its previous decisions the Court freely recognizes; indeed, *Farmers Loan & Trust Co. v. Minnesota*²⁰ explicitly overrules *Blackstone v. Miller*,²¹ which is probably the leading case to sanction taxation by the state of domicile of the debtor. Other cases²² representing the same point of view as *Blackstone v. Miller* must also be deemed to have "ceased to have other than historic interest."²³ All this older authority is clearly irreconcilable with the theory that only one jurisdiction has power to tax intangible property in the form of credits, and that that jurisdiction is the one in which the creditor is domiciled. But, as will presently appear, there remain doctrines, not yet explicitly disapproved by the Court, which will still permit this multiple property taxation in certain circumstances. And to some extent there still exist various remnants of other sorts of multiple taxation, many of them explicitly approved. For the most part, this was before the Court had taken its present position of hostility to multiple taxation. But in order even to prophesy intelligently—which is all the boldest person would attempt to do at this time—how far the Court may go to wipe out the entire principle of multiple taxation, these various kinds of multiple taxation which have been permitted by the Court must be considered with a view to determining how far the cases sanctioning them are still in good standing.

POSSIBILITIES OF MULTIPLE TAXATION STILL EXISTING

Even as respects tangible property there is at least a theoretical possibility of multiple taxation under existing rules. It has already been pointed out that such property may be taxed only by the jurisdiction where it is permanently located,²⁴ but it has also

²⁰ 280 U. S. 204 (1930).

²¹ 188 U. S. 189 (1903).

²² *Wheeler v. Sohmer*, 233 U. S. 434 (1914); *Frick v. Pennsylvania*, 268 U. S. 473 (1925), so far as it approved taxation of the transfer of corporate stock by the state of incorporation apart from the domicile of the owner. For an extreme example of such repudiated reasoning, see also *In re Scott's Estate*, 129 Misc. 625, 222 N. Y. Supp. 515 (Surr. Ct. 1927).

²³ Mr. Justice Sutherland, in *First Nat. Bank of Boston v. Maine*, 284 U. S. 312, 322 (1932).

²⁴ *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194 (1905); *Frick v. Pennsylvania*, 268 U. S. 473 (1925).

been held that the domicil of the owner of tangible property may tax it unless it is shown to be permanently located elsewhere.²⁵ Here too is the same implicit, though certainly not explicit, idea that since property not permanently located anywhere is still taxable somewhere, the Court will fall back on the domicil of the owner as the proper taxing jurisdiction. In theory such property can still be taxed only once, but in fact the possibility exists that it might be taxed in a jurisdiction other than the domicil of the owner on the ground that it was permanently located there, and again at the domicil of the owner because of his inability to prove that it was permanently located in another jurisdiction. This, however, is hardly serious; if it should happen, the unfortunate owner would simply be subjected to tax liability at his domicil because of his inability to prove his case, rather than his being from a legal standpoint subjected to multiple taxation upon the same property.²⁶

More serious from the standpoint of multiple taxation is the doctrine that a jurisdiction where a "stock in trade" as a whole is permanently located may tax the same, even though the particular items of such stock in trade may not be permanently located there.²⁷ Thus, there is a possibility of a single commodity constituting a portion of a stock in trade and being subjected to a tax burden on that theory, and also being taxed by itself at the domicil of the owner. This would be real multiple taxation, but probably it is not very serious in fact. If it became so, the courts would be very likely to interfere.

Another possibility of multiple taxation of the same property might arise from the confusion as to whether debts evidenced by what may generally be termed commercial securities, such as bonds, promissory notes and similar documents, are to be treated as tangible or intangible property. The theory has been enunciated in some cases²⁸ that such commercial securities are to be treated as tangible property and so taxed where they are actually

²⁵ *New York v. Miller*, 202 U. S. 584 (1906).

²⁶ *Cf. In re Dorrance's Estate*, 115 N. J. Eq. 268, 170 Atl. 601 (Prerog. Ct. 1934), (1934) 82 U. OF PA. L. REV. 769. For the supplemental opinion, see 172 Atl. 503 (N. J. Prerog. Ct. 1934).

²⁷ *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U. S. 18 (1891).

²⁸ See *Blackstone v. Miller*, 188 U. S. 189 (1903), and *Wheeler v. Sohmer*, 233 U. S. 434 (1914).

located even though their owner be domiciled in another jurisdiction. The theory has undoubtedly much practical sense. While from a legal standpoint such commercial paper is mere evidence of indebtedness, yet from a business standpoint it is usually thought of and actually treated as the property itself in tangible form. Furthermore, taxation should be based upon practical rather than theoretical and legalistic considerations. In holding that such paper is mere evidence of indebtedness, however, that the debt is the substantial property, and is thus taxable only at the domicile of the creditor, the Supreme Court, it would seem, has now finally excluded any possibility of multiple taxation of intangible property in the form of debts.²⁹

As to multiple taxation of corporate stock, it would appear that *First Nat. Bank of Boston v. Maine*³⁰ has definitely ended that. The Court was there constrained to admit that its own previous decisions approving such taxation are now overruled.³¹ Nevertheless, it is not entirely clear that such multiple taxation cannot still be effected, if the state of incorporation reserves in its general corporation act the power to impose a tax upon the stock, or its transfer, even though the stock is held by nonresidents.³² And a more serious and burdensome scheme of multiple taxation is apparently approved by the Court in permitting states to tax consolidated corporations on the basis of their entire capital stock.³³ This is very serious, both theoretically and practically, since it permits a state to burden foreign corporations not doing business in the state.³⁴ The Court, it would seem, must be opposed to this unreasonable and economically unsound burden, but it has not as

²⁹ See cases cited in note 10, *supra*; *Baldwin v. Missouri*, 281 U. S. 586 (1930).

³⁰ 284 U. S. 312 (1932).

³¹ *Frick v. Pennsylvania*, 268 U. S. 473 (1925) (compare as to this point note 22, *supra*); *Hawley v. Malden*, 232 U. S. 1 (1914). See also *Judy v. Beckwith*, 137 Iowa 24, 114 N. W. 565 (1908).

³² *Corry v. Baltimore*, 196 U. S. 466 (1905). Cf. *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490 (U. S. 1873).

³³ *Delaware R. R. Tax*, 18 Wall. 206 (U. S. 1873); *Kansas City Memphis & Birmingham R. R. v. Stiles*, 242 U. S. 111 (1916). This hardship is intensified by the ruling of the Court that a state may compel a foreign corporation to take out a domestic charter, as a condition to being admitted to do business in the state. *Railway Express Agency v. Virginia*, 282 U. S. 440 (1931).

³⁴ A so-called consolidated corporation consists actually of two or more separate corporations, only one of which is ordinarily doing business in any particular state.

yet so decided. On the whole, in this matter of taxation of corporate stock the Court is very definitely hostile to multiple taxation and has wiped out a large part of it; but it is not, or at least does not yet appear to be, wholly gone.

With regard to the taxation of trust property, the only direct decision of the Court seems to be *Safe Deposit & Trust Co. v. Virginia*,³⁵ and this case does not wholly clarify the situation. Here a Maryland trustee held property for infant beneficiaries, residents of Virginia, the income to accumulate for the beneficiaries until they reached, respectively, the age of twenty-five. Virginia attempted to tax the trust property, but the Court denied its right to do so, holding that only Maryland could tax the property — which consisted, it may be noted, mostly of securities. The opinion of the Court was written by Mr. Justice McReynolds. Mr. Justice Stone submitted a concurring opinion suggesting that while Virginia could not tax the entire property, yet it might possibly tax the interest of the beneficiaries. If this suggestion is sound, it opens the door to at least economic multiple taxation of trust property. From a purely legalistic standpoint it may be defended as imposing the tax upon another piece of property — namely, the equitable interest of the beneficiaries, which is entirely separate from the legal interest of the trustee.³⁶ And such equitable interest is obviously located for taxation purposes at the domicil of the beneficiaries. Indeed this fits in with the theory of *Farmers Loan & Trust Co. v. Minnesota*:³⁷ that intangible property — and the interest of the beneficiaries in trust property is obviously closely analogous to intangible property even though the trust property itself be tangible — is to be taxed at the domicil of the owner. But that brings us back to the substantial burdens of multiple taxation upon the same economic interest, which it is now the apparent purpose of the Court to wipe out as completely as possible. It may be that the Court would be more tolerant toward multiple taxation of such property where the beneficiary of the trust was the settlor, who had thus created the trust for his own benefit; but even this is not certain. What the final

³⁵ 280 U. S. 83 (1929). See also *Brooke v. Norfolk*, 277 U. S. 27 (1928).

³⁶ See *Developments in the Law—Taxation: 1933* (1934) 47 HARV. L. REV. 1209, 1224.

³⁷ 280 U. S. 204 (1930).

solution of this general problem will be is not easily prophesied; but it would seem that the situation respecting trust property is so uncertain that from it little argument is afforded either way as to the probability of the Court's condemning other doctrines which permit multiple taxation.

With regard to income taxation the Court has definitely taken a more liberal point of view toward the power of the states. As showing that the Court will not go so far as to do away with multiple property taxation, this may be somewhat significant; but the income tax is not by the better view a property tax and in fact is *sui generis*.³⁸

In *Maguire v. Trefry*³⁹ it was held that Massachusetts might tax income received by a resident of that state from a Pennsylvania trustee. The trust property consisted solely of securities held in Pennsylvania. The Court was troubled about the possibility of multiple taxation because of the settled idea of the Massachusetts court that an income tax is a property tax.⁴⁰ However, all that was said in this connection was, "In the present case we are not dealing with the right to tax securities which have acquired a local situs."⁴¹

*DeGanay v. Lederer*⁴² presented a problem as to United States taxation of the income of a nonresident alien. As already pointed out⁴³ this problem is somewhat different from the application of state taxes to residents of other states, and so any limitations which the Court subsequently put upon property and inheritance taxation may not be applicable here, even though the income tax is to be regarded as a form of property taxation. The plaintiff in this case was a citizen of France but owned a large amount of securities issued by American corporations and secured by property in this country. These securities were kept in the United States in the hands of an American agent. The plaintiff was held subject to the United States income tax on the income from such securities. The Court relied first on the theory that the securities were tangible property. This theory has of course since been definitely repudiated.⁴⁴ The Court further relied on the idea that multiple taxa-

³⁸ See Brown, *The Nature of the Income Tax* (1933) 17 MINN. L. REV. 127.

³⁹ 253 U. S. 12 (1920).

⁴⁰ See Brown, *supra* note 38, at 132 *et seq.*

⁴² 250 U. S. 376 (1919).

⁴¹ 253 U. S. at 16.

⁴³ See note 14, *supra*.

⁴⁴ *Blodgett v. Silberman*, 277 U. S. 1 (1928); *Baldwin v. Missouri*, 281 U. S. 586 (1930).

tion of such securities is permissible, and such a theory is now very dubious, as we have seen. But the doctrine of the case will probably still be followed, either on the theory of *Burnet v. Brooks*⁴⁵ or else on the still more supportable proposition, leading to the same result, that an income tax is *sui generis*, and so has no necessary relation to the power to tax the property from which the income is derived.

Even when a state imposes an income tax only upon income from property within its own taxing jurisdiction,⁴⁶ still the possibility of multiple property taxation exists and would probably affect the construction of such taxing laws.⁴⁷ The state can, however, still collect all the revenue from this source to which it is reasonably entitled, even if the possibility of multiple taxation should be wholly done away with, by amending the income tax laws so as to increase their scope — which can still be done at least with respect to residents.⁴⁸

A corporate income tax may also be justified as an excise tax, and may even be sustained as such though no income was actually earned.⁴⁹ This raises the problem of excise taxation in general. Such taxes are certainly broader in scope than property taxes, so that a particular tax may be sustained as an excise tax when as a property tax it would be of dubious validity, or even clearly invalid.⁵⁰ But, as already pointed out, the two kinds of taxes have often a close bearing upon each other, so that excise taxes might conceivably throw some light upon the present legality of multiple property taxation.

In very many instances an excise tax will, by the terms of the statute, be measured only by assets within the state, despite the

⁴⁵ 288 U. S. 378 (1933).

⁴⁶ *Ewa Plantation Co. v. Wilder*, 298 Fed. 664 (C. C. A. 9th, 1923). *Cf.* *Hill v. Carter*, 47 F.(2d) 869 (C. C. A. 9th, 1931). Both these cases involve the construction of the income tax statutes of the Territory of Hawaii, which is thus limited.

⁴⁷ See *Harvard Trust Co. v. Commissioner*, 284 Mass. 225, 187 N. E. 596 (1933).

⁴⁸ *Lawrence v. State Tax Comm.*, 286 U. S. 276 (1932), holding that a state may tax the entire income of residents, even though such income is derived wholly or partly from sources outside the state.

⁴⁹ *Bass Ratcliff & Gretton Ltd. v. State Tax Comm.*, 266 U. S. 271 (1924).

⁵⁰ *Cream of Wheat Co. v. Grand Forks County*, 253 U. S. 325 (1920); *Susquehanna Power Co. v. State Tax Comm.*, 283 U. S. 297 (1931).

fact that it may be constitutional to include other assets. Where this is the case, it is occasionally said that some assets situated outside the state but used in carrying on business within the state may be included in the measure of the excise tax levied with respect to that business;⁵¹ but this is not really a case of multiple taxation, since those assets are not as such taxed. The power to levy excise taxes is of course not unlimited, but the limitations are somewhat broader than those restricting property taxes.⁵² It is believed, therefore, that the excise tax situation is not much different from that of income taxes and that such multiple tax burdens as may still be permitted with respect to excise taxes do not have an important bearing either way as to the continued position of multiple property tax burdens.

Before concluding the discussion of these miscellaneous situations where multiple tax burdens have been approved, we must consider the permission accorded to the states to tax intangibles like good-will and the value of a going business used by a foreign corporation in carrying on business within the state. In the leading case⁵³ to approve such a tax counsel for the taxpayer raised the point of multiple taxation⁵⁴ — that is to say, that the same intangible property would be taxed at the domicile of the corporation and also where it is doing business. The Court does not seem squarely to meet this point, but it does state that the intangible property is not situated at New York, the domicile of the corporation, but rather where the business is done.⁵⁵ It further says:

"It may be true that the principal office of the corporation is in New York, and that for certain purposes the maxim of the common law was '*mobilia personam sequuntur*,' but that maxim was never of universal application, and seldom interfered with the right of taxation. . . . It would certainly seem a misapplication of the doctrine expressed in that maxim to hold that by merely transferring its principal office across the

⁵¹ *In re Dodge Bros.*, 241 Mich. 665, 217 N. W. 777 (1928). But *cf.* *People ex rel. Hans Rees' Sons v. Miller*, 90 App. Div. 591, 86 N. Y. Supp. 193 (3d Dept. 1904).

⁵² *Equitable Life Ins. Co. v. Pennsylvania*, 238 U. S. 143 (1915); *Provident Sav. Ass'n v. Kentucky*, 239 U. S. 103 (1915).

⁵³ *Adams Express Co. v. Ohio*, 165 U. S. 194, *rehearing denied*, 166 U. S. 185 (1897).

⁵⁴ See 166 U. S. at 204.

⁵⁵ See *id.* at 223-24.

river to Jersey City the situs of \$12,000,000 of intangible property for purposes of taxation was changed from the State of New York to that of New Jersey.”⁵⁶

From this one would infer that the Court would not permit the state of the domicile of the owner to tax such intangible property, which it says — more reasonably than in most of these cases involving intangibles — is partly situated in all other states where the taxpayer does business.

This problem has arisen several times in connection with the taxation of seats on stock and grain exchanges by the jurisdiction where the member of the exchange carries on his own business, which jurisdiction is not the location of the exchange itself. *Citizens Nat. Bank v. Durr*⁵⁷ approved taxation by Ohio of a seat on the New York Stock Exchange held by a resident of Ohio and used by him in carrying on business in that state. Probably the decision cannot seriously be questioned, in view of the fact that the taxpayer's membership in the exchange makes his Ohio business more profitable and may therefore be reasonably considered an asset of that business. But the more vital question for our purpose is whether the state where the exchange is located could also tax the seat.

The majority of the New York Court of Appeals has taken the position that this is within the power of the state, though the court decided unanimously that the state tax law did not actually impose such a tax.⁵⁸ The problem was squarely presented in *Rogers v. Hennepin County*,⁵⁹ where the Federal Supreme Court held that Minnesota might tax nonresident members of the Minneapolis Chamber of Commerce, which acted as a grain exchange, upon their membership in that body. It must obviously be concluded that if multiple taxation of all intangible property goes, as it has already gone with respect to shares of stock, the doctrine of this case will also be superseded. But the doctrine is itself objectionable as permitting multiple taxation of a somewhat burdensome nature, upon which the Court is now frowning. It would seem much more in accordance with the present view of the Court to hold that such an exchange seat may be taxed by the jurisdiction

⁵⁶ *Ibid.*

⁵⁸ *People v. Feitner*, 167 N. Y. 1, 60 N. E. 265 (1901).

⁵⁷ 257 U. S. 99 (1921).

⁵⁹ 240 U. S. 184 (1916).

where it is actually used in business and not where the exchange happens to be located.⁶⁰ For here also have we a situation where intangible property may fairly be said to have an actual geographical location.

THE BUSINESS *SITUS* DOCTRINE

The most important exception to the rule that intangible property is taxable at the domicile of the owner is in the case of an indebtedness constituting a part of the assets used in a continuous business; it may then be taxed as property where the business is carried on, even though the owner of the business is a resident of another jurisdiction. This is the doctrine generally referred to as "the business *situs* of credits",⁶¹ and it is, or at least has been, almost universally accepted.

The conventional situation where this doctrine is applicable is one where a person (including a corporation) carries on a continuous money-lending business in a jurisdiction apart from his domicile. The test seems basically whether such a business is carried on regularly and in competition with local money lenders. As the Supreme Court said in upholding a local tax upon credits so created, "We are not dealing here merely with a single credit or a series of separate credits, but with a business."⁶² Because of this competition with local money lenders, who would of course be similarly taxed, this result is entirely reasonable.

Up to date the doctrine has been regularly sustained by the Supreme Court. The earliest direct decision is *New Orleans v. Stempele*,⁶³ where a resident of New York kept an agent in Louisiana with power to invest and reinvest in mortgages on Louisiana property. It was held that the indebtedness secured by these mortgages had its business *situs* in Louisiana and was subject to Louisiana taxation. No point is made as to the residence of the debtors, though presumably most of them must have been residents of Louisiana; what is, however, emphasized by the Court is that the

⁶⁰ This will normally, though not invariably, be also the domicile of the taxpayer.

⁶¹ This is the title of T. R. Powell's excellent article discussing this question in (1922) 28 W. VA. L. Q. 89. See also 2 COOLEY, TAXATION (4th ed. 1924) §§ 465-68; GOODRICH, CONFLICT OF LAWS (1927) 90-92; Note, L. R. A. 1915C 923-28.

⁶² Metropolitan Life Ins. Co. v. New Orleans, 205 U. S. 395, 402 (1907).

⁶³ 175 U. S. 309 (1899).

money-lending business was carried on in that state. Some stress is laid upon the fact that the bonds and mortgages were kept in Louisiana, but later decisions show that this is not a point of great importance except possibly in connection with the interpretation of the state statute.

New Orleans v. Stempel was followed by *Bristol v. Washington County*,⁶⁴ where it was held that Minnesota might tax credits owned by a New York resident but created through continuous loans by resident agents in Minnesota, even though the owner kept the evidences of the indebtedness and the mortgages at her home in New York rather than leaving them with the agents, and even though during the latter part of the period in question the Minnesota agents were deprived of any power to satisfy mortgages. These differences from the previous case were held to be immaterial, since the money-lending business was actually carried on in Minnesota. The Court has declared that no tax may be levied where the alleged credits are not real, even though a continuous business is carried on in the state seeking to impose the tax,⁶⁵ but, on the other hand, the mere fact that the credits are in a somewhat unusual form is wholly immaterial.⁶⁶

As might be expected, the states have not been backward in taking advantage of this permission which the federal courts have given; in fact such taxation was customary long before the Supreme Court had explicitly approved it.⁶⁷ Undoubtedly, the subsection of such credits to local taxation demands a somewhat continuous business, and this normally requires a resident agent, but it is, of course, unnecessary that such agent receive any compensation.⁶⁸ The general test of business *situs* accepted by both federal and state courts is well described by the highest court of California:

⁶⁴ 177 U. S. 133 (1900). See also *Metropolitan Life Ins. Co. v. New Orleans*, 205 U. S. 395 (1907).

⁶⁵ *Board of Assessors v. New York Life Ins. Co.*, 216 U. S. 517 (1910).

⁶⁶ *Board of Assessors v. Comptoir Nat. D'Escompte*, 191 U. S. 388 (1903).

⁶⁷ *Catlin v. Hull*, 21 Vt. 152 (1849). *Walker v. Jack*, 88 Fed. 576 (C. C. A. 6th, 1898), involved the Ohio law, but in a later decision in the same case, 96 Fed. 578 (C. C. S. D. Ohio 1899), it was held that the Ohio statute did not subject such credits to taxation unless sole control of them was surrendered to the local agent. See also, for a more recent decision in this sort of case, *Clay, Robinson & Co. v. Douglas County*, 88 Neb. 363, 129 N. W. 548 (1911).

⁶⁸ *Hathaway v. Edwards*, 42 Ind. App. 22, 85 N. E. 28 (1908).

"If we may venture to formulate a general statement of this modification of the rule, it would be that this can only result where the possession and control of the property right has been localized in some independent business or investment away from the owner's domicile, so that its substantial use and value primarily attach to and become an asset of the outside business. In other words, while a non-resident may own the business, the business controls and utilizes in its own operation and maintenance the credits and income thereof."⁶⁹

From this it follows that credits held in a state apart from the residence of its owner merely for collection and without any intention of reinvesting the proceeds are not there taxable, because no continuous business is carried on.⁷⁰ This is even more clearly true with respect to credits held merely for safekeeping.⁷¹ Where, however, a business was carried on in the state through a local agent, the credits were held still taxable after the death of the owner, even though this of course revoked the power of the agent to reinvest.⁷² The credits have similarly been found taxable where the local agent is engaged solely in closing up the business.⁷³ The correctness of these decisions is extremely doubtful, since the business seems to have come to an end. But there are even scattered authorities that credits held in a state merely to be collected for the benefit of a nonresident owner are taxable where so held.⁷⁴ These last decisions are certainly unsound, for the vital requirement of a continuing business is there absent. The attempt of the Indiana Supreme Court⁷⁵ to sustain local taxation upon notes owned by a resident of Ohio and sent to Indiana for safekeeping — and also, though unsuccessful, to avoid Ohio taxation — was reversed by the United States Supreme Court,⁷⁶ which explicitly

⁶⁹ *Westinghouse Elec. & Mfg. Co. v. Los Angeles County*, 188 Cal. 491, 494, 205 Pac. 1076, 1077 (1922).

⁷⁰ *Hinckley v. San Diego County*, 49 Cal. App. 668, 194 Pac. 77 (1920); *Goldgart v. People ex rel. Goar*, 106 Ill. 25 (1883); *Reat v. People ex rel. Gannaway*, 201 Ill. 469, 66 N. E. 242 (1903); *Herron v. Keeran*, 59 Ind. 472 (1877). See also *Wilcox v. Ellis*, 14 Kan. 588 (1875).

⁷¹ *Board of Comm'rs v. Hewitt*, 76 Kan. 816, 93 Pac. 181 (1907); *Crosby v. Charlestown*, 78 N. H. 39, 95 Atl. 1043 (1915).

⁷² *In re Miller*, 116 Iowa 446, 90 N. W. 89 (1902).

⁷³ *State v. London & No. Am. Mtge. Co.*, 80 Minn. 277, 83 N. W. 339 (1900).

⁷⁴ *Redmond v. Commissioners*, 87 N. C. 122 (1882); *Hall v. Miller*, 102 Tex. 289, 115 S. W. 1168 (1909).

⁷⁵ *Buck v. Miller*, 147 Ind. 586, 45 N. E. 647, 47 N. E. 8 (1897).

⁷⁶ *Buck v. Beach*, 206 U. S. 392 (1907).

denied the application of the business *situs* theory upon which the state court had in part relied.

The business *situs* doctrine is not, however, restricted to the conventional situations already outlined. It is applied whenever the credits are deemed to be necessary assets in carrying on a continuing business, even though the credits themselves are only incidental to that business rather than its subject. For example, it is generally held that bonds deposited by a foreign insurance corporation with the state authorities as a condition to carrying on business are taxable by the state of deposit.⁷⁷

Indications are at hand of a general tendency to tax even credits which are merely incidental to another business of a distinct kind, as where goods are sold in the state on credit. Thus, foreign insurance companies may be taxed upon credits for deferred premiums on policies held by residents of the state, even though such premiums are not evidenced by notes or other memoranda.⁷⁸ And bank deposits kept in the state by a foreign corporation and used in connection with its local business may be subject to taxation by that state,⁷⁹ as distinguished from where the deposits are kept merely for convenience in transmitting them to the home office of the company.⁸⁰

The most striking example of this application of the business *situs* theory is the taxation of ordinary business corporations with a home office in another state on amounts owing to them for sales of commodities on credit though a branch in the state. Over the fairness of this result there can again be little disagreement, since domestic corporations and other business units would be subject to taxation on similar credits. The basis for such taxation, approved by a distinct majority of the opinions, is the business *situs*

⁷⁷ *Scottish Union & Nat. Ins. Co. v. Bowland*, 196 U. S. 611 (1905); *State v. Board of Assessors*, 47 La. Ann. 1544, 18 So. 519 (1895). The business *situs* doctrine may also be used to shift the taxation of securities so deposited by a domestic corporation from the county in which its principal office is situated to the county of the state capital. *Texas Fid. & Bonding Co. v. Austin*, 112 Tex. 229, 246 S. W. 1026 (1922). But only if the state statute so provides. *Great So. Life Ins. Co. v. Austin*, 112 Tex. 1, 243 S. W. 778 (1922).

⁷⁸ *Liverpool & London & Globe Ins. Co. v. Board of Assessors*, 221 U. S. 346 (1911); *Orient Ins. Co. v. Board of Assessors*, 221 U. S. 358 (1911).

⁷⁹ *Commonwealth v. Dun*, 31 Ky. L. Rep. 561, 102 S. W. 859 (1907). But cf. *Hillman Land & Iron Co. v. Commonwealth*, 148 Ky. 331, 146 S. W. 776 (1912).

⁸⁰ *State v. Newark*, 62 N. J. L. 74, 40 Atl. 573 (1898).

theory.⁸¹ Even more clearly is this the case where the foreign corporation carries on its manufacturing and most other activities in the state.⁸² Sometimes, however, a state which will tax credits resulting from a lending business in the state does not tax credits from the sale of commodities.⁸³ The power of the state to impose this tax upon credits resulting from sales is not defeated by the fact that all money collected must be immediately transmitted to the home office, so long as the selling business is still continuous,⁸⁴ but the tax is not imposed unless it is considered that the credits are necessarily used in connection with carrying on the business of the local branch.⁸⁵ If the corporation has no branch in the state but has merely a soliciting agent without power to bind the corporation, it is considered that no business is carried on in the state in such a way as to give a business *situs* to credits resulting from sales solicited by him, and no such tax can be imposed.⁸⁶ The proper test as to the taxability of credits in all these cases is substantially the same; namely, is a regular and continuous business carried on in the state and are such credits necessarily incident to that business?

Assuming now that the credits are subjected to taxation in a jurisdiction other than that of the domicil of the creditor under some application of the business *situs* theory as already explained, the question remains whether they may also be taxed, as credits generally are, by the jurisdiction in which the creditor is domiciled. If so, the same credits are taxed at least twice.⁸⁷

⁸¹ *Armour Packing Co. v. Savannah*, 115 Ga. 140, 41 S. E. 237 (1902); *Monongahela River Consolidated Coal & Coke Co. v. Board of Assessors*, 115 La. 564, 39 So. 601 (1905); *People v. Ogdensburgh*, 48 N. Y. 390 (1872); *Marshall Hardware Co. v. Multnomah County*, 58 Ore. 469, 115 Pac. 150 (1911); *Jesse French Piano & Organ Co. v. Dallas*, 61 S. W. 942 (Tex. Civ. App. 1901). See also *New York ex rel. Burke, Ltd. v. Wells*, 208 U. S. 14 (1908). *Contra*: *Vicksburg v. Armour Packing Co.*, 24 So. 224 (Miss. 1898).

⁸² *Commonwealth v. United Cigarette Mach. Co.*, 119 Va. 447, 89 S. E. 935 (1916).

⁸³ *Crane Co. v. Des Moines*, 208 Iowa 164, 225 N. W. 344 (1929); *National Metal Edge Box Co. v. Readsboro*, 94 Vt. 405, 111 Atl. 386 (1920).

⁸⁴ *State v. Pittsburgh Plate Glass Co.*, 147 Minn. 339, 180 N. W. 108 (1920).

⁸⁵ *Westinghouse Elec. & Mfg. Co. v. Los Angeles County*, 188 Cal. 491, 205 Pac. 1076 (1922).

⁸⁶ *Endicott, Johnson & Co. v. Multnomah County*, 96 Ore. 679, 190 Pac. 1109 (1920), distinguishing *Marshall Hardware Co. v. Multnomah County*, 58 Ore. 469, 115 Pac. 150 (1911).

⁸⁷ In the case of credits owned by a consolidated corporation, they might thus be taxed more than twice.

Many states do not in fact impose this form of multiple taxation. Perhaps, the most carefully considered recent case to this effect is *Miami Coal Co. v. Fox*.⁸⁸ An Indiana corporation was engaged in the business of mining coal in Indiana, but had its sole selling and collecting office in Illinois. The Supreme Court of Indiana decided that the debts owed to it by its customers, having a business *situs* in Illinois, could be taxed there and could not therefore be taxed in Indiana. It was stated by the court that "natural justice" prevents Indiana from also taxing these credits, but it is not entirely clear whether the court thinks it is deciding the question as a matter of the construction of the Indiana taxing statutes or as a matter of constitutional law.

A number of other decisions are to the same effect,⁸⁹ but occasionally with a dictum that such taxation is within the power of the domiciliary state though the power has not been exercised⁹⁰—thus asserting the power and giving up the tax solely as a matter of statutory construction. Some cases where the court purports to take this point of view are not precisely applicable, since it would appear that the credits in question did not really have a business *situs* in the other state and so were not taxable there.⁹¹ In others stress is laid upon the fact that there was no showing that the state where the business *situs* was alleged to exist had actually imposed any tax on the credits;⁹² some courts, however, explicitly state that this is immaterial.⁹³ At all events there is substantial authority that this multiple taxation of the same credits will be avoided by a refusal of the state of domicil to tax them when the state of business *situs* does so.

The numerical majority is probably committed to the contrary view, and permits the taxation by the state of domicil even though credits are taxed in another state under the business *situs* theory.⁹⁴

⁸⁸ 203 Ind. 99, 176 N. E. 11 (1932).

⁸⁹ *Buck v. Board of Comm'rs*, 103 Kan. 270, 173 Pac. 344 (1918); *Howell v. Gordon*, 127 Mich. 517, 86 N. E. 1042 (1901); *People ex rel. Jefferson v. Gardner*, 51 Barb. 352 (N. Y. 1868); *People ex rel. Jefferson v. Smith*, 88 N. Y. 576 (1882); *Poppleton v. Yamhill County*, 18 Ore. 377, 23 Pac. 253 (1890).

⁹⁰ See *People ex rel. Jefferson v. Smith*, 88 N. Y. 576, 580 (1882).

⁹¹ *Wilcox v. Ellis*, 14 Kan. 588 (1875); *Crosby v. Charlestown*, 78 N. H. 39, 95 Atl. 1043 (1915).

⁹² *Clay, Robinson & Co. v. Douglas County*, 88 Neb. 363, 129 N. W. 548 (1911); *State v. Gaylord*, 73 Wis. 316, 41 N. W. 521 (1889).

⁹³ See *Commonwealth v. West India Oil Ref. Co.*, 138 Ky. 828, 831, 129 S. W. 301, 302 (1910).

⁹⁴ 2 COOLEY, TAXATION § 467.

Many cases ignore the possibility of this multiple taxation⁹⁵ or even expressly state that it is not material.⁹⁶ And the Supreme Court, not merely inferentially but very explicitly, gave validity to it under the Federal Constitution in *Fidelity & Columbia Trust Co. v. Louisville*,⁹⁷ where a resident of Kentucky was held taxable there on bank accounts in Missouri banks used in connection with a business carried on in Missouri, although the Court admitted that under the business *situs* doctrine Missouri could also tax the same bank accounts. The ruling was repeated in *Cream of Wheat Co. v. Grand Forks County*.⁹⁸

If this were all, there would obviously be no problem as to the validity of the business *situs* doctrine. All that could be said would be that where a person carries on business in another state and uses credits in carrying on that business, the credits are taxable in that state and may also, at least so far as the Federal Constitution is concerned, be taxed at his domicil. To the seeming injustice of the situation, the answer would be that it is a burden which goes along with carrying on business of this nature in another state; and "the Fourteenth Amendment does not prohibit double taxation."⁹⁹

But all these doctrines were enunciated before the Court had evidenced its clear, if recent, hostility to multiple taxation of credits and other intangible property. In these important cases the Court noticed — or, probably it would be more correct to say, was compelled by counsel for the unsuccessful states to meet the point — that the new light which had burst upon it had a rather direct effect upon its previous approval of the business *situs* doctrine. That the Court accomplished the feat of dodging the point

⁹⁵ *Scripps v. Board of Review*, 183 Ill. 278, 55 N. E. 700 (1899); *Appeal of Borden*, 208 Ill. 369, 70 N. E. 310 (1904); *State v. Board of Assessors*, 47 La. Ann. 1544, 18 So. 519 (1895). And see *Jesse French Piano & Organ Co. v. Dallas*, 61 S. W. 942 (Tex. Civ. App. 1901); *Bullock v. Guilford*, 59 Vt. 516, 9 Atl. 360 (1887).

⁹⁶ *Lockwood v. Blodgett*, 106 Conn. 525, 138 Atl. 520 (1927); *State v. Pittsburgh Plate Glass Co.*, 147 Minn. 339, 180 N. W. 108 (1920); *State ex rel. American Cent. Ins. Co. v. Gehner*, 320 Mo. 901, 9 S. W.(2d) 621 (1928). Cf. *Judy v. Beckwith*, 137 Iowa 24, 114 N. W. 565 (1908).

⁹⁷ 245 U. S. 54 (1917). See also *Kirtland v. Hotchkiss*, 100 U. S. 491 (1879); *Blackstone v. Miller*, 188 U. S. 189 (1903); *Bullen v. Wisconsin*, 240 U. S. 625 (1916).

⁹⁸ 253 U. S. 325 (1920).

⁹⁹ *Id.* at 330.

to its own satisfaction does not change the fact that it was compelled explicitly to notice it.¹⁰⁰

In *Beidler v. South Carolina Tax Comm.*¹⁰¹ the business *situs* doctrine seems to be directly involved, in view of the fairly continuous and substantial advances which the Illinois resident had made to the corporation carrying on business in South Carolina. The state was thus able to make a strong argument that the indebtedness was situated in South Carolina for tax purposes under the business *situs* doctrine. As usual, the Court rather dodged than answered this contention, but was constrained to say:

"It is sought to sustain the tax by South Carolina upon the ground that the indebtedness had what is called a 'business situs' in that State, and the state court adverted to this basis for the tax. . . . But a conclusion that debts have thus acquired a business situs must have evidence to support it, and it is our province to inquire whether there is such evidence when the inquiry is essential to the enforcement of a right suitably asserted under the Federal Constitution.

"In the present case, beyond the mere fact of stock ownership and the existence of the indebtedness, there is no evidence whatever, having any bearing upon the question, save a copy of the decedent's account with the corporation, taken from his books which were kept by him in his office at Chicago. The various items of debit and credit in this account, in the absence of any further evidence, add nothing of substance to the fact of the indebtedness as set forth in the agreed statement and afford no adequate basis for a finding that the indebtedness had a business situs in South Carolina."¹⁰²

It seems fair to say from this language that the Court recognized its present tendency to throw considerable doubt upon the business *situs* doctrine, but was unwilling to decide definitely the present standing of the doctrine.

¹⁰⁰ In *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204 (1930), the Court expressly declined to pass upon the present status of the business *situs* doctrine, saying, "The present record gives no occasion for us to inquire whether such securities can be taxed a second time at the owner's domicile." *Id.* at 213. See also the reference to the doctrine as leading to objectionable multiple taxation, *id.* at 210.

¹⁰¹ 282 U. S. 1 (1930).

¹⁰² *Id.* at 8-9. The Court in *Baldwin v. Missouri*, 281 U. S. 586 (1930), also found, and with less obvious difficulty, that the business *situs* situation, especially in its multiple taxation aspect, was not presented.

When it came to decide *First Nat. Bank of Boston v. Maine*,¹⁰³ the Court was still painfully conscious of the haunting ghost of the business *situs* doctrine. But the ghost was frustrated to the Court's satisfaction in the following brief comment:

"We do not overlook the possibility that shares of stock, as well as other intangibles, may be so used in a state other than that of the owner's domicile as to give them a *situs* analogous to the actual *situs* of tangible personal property. . . . That question heretofore has been reserved, and it still is reserved to be disposed of when, if ever, it properly shall be presented for our consideration."¹⁰⁴

This remark seems more than slightly naïve, especially in connection with the *Beidler* case. If the Court is going to continue to find that the business *situs* situation is never presented, the doctrine is a ghost indeed; for all practical considerations, it is dead.

The business *situs* doctrine has a bearing on the other forms of multiple taxation of property already discussed, since it was a constant recourse of the Court in sustaining them. If the doctrine is dead, it does not follow that these others forms of multiple taxation have passed completely beyond the pale of judicial approval; but it is certain that they must continue to exist, if at all, without the chief support by analogy which they have previously enjoyed. It hardly seems too much to say that if the business *situs* doctrine is gone, all other forms of multiple property taxation have lost significant vitality. For instance, in *Rogers v. Hennepin County*¹⁰⁵ the Court relied for its decision, that the stock exchange seat could be taxed at the place where the exchange was located, upon the analogy of the business *situs* cases and also the taxation of shares of stocks of domestic corporations.¹⁰⁶

¹⁰³ 284 U. S. 312 (1932).

¹⁰⁴ *Id.* at 331. See also *Virginia v. Imperial Coal Sales Co.*, 55 Sup. Ct. 12 (1934), where the business *situs* doctrine, though possibly indirectly involved, was ignored by the Court.

¹⁰⁵ 240 U. S. 184 (1916).

¹⁰⁶ The Court said: "There is the further contention with respect to the authority of the State to tax the memberships owned by citizens of other States. It is urged that the memberships are intangible rights held by the member at his domicile. But it sufficiently appears from the allegations that the memberships represented rights and privileges which were exercised in transactions at the exchange in the City of Minneapolis, and, we are of the opinion, applying a principle which has had recognition with respect to credits in favor of non-residents arising from business within the State, and in the case of shares of stock

The argument based upon the taxation of shares of stock by the state of incorporation is clearly no longer valid,¹⁰⁷ and if the business *situs* doctrine also goes, it would be hard to find any remaining rational basis for the theory of this decision. Furthermore, as already pointed out, the result of the *Rogers* case does not seem to be in accordance with the present attitude of the Court to regard multiple property taxation with distinct hostility. It may be hazarded that this doctrine too has probably had its day, and ceased to be.

The court has also used the business *situs* cases to buttress the validity of taxes imposing a direct tax burden by more than one state but not involving the actual multiple taxation of property. This was done with respect to income taxes in *DeGanay v. Lederer*,¹⁰⁸ where the Court said:

"In the case under consideration the stocks and bonds were those of corporations organized under the laws of the United States, and the bonds and mortgages were secured upon property in Pennsylvania. The certificates of stock, the bonds and mortgages were in the Pennsylvania Company's offices in Philadelphia. Not only is this so, but the stocks, bonds and mortgages were held under a power of attorney which gave authority to the agent to sell, assign, or transfer any of them, and to invest and reinvest the proceeds of such sales as it might deem best in the management of the business and affairs of the principal. It is difficult to conceive how property could be more completely localized in the United States."¹⁰⁹

But here, and also in the case of excise taxes, the possible withdrawal of the support of the business *situs* doctrine is not likely to prove fatal. In the first place the burden of such taxes is not actually as heavy as that of multiple property taxation. In the second place, looking at the question from a more technical standpoint, neither an income nor an excise tax is a tax upon property, and so the present condemnation of multiple property taxation,

of domestic corporations, that it was competent for the State to fix the *situs* of the memberships for the purpose of taxation, whether they were held by residents or non-residents, at the place within the State where the exchange was located." *Id.* at 191.

¹⁰⁷ *First Nat. Bank of Boston v. Maine*, 284 U. S. 312 (1932).

¹⁰⁸ 250 U. S. 376 (1919).

¹⁰⁹ *Id.* at 382. See also the quotation from *Maguire v. Trefry*, 253 U. S. 12, 16 (1920).

even if it is carried to its logical extremity, will not affect the doctrines just referred to. Such income and excise taxes may involve multiple taxation, but it is not multiple property taxation.

CONCLUSION

The Supreme Court has given unmistakable indication of its present strong tendency to deprive the states of multiple property taxation, upon which it once looked with indifference, if not benignancy. As to tangible property, this change has been practically accomplished. As to intangible property, multiple taxation has been permitted until the last few years, but in that period the Court has gone a long way toward putting an end to it. Such slight remnants as are permitted by previous decisions of the Court not explicitly overruled, must now be considered to rest upon a very weak foundation.

While this does not necessarily apply to other forms of taxation, yet even here the tendency in the same direction is generally apparent. Multiple inheritance taxation has seemingly been done away with quite as fully as multiple property taxation; indeed, practically all the recent cases showing the changed view of the Court involve inheritance taxation, though they are certainly just as applicable to property taxation.¹¹⁰ While other forms of excise taxes have not necessarily come under the same prohibition against multiple burdens, it is quite probable that at least a tendency to limit them rigidly will appear here also. Curiously enough, no such tendency appears as yet with respect to income taxation; in fact, it may well be contended that the direction is the other way.¹¹¹

The most important doctrine leading to multiple property taxation which is still recognized by the decisions of the Court is business *situs*. Since in all pertinent recent cases the Court has at least considered the possibility that such decisions may interfere with this doctrine, it does not seem too much to say that the Court appreciates the difficulty in harmonizing its present hostility to multiple taxation with the continued existence of the business *situs* doctrine. It is submitted that multiple property taxation as

¹¹⁰ *Frick v. Pennsylvania*, 268 U. S. 473 (1925).

¹¹¹ *Lawrence v. State Tax Comm.*, 286 U. S. 276 (1932). But see Note (1934) 43 YALE L. J. 851.

between the states will have to go and that so far as business *situs* and other doctrines already considered permit such taxation, they will have to be abolished or at least radically remodeled.

It has been suggested¹¹² that the business *situs* doctrine will be modified so that intangible property having a business locality in a jurisdiction separate from the domicile of the owner will be permitted to be taxed there and there only — thus treating it like tangible property, under the *Frick* case.¹¹³ This would avoid any multiple taxation but would possibly run counter to the now settled doctrine of the Supreme Court that evidences of indebtedness and similar documents cannot be treated as tangible property.¹¹⁴

A more substantial objection is present in the marked tendency of the Court to take the position that practically all forms of intangible property which cannot fairly be considered to have any actual *situs* — and even tangible property which has no permanent *situs*¹¹⁵ — are to be taxed at the domicile of the owner and there alone. The Court attempts to rationalize this theory under the maxim, *mobilia sequuntur personam*, but it hardly needs to be repeated that this is an attempted rationalization of the irrational. It is really no more than a slightly disguised statement of the Court's idea of policy. A summary statement of this policy is that the property should of course be taxed somewhere, but that it should be taxed only in one jurisdiction, and that the most desirable jurisdiction to impose the tax in such a situation is the domicile of the owner.

Prophecy of what the Court is going to do next, particularly in view of the fact that it has habitually dodged the problem, at least so far as the business *situs* doctrine is concerned, is extremely hazardous. But it seems more rational, and possibly more accurate, to attempt such a prophecy on the basis of the policy actually

¹¹² See Harrow, *Relation of Jurisdictional Limitations on Power to Tax to Conflict of Laws in Decedents' Estates* (1934) 20 A. B. A. J. 116.

¹¹³ *Frick v. Pennsylvania*, 268 U. S. 473 (1925).

¹¹⁴ The suggestion has, however, an analogy to the taxation of intangible property like good-will used in carrying on a business within the state. See *Adams Express Co. v. Ohio*, 165 U. S. 194 (1897). But in that sort of case the intangibles are merely incidental to the business rather than to the actual subject of it, or at least the result of it, as is normally the situation in the business *situs* cases, and in most of the others here considered.

¹¹⁵ *New York v. Miller*, 202 U. S. 584 (1906).

adopted rather than on the Court's pseudo-rationalization of such policy. Proceeding on this basis, the guess — and it can be no more than a guess — of the writer is that all credits, whether used in a business or not, will be subjected to taxation by the state of domicil of the creditor and by no other jurisdiction. If that is so, the business *situs* of the credits will be ignored and the doctrine of taxation of credits at their business *situs* is wholly dead.

The principle of taxation solely at the domicil of the owner will apply to all other forms of intangible property, unless, perhaps, it can fairly be said in the particular case that such intangible property — usually in the form of good-will or the value of a going business — is substantially, and not merely theoretically, situated with the business which uses it as an asset. But here, too, it seems fairly clear that no multiple taxation will be permitted, so that the state of domicil of the owner will be precluded from taxing such intangibles. Apparently, multiple property taxation, as between the states, is to be regarded as entirely done away with, and in the resulting situation the Court, except in very unusual circumstances, is going to decide in favor of the state of domicil of the owner.

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