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Floyd E. Dix
Member, Terre Haute Bar

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MUST WE CARRY OUR STOCKS AND BONDS IN OUR POCKETS?

(Being an attempt to follow the reasoning of the Supreme Court of the United States during the past forty years, by which it has for a second time arrived at multiple taxation of intangibles)

By FLOYD E. DIX*

A resident of Gary, Indiana, died the owner of a share of the capital stock of a Delaware corporation. He was also the owner of a business in Chicago, Illinois, which he operated entirely from an office in Kalamazoo, Michigan, where accounts receivable of the business were payable and from which office he paid all bills. For many years he had used the stock in connection with the financing of the business in Illinois but at the time of his death the certificate was found in his safe deposit box in Milwaukee, Wisconsin, along with other intangibles connected with the business. Without considering the possibility of reciprocal state legislation, which one or more of the states is entitled, to levy a property tax on the stock for the year prior to his death and which one or more may levy upon it an inheritance, succession or transfer tax? If these questions were put to the 1940 graduating class of one of our law schools, we imagine the answers would be somewhat amusing. If they were submitted, for curbstone opinion, to a group of older lawyers, the results would undoubtedly be interesting. Interesting, but not very amusing, is the answer, that, if not under the specific holding, at least under the reasoning of Curry v. McCauley and Graves v. Elliott,1 decided by the Supreme Court in May of 1939, both taxes could be levied in Indiana, decedent's domicile; in Delaware, the corporation's domicile; in Illinois, where the stock had a business situs; in Michigan, where it had a commercial domicile; and in Wisconsin, where it was physically found.

* Of the Terre Haute Bar.
1 307 U. S. 357 and 383.
"All subjects over which the sovereign power of a state extends, are objects of taxation, but those over which it does not extend, are, upon the soundest principles, exempt from taxation." So spoke Chief Justice Marshall in 1819.2 "Enjoyment of the privileges of residence in a state, and the attendant right to invoke the protection of its laws, are inseparable from responsibility for sharing the costs of government. Taxes are what we pay for civilized society."3 "The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property * * *. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another state, to which it may be said to owe an allegiance, and to which it looks for protection, the taxation of such property within the domicile of the owner partakes rather of the nature of an extortion than a tax."4 "The power to tax carries with it the power to embarrass and destroy."5

And so, ad infinitum, could be copied the repeated pronouncements of our Supreme Court upon these undoubted principles. But as is true with most legal formulas, the statement is easy, but the application is difficult.

Property, of course, is relegated into three general classifications: land, tangible personal property and intangibles. Land, being immobile, has caused no difficulty with the problem of its situs for taxes of all kinds; except from the standpoint of income therefrom and intangible evidences of ownership therein. As to tangible personal property, it was long thought in England that the ancient maxim "mobilia sequuntur personum" (movables follow the person) determined the taxing situs as the domicile of the owner. The Supreme Court early recognized an exception, however, and

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2 McCulloch v. Md. 4 Wheat. 316.
3 Campania v. Collector, 275 U. S. 87.
in 1890 firmly fixed the law to be that it might be taxed in
the state where it was found, regardless of where its owner
lived.6 This was followed in 1904 and 1905 by holdings
that where permanently located in other states it could not
be subjected to property taxes at the domicile of the owner.7

Intangibles, from a transitory standpoint, might be defined
as those evidences of obligations which may be created here,
secured there, owned yonder, used some place else, controlled
at still another place and be found at yet another. With
the growth of modern financing, requiring as it does the
multiple distribution and ownership of the stocks and bonds
of large corporations, the taxing officials, legislatures and
courts have become more and more concerned with seeing that
the owners of intangibles shall bear their proportionate share
of the cost of government. That this cost has increased
slightly during the past few years has not detracted from this
vigilance. No less, it seems, should the owners be concerned
with protecting their property from confiscation by multiple
taxation.

Where then, may intangibles be taxed?

It will be the purpose of this article to try to review the
reasoning by which the Supreme Court has reversed itself
on this question the second time in the past ten years. No
attempt will be made to cover decisions rendered prior to
the turn of this enlightened century, full citation of which the
reader may find in the opinions of the cases herein discussed.
For the want of some better method, we will review the cases
in the order in which they were decided, so that the reader
may, perchance, follow the trend over the years to the present
logical or illogical conclusion.

The struggle between the state and the taxpayer will be
dealt with without distinction between an inheritance (an
excise) and a property (an ad valorem) tax. For our pur-
pose, there is little, if any, distinction between the two.
Although the Court has, from time to time, noted differences,

6 Pullman's Palace Car Co. v. Pa., 141 U. S. 18.
7 Delaware L. & W. R. Co. v. Pa., 198 U. S. 341; Union Refrigerator Transit
and although it has come to consider control over the owner a reason for jurisdiction over the property, no line of demarkation has been definitely worked out and it is fair to suppose that the statement made in 1924 in *Frick v. Pa.*\(^8\) to the effect that "to impose either tax the state must have jurisdiction over the thing that is taxed" is still true. In other words, the writer believes that the reasoning of *Curry v. McCanless* must fairly be interpreted to apply to both kinds of tax.

We start, of course, with the precept that the imposition of a tax without jurisdiction is a violation of the Fourteenth Amendment (not to be confused with the recent statements of the Court that the Constitution does not guarantee against double taxation). What then, more narrowly stated, constitutes jurisdiction over an intangible?

The first comprehensive attempt to deal with the problem was in *New Orleans v. Stempel*,\(^9\) decided in 1899. It resulted in the "business situs doctrine," by language adopted from a Vermont case\(^10\) that "if persons residing abroad bring their property and invest it in this state for the purpose of deriving profit from its use and employment here, and thus avail themselves of the benefits and advantages of our laws for the protection of their property, their property should yield its due proportion towards the support of the government that thus protects it." This theory has become firmly implanted in the law of the Court and has never been departed from. As will be hereinafter shown, this rule must not be interpreted as exclusive.\(^11\)

In 1902 *Blackstone v. Miller* was decided.\(^12\) The court, by Mr. Justice Holmes, (Mr. Justice White dissenting) held

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\(^8\) 268 U. S. 473.  
\(^9\) 175 U. S. 309.  
\(^10\) *Catlin v. Hull*, 21 Vt. 152.  

For its recent application in Indiana, see *Miami Coal Co. v. Fox*, 203 Ind. 99.  
\(^12\) 188 U. S. 189.
that a deposit in a New York Trust Company to the credit of Blackstone, who died domiciled in Illinois, was subject to a transfer tax imposed by New York, notwithstanding that the whole succession, including the deposit, had been similarly taxed in Illinois. The court regretted double taxation by the states but said it infringed no rule of constitutional law. It was thought that there was no distinction for taxing purposes between money in bank and coin in the pocket; the only question to be answered in this case being whether the deposit depended on the law of New York for its existence. The Court held that it did, because "nothing but the fact that the law of the place where the debtor is will make him pay." To illustrate the necessity for invocation of New York law, the court asked where the Executrix would be if New York should declare all debts extinguished upon the death of either party. "The universal succession is taxed in one state, the singular succession is taxed in another. The plaintiff has to make out her right under both in order to get the money." The maxim _mobilia sequuntur personam_ was shed, as a fiction due to historical tradition; not allowed to obscure the facts when they become important.

Here there, for the first time, we have advanced the notion of multiple protection of state law as a basis for multiple taxation.

In 1906, in the case of _Buck v. Beach_, the Court limited the doctrine, in holding, on the particular facts, that Indiana could not levy a property tax upon mortgage notes secured by Ohio real estate, payable to a resident of New York, merely because they were held in Indiana for the purpose of avoiding proper taxation in Ohio. Mr. Justice Peckham, who wrote the majority opinion, reasoned simply that there was no property within the jurisdiction of the State of Indiana. He thought the notes were but written evidences of the debts themselves, which could be properly taxed only in Ohio. Indiana, he said, could have nothing to do with the enforcement of the obligation; the creditor would have to go to

\[13 \text{ 206 U. S. 392.}\]
Ohio to find the debtor, as well as the mortgaged land. He brushed aside the argument that, if the notes were stolen while in Indiana, the Indiana courts would have to be resorted to to punish the thief; on the theory that that would be in vindication of the general criminal justice of the state. The point was evidently not made that, under such circumstances, the owners would be put to it to recover the notes without the help of the law of Indiana. In the dissenting opinion, Mr. Justice Day thought that notes and mortgages were of the same character as bank bills and municipal bonds; all being evidences of existing indebtedness, the latter being subject to taxation where they are found.

The situation of Blackstone v. Miller was turned around in 1915 in Bullen v. Wisconsin and the state of decedent's domicil was held entitled to levy a succession tax on intangibles held by a trustee in another state under a revocable trust, the state where they were held having previously levied such a tax upon them. Mr. Justice Holmes reasoned: "As the states where the property is situated, if governed by the common law, generally recognize the law of the domicil as determining the succession, it may be said that, in a practical sense at least, the law of the domicil is needed to establish the inheritance."

The converse of the Stempel case had arisen in 1905 and the court held, in Union Refrigeration Transit Co. v. Ky., that the state of domicile had no right to impose a property tax upon tangibles permanently located in other states. It was quite natural, therefore, that an effort should now be made to swing tangibles, for inheritance tax purposes, into the rule of the Blackstone and Bullen cases. This attempt failed in the case of Frick v. Pennsylvania, decided in 1924. The unanimous court, Mr. Justice Van Devanter speaking, reverted to the rule of the Union Refrigerator case and held that the state of domicile of a decedent could not impose a succession tax upon tangible property having an actual situs

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14 240 U. S. 625.
15 199 U. S. 194.
16 268 U. S. 473.
in another state. The state of Pennsylvania relied upon the Blackstone and Bullen cases, but the court swept them aside, on the simple statement that they involved intangibles. In this respect a difference was noted without making any distinction. The queer part is that the court actually grounded its reasoning on the lack of a distinction and said: "The state must have jurisdiction over the thing that is taxed and to impose either (property or succession tax) without such jurisdiction, is mere extortion and in contravention of due process of law. * * * The situation was the same as if the property had been immovable realty." The anomalous result thus reached was that foreign intangibles may be the subject of inheritance tax at decedent's domicile because the law of domicil is needed to affect the succession, but that tangibles may not be so taxed because the state of domicil has no jurisdiction.

The unanimous court held in 1926 in Rhode Island Hospital Trust Co. v. Doughton that a state could not impose an inheritance tax upon stock of a foreign corporation held by a non-resident, merely because the corporation was doing business within the state and had located two-thirds of its property there. Chief Justice Taft's simple reasoning was that there was no jurisdiction of the property.

Blackstone v. Miller and Bullen v. Wis. were, however, reverted to in Blodgett v. Silberman in 1928, the unanimous court holding, by Chief Justice Taft, that the interest of a Connecticut decedent in a New York partnership and U. S. bonds, shares of stock, mortgage bonds and debentures of foreign corporations, stock in national banks, promissory notes of residents of other states and insurance policies issued by foreign insurance companies, all physically kept in safe deposit boxes in New York City, were subject to a Connecticut transfer tax. Practically the entire opinion is given over to the matter of determining that such property fell into the category of intangibles and was therefore not within the rule of Frick v. Pa. A small amount of bank notes and cash

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17 270 U. S. 69.
18 277 U. S. 1.
in the New York safe deposit box was held beyond the power of Connecticut to tax, because, "money, so definitely fixed and separated in its actual situs from the person of the owner as this was, is tangible property." It is interesting to note that Mr. Charles E. Hughes argued the cause for the state of Connecticut.

Now we had no distinction between money in bank and coin in pocket but we do have one between government bonds and government bank notes in the same safe deposit box.

In Safe Deposit and Trust Company v. Virginia the Supreme Court, in 1929, Justice McReynolds speaking, decided that Virginia could not impose an ad valorem property tax upon the corpus of a trust fund consisting of stocks and bonds held by a Maryland trustee for the benefit of parties domiciled in Virginia. The court gave no consideration to the fact that the trust had been revocable during the lifetime of the donor, but placed its decision squarely on the ground that the securities had an actual situs in Maryland. The main decision sidestepped the question of the right of Virginia to tax the equitable interest of the Virginia donees in the property, but Mr. Justice Stone, in a concurring opinion, thought this might have been done "quite as much as a debt secured by a mortgage on land in another jurisdiction, notwithstanding the fact that the land is also taxed at its situs." Mr. Justice McReynolds said, "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 instance, and, because of this, to uphold a double and oppressive assessment." Mr. Justice Holmes, in a dissenting opinion, thought there was no difference between taxing the corpus and taxing a beneficial interest of cestuis que trust. He perceived no limitation against double taxation in the Fourteenth Amendment.

19 Blackstone v. Miller, supra. 20 280 U. S. 83.
21 This case, upon almost identical facts, is used as the sole base by the Supreme Court of Indiana in the case of Johnston v. State, 212 Ind. 375.
Up to 1929, therefore, and with reasonably consistent reasoning, the court has held:

1. That the state of domicile has no right to impose a property or inheritance tax upon tangible personal property having an actual situs in another state, because the state of domicile does not have jurisdiction of the thing to be taxed.

2. That intangibles in another state are subject to inheritance tax in the state of decedent's domicile, because the law of domicile is needed to establish the inheritance.

3. That the state of domicile cannot impose a property tax upon intangibles held in a foreign trust, because they have no actual situs in the state of domicile.

4. That a local bank deposit of a non-resident is subject to inheritance tax, because the law of the state where the bank is located is needed to collect the debt.

5. That intangibles representing obligations of non-residents to non-residents, secured by foreign real estate, cannot be subject to a property tax in the state where found, because the law of such state is not needed to enforce them.

6. That a state cannot impose an inheritance tax upon stock of a foreign corporation owned and held by a non-resident, merely because the corporation was doing business in and held property within the state; because it had no jurisdiction of the stock.

We are left, at this point, with only one marked distinction between tangibles and intangibles: to-wit, that while the former may not be subjected to either a property or inheritance tax in more than one state, the latter may be levied upon for inheritance tax in the state of domicile as well as in any other state whose laws are necessary to enforcement.

Query whether the reasoning of Curry v. McCanless will be specifically applied to property taxes. Safe Deposit and Trust Co. v. Virginia, being, as it is, discredited, Johnston v. State should, for the present, not be definitely relied upon.

22 Union Refrigeration Transit Co. v. Ky., supra; Frick v. Pa., supra.
23 Bullen v. Wis., supra; Blodgett v. Silberman, supra.
24 Safe Deposit and Trust Co. v. Va., supra.
25 Blackstone v. Miller, supra.
26 Buck v. Beach, supra.
27 Rhode Island Hosp. T. C. v. Doughton, supra.
This distinction was destined to be limited later in 1929 with the overruling of *Blackstone v. Miller*, in the case of *Farmer’s Loan and Trust Company v. Minn.* The Minnesota was refused the right to impose a transfer tax on Minnesota municipal and state bonds owned and held in New York by a New York decedent. Mr. Justice McReynolds wrote the opinion. In it he did not attempt to answer Justice Holmes’ argument of dual protection of laws, but based his decision squarely on the proposition that “all the property there can be in the nature of things in debts of corporations belongs to the creditors, to whom they are payable; and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due.” “A very large part of the country’s wealth,” he said “is invested in negotiable securities, whose protection against discrimination, unjust and oppressive taxation is a matter of the greatest moment. The inevitable tendency of that view (*Blackstone v. Miller*) is to disturb good relations among the states and produce the kind of discontent expected to subside after establishment of the Union.” He suggested the possibility that under the different views concerning the situs for taxation of intangibles, it would be possible for a bond to be taxed at four different places, to-wit, the domicile of the owner, the debtor’s domicile, where the bond is physically found and where it has a business situs. Such a startling possibility, he said, suggests a wrong premise.

Mr. Justice Stone concurred in the result, on the theory that an inheritance or transfer tax was an excise or privilege tax and “to sustain a privilege tax, the privilege must be enjoyed in the state imposing it.” He thought, however, that there are “too many situations in which a single economic interest may have such legal relationship with different taxing jurisdictions as to justify its taxation in both, to admit our laying down any constitutional principle broadly prohibiting taxation merely because it is double.” Consistent with his former opinion, Mr. Justice Holmes dissented, because, he said, however contrary double taxation may be to

28 280 U. S. 204.
enlightened policy, still the argument cannot be avoided that the law of Minnesota would be necessary to enforce the obligation and that therefore it should have a right to tax. "A good deal has to be read into the Fourteenth Amendment," he said, "to give it any bearing upon this case."

The decision went no farther than to overrule the specific holding of Blackstone v. Miller, by denying the right to levy an inheritance tax to the state of the debtor's domicil (the intangibles being physically within the state of the creditor's domicil).

Three months later, however, Justice McReynolds, in Baldwin v. Missouri[29] extended the doctrine, by denying the right to tax to the state where the nonresident decedent's intangibles were physically located. His simple reasoning was that choses in action pass from the dead to the living only by virtue of the law of decedent's domicil. As they (the creditors) were not within Missouri for taxation purposes the transfer was not subject to her power. Mr. Justice Holmes, dissenting, felt anxiety "at the ever increasing scope given to the Fourteenth Amendment in cutting down * * * the constitutional rights of states" and saw "hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of the Court as for any reason undesirable." Mr. Justice Stone this time also dissented, distinguishing his concurrence in the Farmer's Loan and Trust Co. case for the reason that here the choses in action were actually in the other state, receiving the protection of its laws to secure delivery. He suggested a good way to get around double taxation of intangibles was to keep them in the state of domicil.

This case was the converse of the Blodgett case, and we now have the rule that the state of domicil only, has the right to levy an inheritance tax upon intangibles found in another state; except, of course, where the intangibles may have acquired a "business situs," "commercial situs," or "a situs analogous to that of tangible personal property" in the other state.

29 281 U. S. 586.
Beidler v. South Carolina,\(^{30}\) decided the following year (1930) merely affirmed the two preceding decisions, in holding that a state could not levy a succession tax upon the debt of a domestic corporation to a non-resident decedent. The court held that the indebtedness did not, under the facts, have a business situs in the state of the corporation's domicil. The decision strictly avoided the result if a business situs had existed.

In 1931, in First National Bank v. Maine,\(^{31}\) Mr. Justice Sutherland, writing a 6 to 3 opinion, decided the specific point that Maine could not impose a succession tax upon capital stock of a Maine corporation owned by a Massachusetts decedent. He reiterated that Blackstone v. Miller had been overruled, reviewed the Frick, Farmers Loan and Trust Co., Baldwin and Beidler cases and said that the rule of immunity from taxation by more than one state was broader than the specific application in those cases made of it. His reasoning was that the transmission from the dead to the living was an event which could not take place in two or more states at one and the same time. “Due regard for the processes of correct thinking upholds the conclusion that a determination fixing the local situs of a thing for the purpose of transferring it in one state carries with it an implicit denial that there is a local situs in another state for the purpose of transferring the same thing there.” He said that the taxable event as to tangible property occurs in the state where the property has actual situs and that, although the problem is more difficult as to intangibles, it must be solved unless gross discrimination between the two classes of property should result. He specifically reserved from his holding intangible property that may be so used in a state other than the owner's domicile so as to give it there a situs analogous to the actual situs of tangible personal property. His reasoning nevertheless would seem to apply to such intangibles, because he said: “There is wanting on the part of a state other than that of the domicile

\(^{30}\) 282 U. S. 1.

\(^{31}\) 284 U. S. 312.
any real tangible relationship to the event which is the subject of the tax.”

Recognizing the conflict in prior decisions, he thought that “practical considerations of wisdom, convenience and justice alike dictate the desirability of a uniform general rule conferring the jurisdiction to impose death transfer taxes as to intangibles to the state of the domicil.” The old maxim *mobilia sequuntur personam* was not relied upon; the square out reasoning being that property should be taxed for inheritance once and only once and that the jurisdiction of domicil is the most logical.

Mr. Justice Stone wrote the dissenting opinion, with Mr. Justice Holmes and Mr. Justice Brandeis concurring. His reason again was that the decedent acquired rights and privileges with respect to the Maine corporation, the nature and extent of which were defined by the laws of Maine, and his power to secure the complete transfer of the stock was therefore dependent upon Maine law. He suggested that the problem as to double taxation should be solved by reciprocal state legislation, rather than by resort to the Fourteenth Amendment; because, he said: “The Constitution has failed to provide against multiple taxation.”

Specifically, the case does not broaden the earlier holdings more than to relegate stock in a domestic corporation into the same category as bonds, notes, and credits; all of which, belonging to a non-resident decedent, cannot be made the subject of a succession tax. We have now, therefore, reached the firm ground that intangibles are taxable, for any and all purpose, only at the domicil of the owner; excepting where they have a business situs elsewhere; in which case, evidently, they are taxed there only.\(^\text{32}\)

In *City Farmer's Bk. and Tr. Co. v. Schnader*,\(^\text{33}\) Mr. Justice Butler in 1934, writing the opinion for a unanimous

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32 It was this case which led to the passage in 1937 by the Indiana Legislature of the law authorizing the refunding of intangible taxes theretofore erroneously, wrongfully or illegally imposed (Chap. 159, Acts of Indiana General Assembly, 1937).

33 293 U. S. 112.
court, held that as to tangible personal property with a fixed location outside the state of the decedent's domicile, the "transfer cannot be subjected to taxes imposed by more than one state." The right of the state of the situs only was sustained, the court citing Frick v. Pa.,\textsuperscript{34} Safe Dep. & Tr. Co. v. Va.,\textsuperscript{35} and First Natl. Bk. v. Me.\textsuperscript{36}

In 1935 the court, by a 6 to 3 decision, Mr. Justice McReynolds speaking, held in Senior v. Braden,\textsuperscript{37} that Ohio could not impose a property tax upon land trust certificate representing interest in real estate, some of which was within and some without the state of domicil of the owner of the certificates, the owner being entitled to a share of the net income and, upon sale of the property, to a share of the proceeds. The reason was two-fold, to-wit, that a state had no power to tax land or an interest in land beyond its borders and, as to the land situate within the state, there was no power to tax in any other manner than by uniform rule according to value. The main opinion claimed that "Our concern is with reality, not nomenclature." Mr. Justice Stone, Mr. Justice Brandeis and Mr. Justice Cardozo concurring, wrote the dissenting opinion. He too insisted that the court must look to substance rather than form, "to the principles which underlie and justify the taxing power, rather than descriptive terminology which merely as a matter of convenience we may apply to the interest taxed." He insisted that the certificate holder was in the same relationship to the land as the stockholder of a land owning corporation. He argued that "The objection to double taxation by a single sovereign is no more potent under the Fourteenth Amendment than the objection that a tax otherwise valid has been doubled. We think the court is attempting to endow the Fourteenth Amendment with a newly discovered efficacy to forbid double taxation.

Here we observe each contending force struggling for substance rather than form; one to avoid double taxation, the other to uphold it. The majority of the court seems

\textsuperscript{34} 268 U. S. 473. \hspace{1cm} \textsuperscript{35} 280 U. S. 204. \hspace{1cm} \textsuperscript{36} 284 U. S. 312. \hspace{1cm} \textsuperscript{37} 295 U. S. 422.
committed, and discredits the double taxing decisions as not being in accord with "views now accepted here."

It would seem then, that the atmosphere has been substantially cleared again. *Blackstone v. Miller* has been specifically overruled and all attempts to revive it have failed. The distinction between tangibles and intangibles has been effectively eradicated and "we can find no sufficient reason for saying that intangibles are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles." The views expressed in *Blackstone v. Miller* are "not now accepted here in respect of double taxation."

But there is one exception to these conclusions, one that the Court has consistently noted, one to which the general language of eradication does not apply, one which hearkens back 36 years to the holding of *New Orleans v. Stempel*—the doctrine of "business situs" or "situs analogous to that of tangible personal property." And just as the tiny leak in the hull may widen to let in the ocean, so has the good ship of single taxation of intangibles been wrecked by this break in its armour. Two cases decided before that of *Curry v. McCanless*, presage the calamity.

In the first, (*Wheeling Steel Corp v. Fox*), the unanimous court, Hughes, C. J., speaking, broke a seven year precedent of ruling against double taxation of intangibles and introduced an entirely new possibility, as an outcropping of the business situs theory. The Corporation was domiciled in Delaware, but maintained its general business offices in West Virginia; kept its books and held its directors' meetings there; there its management functioned and its business was controlled and determined. Orders were subject to acceptance there and invoices were payable there. Its manufacturing business was conducted largely in other states, where bank

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38 *Farmers Loan & Trust Co. v. Minn.*, 280 U. S. 204; *Wheeling Steel Corp. v. Fox*, 298 U. S. 193.
40 *175 U. S. 309.*
41 *307 U. S. 357.*
42 *298 U. S. 193.*
deposits were created by customers' checks forwarded from the West Virginia office. The Supreme Court of Appeals of West Virginia held that such of these bank deposits and accounts receivable as had not previously been liable for taxation in other states might be taxed in West Virginia. The Supreme Court of the United States upheld this contention on the simple reasoning that the property had a "taxable situs," was "kept and used," was "localized" in West Virginia; in short, that that state had jurisdiction to levy the tax. The company's argument that Delaware, its state of domicile, had exclusive power to tax its intangibles, was rejected on the theory that the technical paper designation of its principal office there did not deprive the states where the business was actually conducted from taxing the credits arising in the course of that business. The business situs principal of intangibles was admitted, but a new term was created to fit the situation as it existed in West Virginia, to-wit, that of a "commercial domicile" there. The argument was advanced that the West Virginia statute required the taxation of all intangibles of a foreign corporation doing business within the state, regardless of where else they might properly be subject to taxation. This argument was thought not pertinent in this case because the state court had held that the statute intended to exclude from taxation all intangibles subject to tax in another state. But the Court expressly refused to pass on this constitutional aspect of the statute and held that "upon this record the question before us is with regard to the constitutional validity of the tax as assessed in West Virginia and not as to the amount or validity of any tax assessed elsewhere." Thus was the door left open by a unanimous court, four of the Justices failing to sense, undoubtedly, the flood that was later to pass through.

In the second of the two intervening cases, the commercial situs theory was impliedly held not exclusive by Justice Stone, speaking for an eight man court (Mr. Justice Butler not taking part) in First Bank Stock Corporation v. Minn.,43 decided in 1936. The holding was that a Delaware corpora-

43 301 U. S. 234.
tion having its principal office and business in Minnesota could be required to pay a property tax in Minnesota upon stock owned by it in Montana and North Dakota state banks, although these states also levied a tax upon the stock. The court expressly refused to pass upon the legitimacy of the tax in the other states, saying the question was not presented, but held that it was sufficient for this case that the stock had acquired a business situs in Minnesota, where its owner, "in every practical sense invokes and enjoys the protection of the laws and, in consequence realizes the economic advantages of his ownership." Throughout the opinion the terms "business situs" and "commercial domicile" were used interchangeably.

Twice now in the same year we find the court upholding the right of the state of business situs and/or commercial domicile to tax, but refusing to decide the right of any other state to also tax. It yet remains for two or more states to present their dual claims in the same case.

We now come to the two cases handed down May 29, 1939; in each of which Mr. Justice Stone wrote the opinion and in both of which Chief Justice Hughes, Mr. Justice McReynolds, Mr. Justice Roberts and Mr. Justice Butler dissented.

The first is that of Curry v. McCanless. The decedent, domiciled in Tennessee, had executed an irrevocable trust, constituting an Alabama bank trustee of intangibles, the income to donor for life, the corpus to be disposed of as directed in the donor's will. Thereafter, and until her death, the intangibles were at all times in the trustee's custody in Alabama. Decedent died a resident of Tennessee, having executed her will there, by which she named an Alabama trustee for the corpus of the intangibles in the Alabama trust, to be held for her husband, son, and daughter, with certain remainders in fee. Both states, conceding that only one was entitled, contended for the right to impose an inheritance tax upon the intangibles. The Supreme Court held that both had the right.

44 307 U. S. 357.
Not one of the opposing cases since Blackstone v. Miller is specifically overruled, but the theory of multiple protection, as announced by Mr. Justice Holmes, in that decision, is revived, amplified and announced to have always been the law. The concept of single taxation is finally and definitely outlawed. "When the taxpayer extends his activities with respect to intangibles, so as to avail himself of the protection and benefit of the laws of another state, in such a way as to bring his person or property within the reach of the tax gatherer there, the reason for a single place of taxation no longer obtains. There are many circumstances in which more than one state may have jurisdiction to impose a tax and measure it by some or all of the taxpayer's intangibles." Here the law of Tennessee was needed to render valid decedent's will, reasons Mr. Justice Stone, and the law of Alabama was needed to protect her property. "She necessarily invoked the aid of the law of both states, and her legatees, before they can secure and enjoy the benefits of succession, must invoke the law of both"; citing Farmers Loan and Trust Co. v. Minn., 45 Baldwin v. Mo., 46 and First Natl. Bk. v. Me. 47

In the dissenting opinion Mr. Justice Butler argues that at the time of her death, decedent "had no estate or interest in the securities held by the trustee. There is no basis for application of the fiction mobilia sequuntur personam. * * *
From the beginning, the trust estate has been under the protection of, and necessarily the trusts have been and are being executed under the law of Alabama, unaffected by the laws of any other state. * * * Intangibles, like tangibles, may be so held and used outside the state of the domicile of the owner as to become taxable in the state where kept. * * * The securities (here) * * * could not be more completely localized anywhere * * *.*"

Justice Stone's opinion does not use the terms "business situs," "commercial situs" or "situs analogous to that of

45 280 U. S. 204.
46 281 U. S. 586.
47 284 U. S. 312.
tangible personal property." He merely traces the authorities supporting the right to tax in each state and dovetails them into a right to tax in both; on the easy reasoning that both theories are right because the laws of both states are invoked "through control over and protection afforded to those persons whose relationships are the origin of the rights." Thus we have added to the separation of interests in the property itself, the notion that those who exercise the control of these interests may subject them to additional taxation by wandering into still different jurisdictions, from or under the law of which, control may be exercised.

The second case, decided on May 29, 1939, is that of *Graves v. Elliott.* A New York decedent had created a revocable trust of corporate bonds, with a Denver, Colorado, bank as trustee. She died without revoking the trust. New York assessed an inheritance tax upon the relinquishment at death of the power to revoke the trust, and the Supreme Court upheld it. Mr. Justice Stone says the questions presented are the same as those considered in *Curry v. McCanless.* "The relinquishment at death, in consequence of the non-existence in life, of a power to revoke a trust created by a decedent is * * * an appropriate subject of taxation. * * * We cannot say that the legal interest of decedent in the intangibles held in trust in Colorado was so disassociated from her person as to be beyond the taxing jurisdiction of the state of her domicile more than her other rights in intangibles."

In the dissenting opinion Chief Justice Hughes calls attention to the fact that it is not even disputed now that it "is essential to the validity of a tax that the property should be within the territorial jurisdiction of the taxing power. * * * The importance of this limitation of state power is obvious in view of the interrelation of the states under the bond of the constitution and of the opportunities for oppressive taxation if states attempt to tax property or transfers of property not properly attributable to their domain."

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48 83 L. Ed. 865.
Truly, to the lay mind, as well perhaps to the practical legal mind, the limit of complexity has been reached by the holding of this case. It would be hard enough to explain to a client why his failure to take back something that he has already given away, should make that something subject to inheritance tax upon his death; but to explain to him why the state where he lives should have that right to tax, in addition to the state where the subject of the gift is located, would be slightly more difficult.

_Curry v. McCanless_ is affirmed in _Pearson v. McGraw_,49 decided December 4, 1939. An Oregon decedent, shortly before his death, caused an Illinois bank, which for many years had kept and handled as his agent a large amount on intangibles, to convert them into federal reserve notes, which he immediately made the subject of an irrevocable trust, with the Illinois bank as trustee. The Supreme Court of Oregon, on the authority of _Blodgett v. Silberman_,50 held that the notes were tangibles, and since they had not been brought into the state but had acquired a business situs in Illinois, the Oregon statute could not contravene the Fourteenth Amendment by authorizing a succession tax upon their transfer in contemplation of death.

In reversing the case, the Supreme Court, Justice Douglas speaking, held that there was "but one integrated and indivisible transaction * * * the sale of intangibles, the acquisition of federal reserve notes and their transfer" into the trust; i.e. a transfer of intangibles in contemplation of death. Therefore "the property was within the jurisdiction of the state of Oregon, since that jurisdiction is not dependent on the physical location of the property in the state but on control over the owner."

Mr. Justice Stone, concurring, thought that the real reason for allowing the tax was that federal reserve notes are not tangible property, and, being intangibles, there is nothing in the Constitution which precludes their taxation in Oregon

49 84 L. Ed. 139.
50 277 U. S. 1.
"merely because of the physical fact that they are located
without the state."

The writer confesses inability to understand the significance
of the distinction. If, as Mr. Justice Stone reasons in Curry
v. McCanless, the law of domicil is necessarily involved to
protect the validity of decedent's will, what difference can
it make whether it is tangible or intangible property that
passes under the will?

Chief Justice Hughes and Messrs. Justice McReynolds
and Roberts have apparently given up their struggle against
the majority of the court, for there is no dissenting opinion.

Let us now examine these three decisions to see how far
they uphold multiple taxation in the hypothetical case of the
Indiana decedent who owned the share of stock of the Dela-
ware corporation which he had used in his business in Illinois,
and directed from his office in Michigan; the stock certificate
being found in Wisconsin at the time of his death.

Quoting Mr. Justice Stone from Curry v. McCanless:
"Shares of corporate stock may be taxed at the domicil of
the shareholder and also at that of the corporation which
the taxing state has created and controls." First Natl. Bk.
v. Maine having been impliedly overruled, and the principle
applying equally to inheritance and property taxes, it is
apparent that under the holding of the case, the stock is
subject to both taxes in Delaware and Indiana. Further
quoting Mr. Justice Stone: "The taxpayer who is domiciled
in one state but carries on business in another is subject to
a tax there measured by the value of the intangibles used
in his business." This brings Illinois within the fold.
Wheeling Steel Corp. v. Fox, which advanced the commer-
cial domicil theory, is approved, so Michigan may tax.
"When the taxpayer," says Mr. Justice Stone, "brings his
intangibles within the reach of the tax gatherer" of another
state "the reason for a single place of taxation no longer
exists." Therefore Wisconsin, where the bond was found,
is safely in.

Mr. Justice Stone, in Curry v. McCanless, tacitly admits
the iniquity of his conclusion, but blames the unfortunate
and oft-maligned authors of our Constitution thus: "If we enjoyed the freedom of the framers it is possible that we might, in the light of experience, devise a more equitable system of taxation than that which they gave us." Without so stating, he inferentially shifts the solution to his two earlier expressed alternatives—to keep intangibles at home or trust them to the caprice of reciprocal state legislation.51

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." If the Constitution means what it says in this particular, it is difficult to see why the Supreme Court should strain itself with niceties of legal verbiage in order to avoid a desired result. In this era of delegation of judicial functions to boards, administrators and bureaus; with the constant refusal of our Federal Courts to disturb their unjust findings of fact, the attitude of the layman toward the law becomes constantly more skeptical and his faith in lawyers increasing more shallow. Our fundamental notion is that our Constitution will not permit any state to deprive a citizen of any other state of "life, liberty or property without due process of law." To illustrate with the due process by which our highest court has arrived at the conclusion that two or more states may levy the same tax upon the same property at the same time, is to confound the syllogism which results in our hackneyed fundament that law is reason. In the complexity of our twentieth century struggle to stay out of one war, while emerging from the depression of another, we find the eternal fight for unitary economic existence not limited to national boundaries. The creation of trade barriers, the armed resistance to hordes of transient workers, the bait of tax exemption to industries of another state, the competition for favorable freight rates—these things and many others,

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51 The following states do not levy an inheritance tax upon intangibles of non-resident decedents: Delaware, Florida, Maine, Massachusetts, New Jersey, New York, Rhode Island, Tennessee, and Virginia. The following can levy such tax: Alabama, Arizona, Arkansas, District of Columbia, Kansas, Kentucky, Louisiana, Minnesota, Missouri, Montana, North Carolina, Oklahoma, South Dakota, Utah and Washington. The states not named, except Nevada, have reciprocal statutes. Nevada has no estate tax.
tend to strain relations between the states. Is the Constitution powerless to protect the citizens of one state from infringement on his rights by the laws of another; or must such matters be relegated entirely to the uncertainty of reciprocal state legislation? Whether we agree with Ex-President Hogan of the American Bar that the Supreme Court has let down its guards against the exercise of arbitrary power, or with Senator Burnes that the Court is but listening to the lessons of experience and the force of better reasoning, we lawyers cannot help but deplore results which shock the average citizen in his concept of fair play. Just as lawyers are apt to forget a decision like Blackstone v. Miller until another is handed down going into the problem all over again and deciding it the same way, so do we all forget that our security in property rights is fundamentally guaranteed only by the Constitution of the United States and that “the Constitution is what the Supreme Court says it is.”