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A STATE'S TAX JURISDICTION AS LIMITED BY THE UNITED STATES CONSTITUTION*

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The judicial establishment of the limits of a state's tax jurisdiction as dictated by the Federal Constitution has been of concern to the United States Supreme Court for many years.[1] An adequate understanding of the present state of the law in this troublesome field necessitates tracing the development of the principles governing this jurisdiction as pronounced by the Court.

The due process clause of the Fourteenth Amendment to the United States Constitution sets the requirements for establishment of a state's jurisdiction to tax.[2] In construing this provision the Court has experienced no difficulty in arriving at the conclusion that the constitutional right to tax persons,[3] property,[4] and the exercise of privileges[5] requires the subject or incidence of the tax to be within the territorial limits of the taxing unit. The terminology often used to express this requirement is in terms of situs. The establishment of a tax situs by the subject matter is a prerequisite to the imposition of a valid tax.[6]

The due process justification for the necessity of the presence of the subject of the tax is found in the fact that a tax is considered

*A table of headings and subheadings is appended at the end of this article.

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1See, *e.g.*, Treichler v. Wisconsin, 338 U.S. 251 (1949); Hays v. Pacific Mail S.S. Co., 58 U.S. (17 How.) 596 (1854).

2Braniff Airways v. Nebraska State Bd., 347 U.S. 590 (1954); Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194 (1905). The problem was dealt with on common law principles before the adoption of the amendment. Hays v. Pacific Mail S.S. Co., *supra* note 1.

3Haavik v. Alaska Packers Ass'n, 263 U.S. 510 (1924).

4Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891).

5McLeod v. J. E. Dilworth Co., 322 U.S. 327 (1944); St. Louis Cotton Compress Co. v. Arkansas, 260 U.S. 346 (1922); Frick v. Pennsylvania, 268 U.S. 473 (1925).

6*E.g.*, Frick v. Pennsylvania, *supra* note 5; Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194 (1905).

to be a return for opportunities, benefits, or protection afforded the subject by the laws of the taxing state.[7] These advantages cannot accrue to the subject unless it is considered to be within the state.[8] At times, it must be admitted, the Court has employed a fiction[9] in order to meet the requirement; yet its validity remains unaffected.

Many cases presented to the Court have concerned the question of taxability of property in interstate commerce.[10] Thus the commerce clause of the United States Constitution[11] enters the picture. The Court's construction of this clause in some instances has so closely associated its requirements with those of the due process clause[12] that a treatment of the commerce clause as it is related to jurisdiction to tax will be included in this study.

A state's jurisdiction to tax must be accepted in proper perspective. The mere fact that the Court has recognized that jurisdiction to tax exists because certain requirements of due process have been satisfied does not mean that there is no other objection that can be based on lack of due process[13] or that there is no other federal constitutional objection to the tax. As previously intimated, the commerce clause possibly may be a stumbling block to the validity of a tax.[14] Additional constitutional hazards to the determination of the validity of a tax are the equal protection clause of the fourteenth amendment,[15] which prohibits a state from denying to any person within its jurisdiction the equal protection of the laws; the export-import clause, which prohibits a state from taxing imports or exports without the consent of Congress except to the extent necessary for executing its inspection laws;[16] the privileges and immunities clause,

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[7]Curry v. McCanless, 307 U.S. 357 (1939); Union Refrigerator Transit Co. v. Kentucky, *supra* note 6.

[8]Standard Oil Co. v. Peck, 342 U.S. 382 (1952).

[9]*E.g.*, Blodgett v. Silberman, 277 U.S. 1 (1928).

[10]*E.g.*, Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 (1949); Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944).

[11]U.S. CONST. art. I, §8, cl. 3. The Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

[12]*E.g.*, Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891); see Pt. II *infra*, subheading "(b). Commodities."

[13]*E.g.*, Turner v. Wade, 254 U.S. 64 (1920) (assessment procedures).

[14]Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954).

[15]U.S. CONST. amend. XIV, §1; see Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389 (1928), for an example of the violation of this clause.

[16]U.S. CONST. art. 1, §10, cl. 2; Brown v. Maryland, 25 U.S. (12 Wheat.) 419

which prohibits a state from making or enforcing any law that abridges the privileges or immunities of citizens of the United States;[17] the impairment of contract provision, which prohibits any state from passing a law impairing the obligation of contract;[18] and the operation of the principles of intergovernmental immunity, which protect federal instrumentalities from state taxation.[19] Since these provisions are not concerned with jurisdiction as such, they are not discussed in this article. Their demands are of an indispensable character, however, and must be treated with deference in appropriate cases. This fact should not detract from the importance of the present study of the ramifications of due process, which probably outnumber those of most, if not all, of the other constitutional restrictions on a state's power to tax.

At the outset, a distinction should be drawn between a state's jurisdiction to tax and its exercise of such jurisdiction. There may be no constitutional objection to the imposition of a tax; yet the state may not see fit to exercise this power. Consequently, jurisdiction to tax may exist even in the absence of an actual tax.[20]

The final distinction to be noted is that between jurisdiction to tax and the amount of the tax. If the subject is taxable by virtue of its presence in the state, the jurisdiction to tax is not nullified because the tax is burdensome in amount.[21] The Court, while not deviating from this principle, has rendered one decision that invalidated a state tax merely because it was considered excessive in amount. In *Great Northern R.R. v. Weeks*,[22] decided in 1936, a tax based on a grossly excessive assessment of property within the territorial limits of the state was held to violate the due process clause of the fourteenth amendment. Significantly, however, the decision was based on the onerous aspect of the amount of the tax rather than on lack of jurisdiction to tax.

(1827).

[17]Toomer v. Witsell, 334 U.S. 385 (1948). Interesting state cases on this point are O'Connell v. Kontojohn, 131 Fla. 783, 179 So. 802 (1938); Grantham v. City of Chickasha, 156 Okla. 56, 9 P.2d 747 (1932).

[18]U.S. CONST. art. I, §10, cl. 1. See, *e.g.*, Puerto Rico v. Russell & Co., 315 U.S. 610 (1942).

[19]*E.g.*, Rohr Aircraft Corp. v. County of San Diego, 80 Sup. Ct. 1050 (1960).

[20]Dameron v. Brodhead, 345 U.S. 322 (1953).

[21]Magnano Co. v. Hamilton, 292 U.S. 40 (1934); Alaska Fish Salting & By-products Co. v. Smith, 255 U.S. 44 (1921); McCray v. United States, 195 U.S. 27 (1904).

[22]297 U.S. 135.

Four years later, in *Nashville, C. & St. L. Ry. v. Browning,*[23] the distinction between the amount of the tax and the jurisdiction to tax was made more obvious. The Court sapped the strength of the *Weeks* case by reaching a contrary decision with reference to a similar set of facts. This and similar decisions should not be interpreted to mean that a state is under no restrictions as to the amount of the tax. The due process provision places no limitation on the amount of a constitutionally imposed tax, but if the form of taxation is utilized as a mere disguise for the exercise of another constitutionally forbidden power, such as confiscation, the exaction cannot stand.[24]

PART I. REAL PROPERTY

The United States Supreme Court has never entertained a case in which a state attempted to tax directly land located in another state.[25] On numerous occasions its dicta and analogies have been stated so clearly that there is little room to doubt its position with reference to this type of situation.[26] Land, the Court has said, is taxable only by the jurisdiction in which it is located; this principle is so elementary that no state legislature has assumed to impose a tax contrary to it.[27] Accordingly, taxability at the situs of the land does not depend upon the citizenship or domicile of the owner.[28]

Even though the Court has faced no problem involving the direct taxation of foreign land by a state, it has had to determine whether such taxation has been accomplished by indirect means. In *Senior v. Braden,*[29] decided in 1935, Ohio levied what purported to be a personal property tax on land trust certificates representing a domiciliary taxpayer's beneficial interest in foreign land, the legal title to which was held by an out-of-state trustee. The trustee was to hold and manage the realty for the benefit of the certificate holders and

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[23]310 U.S. 362 (1940).

[24]Magnano v. Hamilton, *supra* note 21; Alaska Fish Salting & By-products Co. v. Smith, *supra* note 21.

[25]See Miller Bros. v. Maryland, 347 U.S. 340, n.11 (1954). A careful search of cases decided subsequent to the *Miller* decision warrants no change in this statement.

[26]*E.g.*, S. R. A., Inc. v. Minnesota, 327 U.S. 558 (1946); Union Refrigerator Transit Co. v. Kentucky, *infra* note 27.

[27]See Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194 (1905).

[28]Miller Bros. Co. v. Maryland, 347 U.S. 340, 345 (1954) (dictum).

[29]295 U.S. 422.

to distribute the income or sale proceeds to them. The state conceded that if the tax were assessed against "land or interests in land" it would be unconstitutional. The Court held that the certificates represented interests in land and struck down the Ohio tax as violating the due process clause.

In the famous case of *Blodgett v. Silberman*[30] the value of land outside the taxing jurisdiction played an important role in the computation of a valid tax within the jurisdiction. A general partner's interest in a New York limited partnership that owned, *inter alia*, lands and buildings in New York was considered to be intangible personal property, subject to a death tax at the domicile of the decedent general partner in Connecticut. This holding was based upon the reasoning that the decedent's interest under the New York statute and the partnership agreement was only the right to share in the remains of the partnership assets after its liabilities were satisfied; it was not an interest in land or other specific assets. Consequently, the land and buildings were deemed converted into intangible personalty. Since intangible personalty is subject to a death tax at the domicile of the decedent owner, the value of the partnership interest, which included part of the value of the land and buildings, was properly included in computing the Connecticut death tax. Implicit in the opinion is the recognition of Connecticut's inability to impose a tax on, or with reference to, land outside its own boundaries.

The five-to-four decision in *Maxwell v. Bugbee*[31] dealt with an even more interesting, and certainly more controversial, situation involving foreign land in a local tax situation. An inheritance tax statute provided for a tax on the transfer of property in the state. The rate of the tax was graduated in accordance with the value of decedent's entire estate regardless of location. The estate included land and other property located outside the state. The majority of the Court approved the exaction, saying that the subject matter of the tax was the privilege to succeed to property within the jurisdiction. Since this was true, no objection was found to the state's use of the value of the property outside the jurisdiction in computing the taxation rate to be applied, unless the inclusion of this out-of-state property, with the resultant increased rate, would make the tax amount to one on property beyond its jurisdiction. The dissenting justices were convinced that if the use of foreign property in com-

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[30]277 U.S. 1 (1928).
[31]250 U.S. 525 (1919).

puting the rate of tax on a local privilege resulted in a higher tax than would result from exclusion of the out-of-state property, the foreign property was taxed unconstitutionally.[32] This position is difficult to criticize, but it does not represent the present law as long as the limitations specified by the majority are observed.

Although the Court has adhered strictly to the elementary principle that land is taxable only where it is located, jurisdictional problems still arise. An illustration is found in *Savings & Loan Society v. Multnomah County*.[33] A domiciliary of California held a mortgage on land located in Oregon. Oregon sought to tax the mortgage interest as an interest in land within its jurisdiction. The tax was upheld against the contention that the tax statute violated the due process of law clause. The Court stated that the mortgage, regardless of whether it was a mere lien on the land or carried title, represented a taxable interest in the Oregon land and owed its existence, maintenance, and enforcement to the law of that state. Alternative procedures were available to the legislature in considering the mortgage interest when formulating the tax statute. It could have treated a mortgage debt as personal property, taxable at the domicile of the creditor like other choses in action, or as an interest in real property, taxable at the situs like other real property. Oregon chose to tax the interest as real property.

At this point the observation may be made that if the ingenuity of man can create jurisdictional problems in regard to the taxation of land, his accomplishments in the tax fields of less stable types of property and of privileges must be tremendous.

PART II. TANGIBLE PERSONAL PROPERTY

PROPERTY TAXES

The Tax Situs

The tax rule is well established that tangible personal property is considered to be with the owner and taxable by his domiciliary state unless it is permanently located outside the state.[34] When the

[32]*Id.* at 543.

[33]169 U.S. 421 (1898).

[34]Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944); Ayer & Lord Tie Co. v. Kentucky, 202 U.S. 409 (1906); Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194 (1905); St. Louis v. Ferry Co., *infra* note 36.

property is temporarily located elsewhere the Court has utilized a fiction to justify a tax by the domiciliary state. Since the situs of the property is said to follow the owner,[35] the use of the Latin maxim *mobilia sequuntur personam* has been employed to express this concept.[36]

Permanency of Location

Property that has been kept in a non-domiciliary state for a period sufficient in length for the Court to consider a tax situs to have been acquired may be taxed there.[37] Accordingly, if an owner of tangibles keeps them in a state for immediate or eventual sale, or even if not for sale, with a sufficient degree of permanency, they are taxable there despite the fact that he is domiciled elsewhere.[38] This is also true of tangibles maintained under a contract whereby they are used regularly in a non-domiciliary state.[39]

The requirement of permanency of location within a non-domiciliary state as a prerequisite to the taxation of that property is a child of the due process of law clause of the fourteenth amendment.[40] Without the necessary degree of permanency there is no tax situs within the jurisdiction, and consequently an exaction in the guise of a tax amounts to the taking of property without due process of law.[41]

As will be evident throughout this study, an adequate conception of the degree of permanency required for the acquirement of a tax situs by tangible personal property has its ramifications. It is apparent that such a concept cannot contemplate all property physically located within a tax jurisdiction, since mere temporary location will not support a tax situs.[42] It is obvious, also, that when the fiction of *mobilia sequuntur personam* is applied in a proper case the requirement of actual permanency of location is nullified. The treatment of tangible

[35]State R.R. Tax Cases, 92 U.S. 575 (1875); Tappan v. Merchants' Nat'l Bank, 86 U.S. (19 Wall.) 490 (1873).

[36]*E.g.*, St. Louis v. Ferry Co., 78 U.S. (11 Wall.) 423 (1870).

[37]Old Dominion S.S. Co. v. Virginia, 198 U.S. 299 (1905); see Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891), and cases cited therein.

[38]Hannis Distilling Co. v. Mayor of Baltimore, 216 U.S. 285 (1910); Selliger v. Kentucky, 213 U.S. 200 (1909); Thompson v. Kentucky, 209 U.S. 340 (1908); Carstairs v. Cochran, 193 U.S. 10 (1904).

[39]Gromer v. Standard Dredging Co., 224 U.S. 362 (1912).

[40]Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944).

[41]Standard Oil Co. v. Peck, 342 U.S. 382 (1952).

[42]New York *ex rel.* N.Y. Cent. & H.R.R.R. v. Miller, 202 U.S. 584 (1906).

personalty as being with the owner in one state when it is actually located in another state, albeit temporarily, places a greater strain on the requirement of permanent physical location than it will stand.

The discussion to come later concerning the acquirement of a tax situs by fleets of vehicles engaged in the transportation of goods in interstate commerce will reveal that the required permanency of location means only that the property in this particular class of cases must be within the jurisdiction for the entire tax period. Its permanent physical location without any departures, however, is not required.[43] Significant also with reference to this class of cases is the recognition that an average or a portion of a fleet of vehicles may acquire a tax situs outside the domiciliary state of the owner even though no particular vehicle in the fleet is required to be in the taxing state for the entire year.[44]

Other interstate commerce cases, to be discussed subsequently, indicate that in some instances the Court has paid little heed to the requirement of permanency for the establishment of a tax situs. These cases are concerned with commodities, as distinguished from instrumentalities or vehicles, in the stream of commerce. In determining when these commodities are taxable by a state, the Court requires that they be taken out of the stream of interstate commerce.[45] Once out of interstate commerce they have been considered taxable, apparently with little thought given to the requirement of permanency of location, which has been considered so important in the case of vehicles engaged in interstate commerce.[46]

Thus it becomes evident that an all-inclusive definition of the term *permanency* as it relates to the acquirement of a tax situs of tangible personal property would be cumbersome and probably misleading. Since most of this article is concerned directly or indirectly with the multitude of meanings involved in connotations of this term, no definition will be included.

Tangibles in Interstate Commerce

State property taxation of tangible personal property is often complicated by the fact that some of this property is traveling from one state to another as an instrumentality in which goods are being

[43]Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944).

[44]Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891).

[45]See Pt. II *infra*, subheading " (b). Commodities."

[46]See *ibid.* and " (a). Instrumentalities."

transported in interstate commerce. In addition, the commercial commodity itself has caused judicial complexities by being in the stream of commerce between the states.

The United States Constitution does not prohibit a state from imposing a non-discriminatory property tax on tangible personal property within its jurisdiction that is employed in interstate commerce.[47] The application of this principle, however, requires the Court to reach two important decisions in the light of constitutional requirements. First, the question must be answered whether any of the tangibles have acquired a tax situs in the taxing state for the purpose of subjection to a property tax. The imposition of a tax on property when no situs exists is a violation of the due process clause of the fourteenth amendment.[48] Second, assuming that a tax situs has been acquired by some of the property in the taxing state, a determination must be made as to what portion of the interstate organism may appropriately be attributed to the particular state seeking to impose the tax. This determination is concerned with the requirements of the commerce clause,[49] since the taxation of a greater share of the property than rightfully should be apportioned to the state would unduly burden interstate commerce.

a. Instrumentalities

The general rule has long been settled that the domiciliary state of an owner has the power to impose a property tax on his tangible instrumentalities engaged in transporting commodities in interstate commerce.[50] Early recognition was also accorded the fact that a tax situs can be acquired outside the domiciliary state of the owner, provided that the instrumentalities remain in the non-domiciliary state for a period sufficient in length for them to be considered as incorporated in the general mass of property within that state.[51] The Supreme Court, in spite of having recognized the possibility of a

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[47]Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891).

[48]Braniff Airways v. Nebraska State Bd., 347 U.S. 590 (1954).

[49]Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 (1949). U.S. CONST. art. 1, §8, cl. 3, provides, *inter alia*, that Congress shall have the power to regulate commerce among the states. The discussion of the cases will indicate how a state may violate this provision by the use of its tax power.

[50]See Ayer & Lord Tie Co. v. Kentucky, 202 U.S. 409 (1906), and cases cited therein.

[51]Hays v. Pacific Mail S.S. Co., 58 U.S. (17 How.) 596 (1854).

tax situs outside the domiciliary state, was not easy to convince that any particular situation was an appropriate one for the establishment of such a situs.[52] The early cases involved vessels engaged in coastwise interstate commerce. Their periodic but short stays in a non-domiciliary state for the purpose of loading and unloading passengers were not acceptable as sufficient for the establishment of a tax situs. The Court, however, impliedly recognized that a situs could be created if the stays were sufficient in number.[53] The recognition of this possibility has been of no practical value, since the Court has never actually allowed a non-domiciliary state to impose a property tax on ocean-going vessels engaged in coastal trade. The taxation of vessels in this type of trade is apparently governed by principles applied to vessels that cross the ocean. Vessels traveling over the ocean are taxable at the domiciliary state of the owner even though they are never in the domiciliary state.[54] The mere fact that the vessels are enrolled in a non-domiciliary state has never been held sufficient for the establishment of a tax situs in that state.[55] In *Old Dominion S.S. Co. v. Virginia*,[56] however, the vessels, although engaged in interstate commerce, were navigated wholly within the limits of the non-domiciliary state, Virginia. They were held to be taxable by this state because they had acquired a permanent situs. Dredges have been held taxable in a non-domiciliary state in which they were kept regularly and employed in the work for which they were designed.[57]

The Doctrine of Apportionment. In early cases involving the question of a non-domiciliary state's power to tax a fleet of tangible instrumentalities used in the transportation of goods in interstate commerce, the Court apparently did not seriously consider the possibility that only a proportion of the whole fleet might acquire a tax situs in a single non-domiciliary state. The assumption seems to have been that if a tax situs was established in the foreign state the entire fleet entering the state was taxable.

In 1891 the Court approved Pennsylvania's deviation from this

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[52]Transportation Co. v. Wheeling, 99 U.S. 273 (1878); Morgan v. Parham, 83 U.S. (16 Wall.) 471 (1872); St. Louis v. Ferry Co., 78 U.S. (11 Wall.) 423 (1870); Hays v. Pacific Mail S.S. Co., *supra* note 51.

[53]Morgan v. Parham, *supra* note 52; Hays v. Pacific Mail S.S. Co., *supra* note 51.

[54]Southern Pac. Co. v. Kentucky, 222 U.S. 63 (1911).

[55]See Ayer & Lord Tie Co. v. Kentucky, 202 U.S. 409 (1906).

[56]198 U.S. 299 (1905).

[57]Gromer v. Standard Dredging Co., 224 U.S. 362 (1912).

assumption. In *Pullman's Palace Car Co. v. Pennsylvania*[58] a foreign corporation was engaged in running railroad cars into, through, and out of the state. It had, at all times during the tax period, an average of one hundred cars in the state, although no particular cars were within the state for all of this period. The Court was satisfied that this average number of cars had acquired a tax situs in the non-domiciliary state. Although the constitutional provision with which the Court was expressly concerned was the commerce clause, the fact that a tax situs was tacitly recognized to exist indicates that the due process provision was satisfied. The Court drew a distinction between instrumentalities engaged in interstate transportation over land and similar commerce by water. This distinction was based on the "strikingly dissimilar" aspects of the two types of commerce. State interference by taxation with the use of natural waterways was considered unjustifiable constitutionally. Interference with artificial roadways was another matter.[59]

More than a half century later the Court reversed this position in so far as inland water routes were concerned. In *Ott v. Mississippi Valley Barge Line Co.*[60] a foreign corporation employed tugboats and barges in its interstate business of transporting freight on the Mississippi River. These vessels traveled constantly in and out of Louisiana but were in that state for only the comparatively short periods of time required to discharge and take on cargo and to make repairs. The Court concluded that a certain proportion of the total number of these vessels had acquired a tax situs in Louisiana and were taxable there by virtue of the application of an acceptable apportionment formula. The Court expressly limited its decision to instrumentalities engaged in interstate commerce on inland waterways. Care was taken to note that the decision did not reach the taxability of ocean carriage, either in coastal or foreign commerce. Cases dealing with attempts to tax instrumentalities engaged in these types of commerce were cited. In all of them, however, the question whether a tax situs could be acquired by ocean-going vessels in a non-domiciliary state on an apportionment basis, as used in the *Pullman's Palace Car Co.* and *Ott* cases, either was not involved or was not considered. This question remains unanswered.

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[58]141 U.S. 18 (1891).

[59]Johnson Oil Co. v. Oklahoma, 290 U.S. 158 (1933), is another example of a constitutional tax on instrumentalities engaged in an interstate transportation business conducted on land.

[60]336 U.S. 169 (1949).

The Court was not long in extending the reasoning of the *Pullman's Palace Car Co.* and *Ott* cases to cover air transportation. In *Braniff Airways v. Nebraska State Board*[61] a foreign corporation's aircraft made eighteen stops per day in Nebraska. The corporation rented ground facilities, purchased and paid for fuel, and picked up and discharged freight and passengers in Nebraska. The same aircraft did not land in Nebraska every day, however, and none was there continuously. Regardless of this fact, the regularity of contact of the aircraft with Nebraska and the benefit derived therefrom formed a basis for the acquirement of a tax situs sufficient to support the levy of an apportioned ad valorem property tax on the aircraft.

The Court seems well on its way to reaching the conclusion that a non-domiciliary state may tax, on an apportionment basis, instrumentalities engaged in interstate commerce regardless of the type of transportation involved, provided that the nature of the contact of the instrumentalities with the state is substantial and continuous. A consistent decision concerning instrumentalities engaged in coast-wise interstate commerce is apparently all that is lacking to warrant this conclusion.

A frequently used manner of expressing the requirement that a tax situs must be established in a non-domiciliary state by instrumentalities engaged in interstate commerce is that a defined part of the domiciliary corpus must be permanently located in that state.[62] The *Pullman's Palace Car, Ott,* and *Braniff* cases illustrate how this requirement may be satisfied. Others, however, have failed to meet the test.

In *New York ex rel. N.Y. Cent. & H.R.R.R. v. Miller,*[63] decided in 1906, a New York railroad corporation engaged in interstate commerce sent its railroad cars over roads in New York and other states. The corporation owned some of the roads; others it hired. In addition, cars were sent over other lines as well as its own and at times were even used by other railroad companies for their independent business. The cars were often out of the possession of the corporation for some time before returning to the domiciliary state, New York. No cars were used continuously and exclusively outside New York during the entire year. The corporation contended that these facts

[61]347 U.S. 590 (1954).

[62]*E.g.*, Standard Oil Co. v. Peck, 342 U.S. 382 (1952); Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944); New York *ex rel.* N.Y. Cent. & H.R.R.R. v. Miller, *infra* note 63.

[63]202 U.S. 584.

entitled it to deduct a proportion of the total number of railroad cars in the computation of the New York franchise tax. The Court disagreed unanimously, reasoning that the nature of the tax presented no difficulty because a franchise tax measured by tangible personal property may be treated as a tax on the property. In such a case the property must have a tax situs in the taxing state. The position was then taken that none of the railroad cars had lost the tax situs in the domiciliary state and none had acquired a non-domiciliary tax situs by virtue of travels outside New York. *Pullman's Palace Car Co.*, in which an ascertained average of railroad cars had been held to have acquired a tax situs in a non-domiciliary state, was distinguished. There the same cars were continuously receiving the protection of the non-domiciliary state, and it was just that the state should tax a proportion of them. Here, however, no specific or average number of cars were shown to have been so continuously in any other state as to be taxable there. The Court pointed out that there was no constitutional objection to taxation of the property of a corporation by its domiciliary state even if that property should be taken "successively into another state for a day, a week, or six months" and then brought back. The underlying reasoning is that occasional excursions to foreign parts do not destroy the permanent situs of the property in the domiciliary state.

In 1944 *New York ex rel. N.Y. Cent. & H.R.R.R. v. Miller* was used as a case directly in point when *Northwest Airlines, Inc. v. Minnesota*[64] was decided. Minnesota, the domiciliary state of the corporate owner, levied a property tax on an entire fleet of airplanes engaged in interstate commerce. The airplanes were used to transport passengers, freight, and mail on regular, fixed routes in Minnesota and several other states. All were flying continuously from state to state except when grounded for repairs in the home port of St. Paul, where the corporate owner's principal place of business was located. Only fourteen per cent of the scheduled route mileage was in the domiciliary state. Some of the planes had been taxed by some of the non-domiciliary states in which they traveled.

A bare majority of the Court held that Minnesota violated neither the due process clause of the fourteenth amendment nor the commerce clause by imposing the tax. The reasoning of the Court in the *Miller* case was considered to be particularly pertinent to this situation. The Court was convinced that in spite of the facts that

[64] 322 U.S. 292.

eighty-six per cent of the scheduled mileage of the planes was in non-domiciliary states, that the planes operated on fixed routes, and that some of them had been taxed by some of these states, there had been no satisfactory showing that a defined part of the domiciliary corpus had acquired a tax situs outside the domiciliary state; consequently, all were taxable by the domiciliary state. It is interesting to note that while the majority specifically disclaimed making any decision as to the validity of the taxes collected by the non-domiciliary states, it based the right of the domiciliary state to tax on the lack of acquirement of tax situs elsewhere.

The Court stressed the fact that the doctrine of apportionment used in *Pullman's Palace Car Co.* and other cases had never been applied in theory or practice to units of interstate commerce visiting a non-domiciliary state for fractional parts of a year. Continuous protection for the entire year by a state other than the domiciliary state was deemed to furnish the constitutional basis for tax apportionment in such interstate commerce situations. Without this protection the required degree of permanency of location of the property in the non-domiciliary state was lacking. The majority concluded that the domiciliary state remained the permanent situs of the property notwithstanding its "occasional excursion to foreign parts."

The four dissenting justices felt that instruments of interstate transportation moving over fixed routes on regular schedules acquired a tax situs in every state through which they passed.[65] They recognized, however, that in some cases vehicles of transportation moving interstate had been held to be so sporadically and irregularly present in other states that they acquired no situs there. They also distinguished the situation facing the Court in *Miller*. There, they reasoned, the cars moved not only over the carrier's own tracks but also were interchanged with other railroads and moved almost at random throughout the United States. Further, in the *Miller* case no evidence was offered tending to show in what state the cars moved, or with what degree of regularity they were present in any particular state or group of states other than the domiciliary state.

A comparison of *Northwest Airlines* with *Braniff*, in which a tax situs was acquired by a defined part of the domiciliary corpus, consisting of airplanes, makes an interesting study. *Braniff* was decided ten years after *Northwest Airlines*; and, although it may be contended that a degree of inconsistency exists between the two decisions,

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[65] *Id.* at 308.

the Court in *Braniff* expressly refused to find any fault with its position in *Northwest Airlines*.[66]

The Effect of Apportionment on the Domiciliary State. Recognition of the right of the non-domiciliary state to impose a property tax on instrumentalities engaged in interstate transportation led to the question of the extent of the right of the domiciliary state to impose a property tax on the same property. In 1952 *Standard Oil Co. v. Peck*[67] faced the Court. Ohio levied a property tax on the entire fleet of an Ohio corporation's boats and barges which it employed for the transportation of oil on the Mississippi and Ohio rivers. Oil was neither picked up nor discharged in Ohio. The main terminals were in Tennessee, Kentucky, and Louisiana. The maximum distance traversed by the boats and barges on any trip through waters bordering Ohio was seventeen and one-half miles. There was an unresolved doubt that any of this stretch of river was actually in Ohio. The vessels were registered in Ohio and stopped there occasionally for fuel and repairs. No loading or unloading was accomplished in Ohio. None of the non-domiciliary states had attempted to tax any of the vessels, and there was no showing that any proportion of the vessels were in any one state for the whole of the tax year.

The Court held that the rule permitting taxation by two or more states on an apportionment basis precludes taxation of all the property by the domiciliary state of the owner. To hold otherwise, the Court stated, would open the way to multiple taxation of interstate operations; furthermore, the tax would have no relation to the opportunities, benefits, or protection given by the taxing state to those operations. Thus, in the process of invalidating the tax, the Court apparently utilized the commerce clause by implying that multiple taxation of interstate operations unduly burdens interstate commerce. The due process of law clause also was an impossible hurdle for the tax, since the imposition of such an exaction required the taxpayer to pay for protection that was not being rendered because all of the property did not have a situs in the domiciliary state. The fact that the non-domiciliary states had not attempted to tax was not disturbing because of the apparent assumption that the existence of a tax situs does not depend on its use.

[66]The same attitude was expressed in Standard Oil Co. v. Peck, 342 U.S. 382 (1952), two years before the *Braniff* decision was rendered.

[67]342 U.S. 382.

The Court distinguished *Miller* and *Northwest Airlines*, in both of which the domiciliary state was allowed to tax the entire fleet of instrumentalities engaged in interstate transportation. In these cases there was no showing that a defined part of the domiciliary corpus had acquired a tax situs elsewhere. These cases were deemed to have no application to the *Peck* situation, since the boats and barges that Ohio presumed to tax were "almost continuously" outside Ohio during the tax year; consequently, the non-domiciliary states could tax them on an apportionment basis. The boats and barges in the *Peck* case admittedly were in the owner's domiciliary state for some, though a minor part, of the tax year. This was true also of the airplanes in *Northwest Airlines* even though, presumably, the period of time was greater than in the *Peck* case. Apparently, therefore, since both decisions are in the good graces of the Court, the difference between the two must be recognized as nothing but a matter of degree — poor consolation for the lawyer in his role as legal prophet. The ease with which the Court assumed, merely on the basis of a showing of continuous absence rather than actual situs, that the vessels in the *Peck* case had acquired a tax situs outside the domiciliary state is somewhat disconcerting. This sentiment is strengthened by the Court's adamant attitude exhibited in *Northwest Airlines* when it held strong evidence tending to establish the existence of a tax situs outside the domiciliary state to be inconsequential.

Three years after the *Peck* decision additional light was thrown on the attitude of the Court toward the decision in *Northwest Airlines*. This clarification appeared in the *Braniff* opinion, in which a tax situs in a non-domiciliary state was recognized as having been acquired by airplanes.[68] The Court disagreed with the contention that *Northwest Airlines* would have to be overruled in order to hold that airplanes could acquire a tax situs in a non-domiciliary state. It added that if there had been a satisfactory showing in *Northwest Airlines* that a defined part of the domiciliary corpus had acquired a tax situs outside the domiciliary state, it would be fair to say that the domiciliary state would not have been allowed to tax the entire fleet of airplanes. Thus the Court indicated by way of dictum that the rule adopted in the *Peck* case with reference to instrumentalities in interstate commerce on inland waters was also applicable to instrumentalities engaged in such commerce by air transportation.

Presumably the extent to which the domiciliary state can impose

[68]347 U.S. 590 (1954).

a property tax in the *Peck* situation is now the same as that accorded a non-domiciliary state: it can tax that proportion of the total amount of property determined by the use of an equitable formula that accords fair tax apportionment among all the states in which a tax situs has been established. In the *Peck* case the share of the domiciliary state would have been negligible. Such an arrangement would work to the advantage of the interstate carrier unless all qualified states took full advantage of their rights to tax, since, to the extent that one or more of the states did not tax, the property would escape taxation. On the other hand, when all qualified states began to tax, the carrier probably would find itself in the unenviable position of contesting the validity of various tax formulae; the independent administration of the tax formulae could easily result in a total tax in excess of what it should pay.

The Role of Apportionment in Foreign Commerce. There is a possibility that instrumentalities engaged in foreign commerce that habitually frequent the ports of a non-domiciliary state in this country may be held to be taxable in that state on an apportionment basis. The practical facts, however, tend to minimize the chance of such a situation arising as long as the Court stresses the requirement of a substantial contact with the non-domiciliary state. This type of situation is not concerned with the interstate portion of the commerce clause, since interstate commerce is not involved; but the same provision of the United States Constitution that gives Congress the power to regulate commerce between the states also gives that body the power to regulate foreign commerce.[69] Whether the Court will be more lenient in its conception of the constitutional requirements for the acquirement of a tax situs in the non-domiciliary state in such a situation than it requires under the interstate commerce clause is a matter of pure speculation. One interesting observation seems to be pertinent. If such a situation were presented to the Court, there is little doubt that it would be called upon to determine the scope of its holding in *Southern Pacific Co. v. Kentucky,*[70] in which the domiciliary state of the corporate owner was allowed to tax the perenially absent fleet of ocean-going steamships in order to prevent its escape from all state property taxation.

The Formula for Equitable Apportionment. In the beginning of

[69]U.S. CONST. art. I, §8, cl. 3.
[70]222 U.S. 63 (1911).

this discussion of property taxation of instrumentalities in interstate commerce the point was made that even though a court may be satisfied that a tax situs has been acquired in a state by a portion of the whole number of instrumentalities touching that state, the Court's task is not complete. The exact portion of the interstate organism that may apportionately be attributed to the taxing state in which it functions must be ascertained. This is a requirement of the commerce clause in order to insure that interstate commerce shall remain free from state regulation.[71]

Various formulae for apportioning the property equitably have been used by the taxing states. The fairness of the formula depends upon the situation in which it is applied, but if the Court is satisfied as to its equitable operation the requirement of the commerce clause has been met.[72] A state's formula providing for assessment of the same proportion of the corporate owner's interstate railroad cars as the number of miles of railroad over which the cars were run within the taxing state bore to the total number of miles of railroad in all the states over which its cars were run was held valid in the light of the commerce clause.[73] This type of mileage formula is not uncommon. It has been specifically upheld several times,[74] but it may be inequitable under certain circumstances, such as extreme variations in density of traffic.[75]

b. Commodities

As long as tangible commodities are in what the Court considers the stream of interstate commerce they are not to be subjected to state property taxation, since a tax on such commerce by a state is an unconstitutional regulation thereof.[76] This is true regardless of whether they cross state boundaries by being transported in a vehicle,[77] are propelled by natural forces,[78] or utilize their own power.[79] The

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[71]Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 (1949).

[72]*Ibid.*

[73]Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891).

[74]Ott v. Mississippi Valley Barge Line Co., *supra* note 71; Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362 (1940).

[75]Union Tank Line Co. v. Wright, 249 U.S. 275 (1919). An interesting but complicated formula that the Court approved appears in Braniff Airways v. Nebraska State Bd., 347 U.S. 590 (1954).

[76]Case of the State Freight Tax, 82 U.S. (15 Wall.) 232 (1872).

[77]*Ibid.*

[78]Coe v. Errol, 116 U.S. 517 (1886).

[79]Kelly v. Rhoads, 188 U.S. 1 (1903).

determination of when such commerce begins and when it ends obviously becomes important.

When a commodity has begun to move as an article of trade from one state to another, interstate commerce has begun.[80] Preliminary work, such as carrying commodities in vehicles or floating them to the depot where the journey is to commence, is not a part of interstate transportation.[81] Accordingly, logs taken to the bank of a river, where some were put into the river with the intention of sending them down the river to another state, were held not to be in interstate commerce.[82] Even when logs were put into a stream in the domiciliary state of the owner and floated to a point in that state where they were held while awaiting shipment by rail to other states as the demands in those states justified, the interstate journey was considered as not yet begun.[83] In such cases the taxability of the logs at their situs was recognized to be unaffected by the requirement of the commerce clause.

At times the interstate transit concededly has begun but is interrupted. The question then presented is whether the interruption terminates the interstate nature of the movement to such an extent that the commerce clause no longer protects the property from taxation by the state in which it is then located. Again floating logs created a problem for the Court.[84] In this instance they were placed in a river, and after the floating journey had commenced they were held for a short time at a boom in a town to await subsidence of high water which made it unsafe to continue the journey immediately. The logs were held immune from a local property tax, since the temporary interruption was caused by the necessity of the journey.

Sheep being driven across Wyoming from Utah to Nebraska grazed on both public and private lands en route.[85] The journey of 500 miles took from six to eight weeks; the daily travel averaged about nine miles. Wyoming's attempt to tax the sheep failed because the sheep were held to be in uninterrupted interstate transit in spite of the periods of grazing. The Court was convinced that the average

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[80]Coe v. Errol, 116 U.S. 517 (1886).

[81]Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922); Coe v. Errol, *supra* note 80.

[82]Coe v. Errol, 116 U.S. 517 (1886).

[83]Diamond Match Co. v. Ontonagon, 188 U.S. 82 (1903).

[84]Champlain Realty Co. v. Town of Brattleboro, 260 U.S. 366 (1922); *accord*, Hughes Brothers Timber Co. v. Minnesota, 272 U.S. 469 (1926).

[85]Kelly v. Rhoads, 188 U.S. 1 (1903).

mileage covered was ample proof that the sheep had not been brought into the state for the mere purpose of grazing.

Property that concededly has been in the stream of interstate commerce may be taxed where it comes to rest if it has been stopped to take advantage of a local facility not directly ancillary to its interstate movement. Several examples should be sufficient to clarify this principle. Grain being shipped through Illinois was withdrawn from the carrier and stored in an elevator for the temporary purpose of inspecting, weighing, cleaning, grading, and mixing it.[86] It was then replaced in the hands of a carrier and transported to New York. The grain was held to be taxable in Illinois. The Court was impressed by the fact that the property, during the interruption of transit, was being held for the owner's own purposes and with full power of disposition. Coal shipped to New Jersey was taken from cars and kept in that state in advance of definite orders from other states.[87] The Court was convinced that the accumulation of stock between mine and market was for the owner's convenience in filling coal orders more readily. The stop was more than a mere incident of interstate transportation; hence the coal was taxable in New Jersey. Similarly, interstate transit was held to have ceased when oil shipped from other states was removed from cars and placed in storage tanks to await future orders.[88] Here, again, the temporary storage was considered to be for the business purposes and profits of the owner.

When tangibles arrive at their destination and become part of a common mass of property within a state they may be subjected to property taxes.[89] Interstate commerce terminates when the property arrives at its final destination even though it remains in the vehicle in which it was transported into the state.[90] The latter holding was later applied to property that had arrived in the state of its destination but was offered for sale while it was a few miles up the river from the established market place.[91]

In summary, the commerce clause does not confer immunity from state taxation upon property unless it is actually in the course of

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[86]Bacon v. Illinois, 227 U.S. 504 (1913).

[87]Susquehanna Coal Co. v. City of South Amboy, 228 U.S. 665 (1913).

[88]General Oil Co. v. Crain, 209 U.S. 211 (1908). An excise tax was involved in this case, but there is no reason to conclude that the question whether interstate transit has ceased depends upon the type of tax that is sought to be imposed.

[89]Minnesota v. Blasius, 290 U.S. 1 (1933).

[90]Brown v. Houston, 114 U.S. 622 (1885).

[91]Pittsburg & Southern Coal Co. v. Bates, 156 U.S. 577 (1895).

interstate transit. "Transit" is construed broadly enough to include stops necessarily incident thereto. Transit alone does not deprive the state of origin or the state of destination of jurisdiction to tax; the transit must be of an interstate character. When a distinct halt in the transit brings a gain that otherwise would not ensue, the Court frowns on efforts to escape local taxation.

There is an aspect of the foregoing decisions that is disconcerting in the light of the recognized requirement of permanency of location of property as a prerequisite of the establishment of a tax situs. When the Court holds that the state of origin may tax logs intended for interstate transit but that have been subjected only to preliminary activities on tax day,[92] it is obvious that the logs have not yet lost their original tax situs. The state of origin, therefore, can take advantage of this fact without being affected by the operation of the commerce clause. On the other hand, when the property has entered the stream of commerce and the transit is interrupted subsequently to the extent that the Court rules the property taxable in the state where the interruption occurred,[93] the Court does not seem concerned with the item of permanency. This is particularly noticeable in cases in which interstate transit has been held to cease and the property held taxable when it is in storage awaiting future orders from other states.[94] It is obvious that such property usually does not assume a substantial degree of permanency of location in the taxing state.

By its apparent assumption of the existence of a tax situs of commodities merely because the interstate transit has ceased, the Court gave more latitude to the commerce clause than it was willing to do with reference to the acquirement of a tax situs by instrumentalities engaged in interstate transportation. In the latter cases the requirements of the due process clause were recognized as determinative of the existence of a tax situs.[95] In the former the Court seemed to be thinking of the commerce clause not only with reference to the unconstitutionality of the regulation of interstate commerce by a state but also with reference to tax situs. A serious inconsistency seems to result.

Double Taxation

In the early cases establishing that a non-domiciliary state could

[92]Coe v. Errol, 116 U.S. 517 (1886).

[93]See note 37 *supra*.

[94]See notes 87, 88 *supra*.

[95]Braniff Airways v. Nebraska State Bd., 347 U.S. 590 (1954); Standard Oil Co.

impose a tax on tangibles in an appropriate situation,[96] the Court was not concerned with whether the domiciliary state could also tax. At that time the Court assumed that there was no constitutional prohibition against double taxation in this type of situation.[97] In 1905, however, the issue was directly presented in *Union Refrigerator Transit Co. v. Kentucky*,[98] in which the due process limitation on the jurisdiction of a state to tax tangible personalty was first expressly imposed.[99] The Court held that tangible personal property in the form of refrigerator cars located permanently in foreign states and employed there in the prosecution of the owner's business could not be the subject of a property tax by the domiciliary state of the owner. The property was wholly outside the territorial jurisdiction of the domiciliary state's taxing power and received no protection from its laws, for which the tax was supposed to compensate. Consequently, the Court stated, to subject the property to a property tax by the owner's domiciliary state would be to deprive the owner of his property without due process of law. The Court thus clearly implied that the refrigerator cars had acquired a tax situs in the foreign state.[100] Mr. Justice Holmes dissented.[101] He agreed that the result reached by the majority of the Court probably was a desirable one, but he disagreed that the fourteenth amendment required such a decision. This eminent jurist consistently contended, over a period of approximately thirty years, that there is no federal constitutional prohibition of double taxation by the states. Subsequent parts of this article will reveal the significance of his position.

In 1953 the Court impliedly affirmed its holding in the *Union Refrigerator* case by its reasoning in *Dameron v. Brodhead*,[102] in which it upheld the applicability of the Soldiers' and the Sailors'

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v. Peck, 342 U.S. 382 (1952).

[96]See notes 37, 38, 39 *supra*.

[97]Coe v. Errol, 116 U.S. 517 (1886).

[98]199 U.S. 194.

[99]In Delaware, L. & W.R.R. v. Pennsylvania, 198 U.S. 341, decided the same year, the Court reached the same decision on the same basis, but the situation involved a tax statute that concededly did not authorize taxation of such property.

[100]See Dameron v. Brodhead, 345 U.S. 322 (1953), in which the right of the domiciliary state to tax was saved by virtue of a federal statute concerned with a federal instrumentality. The assumption of the Court apparently was that, in the absence of statute, the domiciliary state would have no power to tax tangibles located for the entire year in a non-domiciliary state.

[101]199 U.S. at 211.

[102]345 U.S. 322.

Civil Relief Act.[103] Under this act the property of a serviceman is deemed not to lose its situs in his domiciliary state or acquire a taxable situs in another state by virtue of being kept in the latter state solely by reason of compliance with military or naval orders directing his transfer to a military post in that state. In addition, the serviceman is not regarded as losing his original domicile. The serviceman in question, a domiciliary of Louisiana, had kept his household goods in Colorado, the state to which he was transferred by military orders, for the entire Colorado tax year. The goods, however, under the aforementioned statutes acquired no tax situs in Colorado. The constitutionality of the statute was recognized by virtue of the constitutionally recognized immunity from state taxation of property engaged in a function of the federal government.

The interesting implication of this case from the standpoint of the tax situs of tangible personal property is that in the absence of the Soldiers' and Sailors' Relief Act the property would have been considered as having a tax situs in the State of Colorado by virtue of being located there the entire tax year, in spite of the fact that the owner of the property was living there only temporarily. It is true that the statute saved both the tax situs of the property and the domicile of the serviceman from change by military order; yet the Court considered the part of the statute dealing with the tax situs as crucial. From this fact emanates the strong inference that the Court, in the absence of a federal statute, would not be concerned with the domicile of the owner of the property in determining its taxable situs.

The constitutional objection to taxation by the owner's domiciliary state of tangibles permanently located outside the state is not without exception. In *Southern Pacific Co. v. Kentucky*[104] the State of Kentucky was more fortunate in its quest to tax tangibles permanently located outside that state than it was in the *Union Refrigerator* case. Kentucky, the state of the corporate domicile, levied a tax on a fleet of steamships owned by the corporation. The vessels were never in Kentucky; they were permanently engaged in sailing the high seas. The tax was apparently sustained for the reason that since no tax situs had been acquired outside Kentucky the ships would go tax free unless Kentucky were allowed to tax. The Court thus recognized that *mobilia sequuntur personam,* although largely devitalized

[103] 50 U.S.C. §574 (1958).
[104] 222 U.S. 63 (1911).

by *Union Refrigerator*, is not completely dead with regard to property permanently located outside the domiciliary state of the owner; if no other state can tax the property, the domiciliary may exercise the privilege. In its later treatment of the respective rights of the domiciliary state and non-domiciliary states to tax instrumentalities engaged in interstate commerce the Court has remained adamant in its position with reference to the prohibition by the due process clause of double taxation.[105] While it recognizes the right of more than one state to participate in the taxation of a fleet of interstate instrumentalities, its requirement of apportionment guarantees that the same tangibles will not be taxed by more than one state at the same time.

With reference to tangible commodities such as sheep and logs, which are held taxable by virtue of an appropriate interruption in the interstate transit, the picture of the constitutionality of double taxation is not clear. If the cargo is stopped for the purpose of enjoying independent local advantages, such interruptions may expose the tangibles to property taxation in more than one state in a normal tax period if the states involved have different assessment dates. Apparently the Court has never been called upon to solve this problem. It is safe to say, however, that under the current decisions there has been no exception to the rule whereby tangible personal property enjoys immunity from property taxation by more than one state, and to its corollary that allows the domiciliary state to tax only when the property has no tax situs elsewhere.

Death Taxes

There is no question that a state may impose death taxes with reference to tangible personal property if the property has a tax situs within the state.[106] Such a tax is usually considered an excise tax[107] rather than one on property. Tax problems before the Court with reference to this type of property have not been frequent.

Frick v. Pennsylvania,[108] decided in 1925, undoubtedly furnishes the most outstanding case law in this phase of a state's tax jurisdiction. The Court held that a Pennsylvania statute purporting to impose a death transfer tax on the part of a domiciliary's estate, both

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105Standard Oil Co. v. Peck, 342 U.S. 382 (1952).

106Frick v. Pennsylvania, 268 U.S. 473 (1925).

107See 4 Cooley, Taxation §1723 (4th ed. 1924). In New York Trust Co. v. Eisner, 256 U.S. 345 (1921), the Court recognized federal death taxes as excises.

108268 U.S. 473.

real and personal, located in Pennsylvania contravened the due process clause of the fourteenth amendment because it included tangible personal property having an actual situs in another state as part of the gross estate. The Court found that Pennsylvania was attempting to include property permanently located in New York and Massachusetts in the computation of its death tax on tangible personalty. In spite of the fact that the decedent was a domiciliary of Pennsylvania, the property, by reason of its character and situs, was wholly within the jurisdiction of the states in which it had actual situs. The Court thereby adopted for death tax cases the rule that it had applied to a property tax twenty years previously in the *Union Refrigerator* case.[109] Thus double taxation of tangible personal property is presently considered unconstitutional with reference both to property taxes and death taxes.

In the *Frick* case the Court distinguished the situation from that of *Maxwell v. Bugbee,*[110] in which it had previously approved the inclusion of tangible property, including realty, located outside the taxing state in the computation of the rate of the inheritance tax imposed on the transfer of property located within the taxing state. The difference lay in the fact that the tax scheme in *Frick* called for the imposition of a tax on the transfer of tangible personal property located beyond the jurisdiction of the state seeking to impose the tax; whereas in *Bugbee,* although property beyond the jurisdiction of the taxing state was considered in arriving at the rate of tax, the taxable transfer related only to property within the jurisdiction of the state. In *Bugbee* the Court recognized that the inclusion of foreign property would result in an increased rate of taxation. It was of the opinion, however, that a state statute providing for this procedure did not violate the due process clause as long as the Court was satisfied that the rate was not increased to such an extent that the result was tantamount to taxing the transfer of foreign property. The apparent arbitrary factor in such a position probably was the primary reason that it became law by the decision of a bare majority of the Court.

The question whether tangibles were permanently located in a non-domiciliary state so as to be subject to a death tax there under the *Frick* rule was presented to the Court in 1934.[111] A New York domi-

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[109]See note 98 *supra* and accompanying text.

[110]250 U.S. 525 (1919).

[111]City Bank Farmers Trust Co. v. Schnader, 293 U.S. 112.

ciliary lent paintings to a Philadelphia museum for exhibition under an oral agreement, terminable at will, under which the paintings could be sold for presentation to the museum. No definite time was set for returning the paintings; they were still in Pennsylvania when the owner died nearly three years later. The Court held that the paintings were permanently located in Pennsylvania as contemplated by the *Frick* rule. Accordingly, the property had acquired a tax situs within Pennsylvania and its transfer could be subjected to a death tax there.

The year 1949 saw the Court's most recent application of the *Frick* rule.[112] A Wisconsin emergency death tax statute was held to be contrary to the due process clause of the fourteenth amendment because the statutory method of computing the tax required the inclusion of tangible property outside Wisconsin. The statute provided for a tax amounting to eighty per cent of the basic federal estate tax, rated and measured by the entire estate, regardless of situs. The decedent, a domiciliary of Wisconsin, owned personal and real property in Illinois and Florida in addition to his Wisconsin property. The terminology "rated and measured" used by the Court may be reminiscent of *Bugbee* to some extent, but the Court expressly held that *Frick's* facts and principles were particularly applicable in this situation. Thus the Court sustained its prior pronouncements of the constitutional prohibition against death taxation of tangibles by the decedent's domiciliary state when they have acquired a tax situs outside the state.

A question may arise in the future as to the constitutionality of a death duty imposed by a non-domiciliary state with reference to tangible personalty that has acquired a situs for tax purposes under the rules governing interstate commerce cases. A situation of this kind apparently has never been presented to the Court. Since the Court seems inclined to accept for death tax cases its conception of situs of tangible personalty first adopted in property tax cases, the treatment of the question should be interesting.

PART III. INTANGIBLE PERSONAL PROPERTY

PROPERTY TAXES

The nature of intangible personal property has created practical and judicial difficulties. To say that an intangible is localized for

[112]Treichler v. Wisconsin, 338 U.S. 251.

tax purposes in any particular place necessitates the employment of a warrantable fiction or some other reason constitutionally justified in the eyes of the Court by the revenue needs of the government. Accordingly, the Court has employed the use of the maxim *mobilia sequuntur personam*[113] to hold that the domicile of the owner is the tax situs of the intangible.[114]

Justification for the use of the maxim is found in the difficulty of the tax gatherer in locating evidence of intangibles and the uncertainty as to which taxing district affords benefits or protection to the property represented by the evidence.[115] Normally the intangibles are subject to the immediate control of the owner, and this close relationship furnishes an adequate basis for a tax.[116] The arbitrariness of this position is recognized; but, since intangibles have no real situs, the domicile of the owner is the nearest approximation. Even so, as will appear in the following discussion, other taxing jurisdictions may also have power to tax the same property.[117]

Business Situs

Mobilia sequuntur personam has not been employed to preclude property taxation of intangibles outside the domiciliary state of the owner in all cases. The Court has recognized that such property may acquire a situs for purposes of property taxation outside the owner's domiciliary state if it is used as an integral part of a business in another state.[118] The maxim was not intended to operate to relieve the owner of paying for the benefits and protection accorded his property by this other state.[119] Consequently, the non-domiciliary state has been allowed to impose a property tax on notes, mortgages, and certificates of indebtedness that were continually used within its borders for purpose of reinvestment.[120] The tax situs thus acquired by the intangibles has been referred to variously as the business situs[121] or the commercial domicile.[122] This doctrine of tax situs was held to

[113]Movables follow the person (of the owner).

[114]Kirtland v. Hotchkiss, 100 U.S. 491 (1879); Tappan v. Merchants' Nat'l Bank, 86 U.S. (19 Wall.) 490 (1873).

[115]Greenough v. Tax Assessor, 331 U.S. 486 (1947).

[116]*Ibid.*

[117]*Ibid.*

[118]New Orleans v. Stempel, 175 U.S. 309 (1899).

[119]*Ibid.*

[120]*Ibid.*

[121]First Bank Stock Corp. v. Minnesota, 301 U.S. 234 (1937).

[122]Wheeling Steel Corp. v. Fox, 298 U.S. 193 (1936).

support West Virginia property taxes upon a Delaware corporation's bank deposits in banks located outside West Virginia as well as accounts receivable owed by debtors residing outside that state.[123] The commercial domicile was considered to be in West Virginia, since the principal office of the corporation was located there; the accounts receivable arose through contracts that were subject to acceptance or rejection there; and all moneys of the corporation, including the foreign bank deposits, were controlled from the principal office. One year later stock of a Delaware corporation was held taxable by Minnesota on the same theory.[124]

The requirements for the establishment of a business situs or commercial domicile vary, largely because of differences in the nature of the businesses and intangibles involved.[125] The general formula requires that the intangibles become localized in the foreign state by their use in a going, local business.[126] This localization requires more than mere isolated instances of usage, since the intangibles must become an integral part of the business.[127]

Some aspects of the doctrine of the business situs appear to be definite. The tax situs is not the domicile of the creditor,[128] and it need not be the domicile of the debtor.[129] The evidence of intangibles need not be in the state of the business situs.[130] The doctrine is not limited to any particular type of intangible.[131] Finally, in no case in which the doctrine has been applied has the Court held that the domiciliary state of the owner or another state that lends advantages to the intangibles is prohibited from levying a property tax on the intangibles.[132]

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[123]*Ibid.*

[124]First Bank Stock Corp. v. Minnesota, *supra* note 121. Good will employed by a non-resident in carrying on a business within a state is taxable there. Railway Express Agency v. Virginia, 358 U.S. 434 (1959); Adams Express Co. v. Ohio State Auditor, 165 U.S. 194 (1897).

[125]*E.g.*, compare the factual situations of Wheeling Steel Corp. v. Fox, 298 U.S. 193 (1936), and New Orleans v. Stempel, 175 U.S. 309 (1899).

[126]See text at note 123 *supra*.

[127]*Ibid.* The contention has been made that any use of intangibles in a general business is sufficient to make them taxable; the Court did not find it necessary to deal with this contention, however. Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949).

[128]New Orleans v. Stempel, 175 U.S. 309 (1899).

[129]Wheeling Steel Corp. v. Fox, 298 U.S. 193 (1936).

[130]*Ibid.*; Bristol v. Washington County, 177 U.S. 133 (1900).

[131]See note 130 *supra*.

[132]See notes 118, 122 *supra* and accompanying text.

The Corporate Domicile

Intangibles have been subjected constitutionally to property taxation on other bases than application of the maxim *mobilia sequuntur personam* and the doctrine of business situs. The stock of a domestic corporation is the subject of a property tax by the state of incorporation even though the owner of the stock is a non-resident of the taxing state.[133] This type of intangible draws its lifeblood from the laws of the state of corporate domicile; consequently, that state is entitled to tax recompense. Other bases will appear in the subsequent discussion concerning intangibles held in trust.

Double Taxation

The proposition that more than one state may impose a property tax on the same intangibles during the same period of time seems to have been tacitly accepted in the early cases of the Court. In 1879 a debt was held to be taxable by the domiciliary state of the creditor-owner;[134] in 1899 a state of business situs constitutionally imposed a property tax on intangibles;[135] and in 1905 a state lawfully imposed a property tax on the stock of a domestic corporation even though the stockholder was a non-resident.[136] In none of these cases was the issue of double taxation presented.

Following the *Union Refrigerator* decision of 1905, in which more than one state was prohibited from imposing a property tax on tangible personal property,[137] a similar holding was sought with reference to intangibles.[138] This was done in spite of the fact that in *Union Refrigerator* a clear distinction was drawn between intangible and tangible personal property in regard to the propriety of double taxation. Massachusetts assessed a property tax against a domiciliary on the stock of a foreign corporation that owned no property and did no business in that state. The taxpayer raised the issue of double taxation by contending that since the holding in the

[133]Schuylkill Trust Co. v. Pennsylvania, 302 U.S. 506 (1938); Corry v. Mayor of Baltimore, 196 U.S. 466 (1905). A state may not impose a tax upon or with respect to stock of a foreign corporation owned by a non-resident merely because the corporation owns property in the state.

[134]Kirtland v. Hotchkiss, 100 U.S. 491.

[135]New Orleans v. Stempel, 175 U.S. 309.

[136]Corry v. Mayor of Baltimore, 196 U.S. 466.

[137]See note 98 *supra* and accompanying text.

[138]Hawley v. City of Malden, 232 U.S. 1 (1914).

earlier case of *Cory v. Mayor of Baltimore*[139] permitted the corporate domicile to tax stock as property located in the state of incorporation, Massachusetts should not be allowed to tax. The taxpayer argued that the rule of *Union Refrigerator* precluded Massachusetts from taxing. The Court, however, refused to apply this rule to intangibles that could have no physical situs. It pointed out that the state of corporate domicile had not actually taxed the stock but clearly implied that there was no constitutional objection to such taxation. In 1917, in the leading case of *Fidelity & Columbia Trust Co. v. City of Louisville*,[140] bank accounts owned by a resident of Kentucky were held taxable by Kentucky even though they had been taxed at their business situs in Missouri. Mr. Justice Holmes, writing for the Court, found such multiple taxation constitutionally unobjectionable.

Three years later taxation of intangibles by both the state of the corporate domicile and the state of the business situs was approved.[141] North Dakota had assessed what purported to be a property tax on the intangible property of a domestic corporation that had no property in the state and did no business there. The corporation alleged previous taxing of the property by the state in which the company's plant and business were located. The Court, apparently limiting the meaning of its statement to intangible personal property, succinctly pointed out that the fourteenth amendment does not prohibit double taxation.

In 1937 the Court included in one of its opinions a statement that might be construed as an indication of a feeling of insecurity as to its previously accepted position concerning double property taxation of intangibles.[142] In approving taxation by a business situs state against the contention that a foreign corporation's shares of stock were taxable exclusively by the corporate domicile, the Court conceded the right of the corporate domicile to tax "at least in the absence of activities identifying them with some other place as their 'business situs.' "[143] It probably is of significance to note that this expression, which might be considered as auguring a change of position on the

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[139]196 U.S. 466 (1905).

[140]245 U.S. 54.

[141]Cream of Wheat Co. v. County of Grand Forks, 253 U.S. 325 (1920).

[142]First Bank Stock Corp. v. Minnesota, 301 U.S. 234. Newark Fire Ins. Co. v. State Bd., 307 U.S. 313 (1939), approved a property tax on intangibles by the state of the corporate domicile, but four justices implied that they would not have so held if a business situs had been shown to exist in another state.

[143]301 U.S. at 237.

part of the Court, occurred before its decision in *State Tax Comm'n of Utah v. Aldrich*[144] that death taxation of intangibles by more than one state was again considered constitutional after a temporary departure from this position in the early 1930's.[145] Since the Court has applied the reasoning initially arising in a death tax case to a situation dealing with property taxation in which the same type of property was involved,[146] there seems to be little reason to doubt that the present position of the Court is that double taxation of intangibles by the imposition of property taxes violates no provision of the Federal Constitution.

DEATH TAXES

The power of a domiciliary state of a decedent to impose a death tax on his intangibles is well settled in this country.[147] This power is based on the application of the maxim *mobilia sequuntur personam.* This is true without regard to whether the intangibles are evidenced by writing or otherwise and whether the papers are found in the state of domicile or elsewhere. Further, the principle is not to be shaken by inquiry into the question whether the transfer of the intangibles is also subject to taxation in another jurisdiction.[148]

The Court has indicated that it might not be bound by a state's determination of the nature of a particular item as tangible or intangible. In *Blodgett v. Silberman*[149] bonds were recognized as intangible rather than tangible personal property, as they are sometimes considered under the laws of various states.[150] As intangibles, the bonds were held subject to the application of the maxim.

The *Blodgett* case is noteworthy for another reason: the principles of law underlying the doctrine of equitable conversion were recognized as applicable in an appropriate tax situation.[151] A New York

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144316 U.S. 174 (1942).

145See note 154 *infra* and accompanying text.

146Stewart v. Pennsylvania, 312 U.S. 649 (1941), *aff'g without opinion* Commonwealth v. Stewart, 338 Pa. 9, 12 A.2d 444 (1940).

147*E.g.*, Central Hanover Bank & Trust Co. v. Kelly, 319 U.S. 94 (1943); Blodgett v. Silberman, 277 U.S. 1 (1928).

148See note 147 *supra.*

149277 U.S. 1 (1928).

150*Ibid.* See New Orleans v. Stempel, 175 U.S. 309 (1899), in which the Court recognized that bonds sometimes are in such a concrete form that they are treated as tangible personal property.

151Under this doctrine property of one kind is considered as acquiring characlimited partnership interest owned by a Connecticut decedent was considered intangible personal property under New York law even though the partnership owned tangible personal property and realty located in New York. The Court approved Connecticut's imposition of a death tax on the partnership interest. Connecticut thus took advantage of the fact that the interest was deemed an intangible, thus becoming taxable at the decedent's domicile in Connecticut. If the partnership interest had been considered realty or tangible personalty permanently located in New York, Connecticut would have had no jurisdiction to tax.

Double Taxation

In *Blackstone v. Miller*,[152] decided in 1903, the Court was faced with the issue of the constitutionality of more than one state imposing a death duty with reference to the same intangible personal property. It held that New York, the debtor's state, could impose a death tax on the transfer of a bank deposit located in the state for more than a year before the owner, an Illinois domiciliary, died. It reasoned that New York's jurisdiction to tax could not be based on mere temporary presence of the bank credit within the state; but, since the credit had been held for reinvestment in stocks for a substantial period, it was delayed within the taxing power of New York long enough to warrant considering its stay more than temporary. Consequently, its transfer at death was taxable by that state. Mr. Justice Holmes, writing for the Court, recognized that the power of two states to tax on different and more or less inconsistent principles produced hardship, but found that these inconsistencies infringed no rule of constitutional law.

The rule of *Blackstone v. Miller*, permitting multi-state death taxes on intangibles,[153] was in force until 1930, when the Holmes theory that there is no constitutional objection to double taxation of intangibles was completely, albeit temporarily, repudiated. *Blackstone v. Miller* was specifically overruled,[154] and in situations dealing with various

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teristics of property of another kind in order that a just and equitable objective may be accomplished.

[152]188 U.S. 189.

[153]In considering the 1919 case of Maxwell v. Bugbee, 250 U.S. 525, which involved multi-state death taxation of intangibles, the Court did not even consider the possibility of the unconstitutionality of such taxation.

[154]Farmers Loan and Trust Co. v. Minnesota, 280 U.S. 204 (1930).

types of intangibles and death taxes the domiciliary state of the decedent owner was considered to have exclusive power to impose such taxes.[155] In reaching this decision the Court was influenced greatly by its prior treatment of tangible personal property as immune from double taxation[156] and its desire to refrain from unjust and oppressive discrimination between tangibles and intangibles.

Two years later *First Nat'l Bank v. Maine*[157] reaffirmed the limitation of death duty impositions on intangibles to only one state — that of the decedent owner.[158] The property transferred in this case was corporate stock; the state of incorporation was considered as having no jurisdiction to impose a death tax, since the decedent owner was domiciled elsewhere. The Court reasoned that the transmission of intangible personal property, like tangible personal property, from the dead to the living can take place in but one state. Jurisdiction to tax this event exists only in the state of the domicile of the owner because of the application of the maxim *mobilia sequuntur personam.* The decision in this case was the fourth within a period of three years in which a majority of the Court took a positive position against death taxation of intangibles by more than one state.

The restrictive attitude of the Court toward the power of states to impose death taxes on intangibles was relaxed in 1939 when double taxation was ruled constitutional in certain trust situations.[159] This relaxation was augmented in 1942 when the Court did a complete about-face in reaching its decision in *State Tax Comm'n of Utah v.*

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[155]*Farmers Loan and Trust Co.* involved negotiable bonds and certificates of indebtedness issued in a foreign state; Baldwin v. Missouri, 281 U.S. 586 (1930), was concerned with notes secured by mortgages on Missouri lands, kept in Missouri by the non-resident owner; Beidler v. South Carolina Tax Comm'n, 282 U.S. 1 (1930), had to do with an indebtedness owed by a corporation of that state to an Illinois decedent who was the principal stockholder of the corporation. In all three cases the due process clause of the 14th amendment was held to allow a death tax by the domiciliary state of the decedent only.

[156]Farmers Loan and Trust Co. v. Minnesota, 280 U.S. 204 (1930).

[157]284 U.S. 312 (1932).

[158]In this case and also in *Farmers Loan and Trust Co.* the Court noted the possibility of stock acquiring a business situs outside the domiciliary state, with the consequent non-applicability of the principle governing the two cases. The Court, however, expressly refrained from dealing with such a situation, and the subsequent decision reached in *State Tax Comm'n of Utah v. Aldrich* rendered the question of double taxation in such a situation purely academic.

[159]See notes 178, 179 *infra* and accompanying text.

Aldrich.[160] The owner of stock in a Utah corporation died a domiciliary of New York, where he had held the certificates representing the shares. A death tax had been paid to New York; the Court was presented the question whether Utah might also impose a death tax on the transfer of the same intangible personal property. In answering in the affirmative the majority of the Court recognized the right of the domiciliary state to impose a death tax but stated that another state that had extended benefits or protection or could demonstrate the practical fact of its power or sovereignty over the shares of stock might likewise constitutionally make its exaction. Utah, the Court decided, could meet these requirements. Utah law defined the nature and extent of the interest of the shareholders in the corporation; its law afforded protection for those rights. Utah had power over the transfer by the corporation of its shares of stock, and any freedom of transfer of the stock stemmed from Utah law. Thus this protection, benefit, and power over the shares entitled Utah to impose a death tax on the transfer of the stock.

The Court felt bound to allow double taxation in the *Aldrich* situation in order to be consistent with its decisions allowing double taxation in the trust situations faced three years previously.[161] In order to do this *First Nat'l Bank v. Maine* was specifically overruled; *Blackstone v. Miller*, which had been repudiated in 1930, was again favorably embraced, and the long-time position of Justice Holmes that there is no constitutional immunity from double taxation of the transfer of intangibles at the death of the owner was vindicated.

INTANGIBLES HELD IN TRUST

Property Taxes

The legal interest of the trustee in the trust res is distinct from the equitable interest of the beneficiary; it is considered as a distinct right, taxable as intangible personal property at the domicile of the trustee.[162] The tax situs may, but need not, be where the trust is actively administered; it may be based on the mere fact that the trustee is domiciled there and is accorded the advantages of the law of his domicile.[163]

[160] 316 U.S. 174.

[161] See notes 178, 179 *infra* and accompanying text.

[162] Greenough v. Tax Assessors, 331 U.S. 486 (1947).

[163] *Ibid.*

The theory that the tax situs of intangibles held in trust may be established by the mere fact of residence of the trustee was written into the law in 1947 by a bare majority of the Court.[164] The Court held that the domiciliary state of one of two trustees of a testamentary trust consisting of shares of stock could impose an ad valorem property tax on one half the value of the corpus of the trust, even though the administration of the trust was under the supervision of the courts of another state, the other trustee and the beneficiary lived in that state, and the evidences of the intangibles were located there. The majority of the Court felt that such a holding was consistent with the due process clause, since the domiciliary state of the legal owner, the trustee, furnished benefits and protection to the trust res in spite of its administration in another state. The Court noted that third parties dealing with the trustee on trust matters would have to proceed against him directly as an individual, since he did not reside in the state of the seat of the trust. The trustee might need the aid of the law of his domicile to enforce trust claims against a resident of the same state. He was as suable as any other obligor, even though the trust was administered in another state. Thus the domiciliary state of the trustee was rendering benefits for which a tax could be imposed.

The dissenting justices did not agree that the mere fact of residence of a trustee in a state was a sufficiently substantial connection between the trust res and the trustee to warrant a property tax.[165] They were unwilling to accept the majority's analysis that the benefits granted the trustee of the out-of-state trust by the law of his domicile were sufficient to support a tax situs for the trust property in whole or in part. They also took note of the significant point that even though only one half of the trust property was being taxed, there was no reason under the majority holding why the entire trust res could not be taxed by the state, since the resident trustee had no power over, or title to, any fraction of the trust property that he did not have over all of it.

Double Taxation. The fact that the laws of more than one state are often involved in trust situations creates tax complexities. A troublesome problem arises when the beneficiaries of the trust are domiciled in a different state from that of the trustee and the state

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[164]*Ibid.*
[165]*Id.* at 500.

of domicile of the beneficiaries seeks to impose a tax. In *Safe Deposit and Trust Co. v. Virginia*[166] the Court conceded to Maryland, the domiciliary state of the trustee, jurisdiction to impose a property tax on the whole corpus of the trust, consisting of stocks and bonds kept by the trustee in that state. It held, however, that imposition of the same kind of tax by Virginia, the domiciliary state of the beneficiaries, would necessitate an improper application of the maxim *mobilia sequuntur personam* and was prohibited by the due process clause of the fourteenth amendment.[167]

In this case the beneficiaries, two infant sons of the settlor, were to receive none of the trust property, and would have no control over it, until reaching the age of twenty-five years. If either son died before his twenty-fifth birthday, distribution was to be made to his issue or, in the absence of issue, to the survivor. The Court seemed to draw a distinction between the value of the whole corpus of the trust, as owned by the trustee, and the value of the beneficial interest. This difference, as Justice Stone clarified in his concurring opinion,[168] was founded on the contingency that one or both of the sons would never acquire legal title because of death before reaching the age of twenty-five. Consequently, the value of the whole corpus at the time of the property tax levy apparently was assumed to be greater than that of the equitable interests of the beneficiaries. The Court expressly pointed out that the power of Virginia to lay a tax upon the fair value of an interest actually owned by one of her resident citizens was not in issue. Justice Holmes dissented.[169] He could see no reason for distinguishing between the amount of property legally owned by the trustee and that equitably owned by the beneficiaries. He concluded, therefore, that both Maryland and Virginia could impose property taxes consistent with the due process clause, since the laws of each state provided benefits to the respective interests.

In 1941, twelve years after the *Safe Deposit* case, the Court affirmed without opinion a decision of the Supreme Court of Pennsylvania[170] in which Pennsylvania was allowed to impose a property

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166280 U.S. 83 (1929).

167Brooke v. City of Norfolk, 277 U.S. 27 (1928), presumably was decided on the same basis. The state property tax invalidated was assessed to a life beneficiary on a trust res consisting of intangibles. Both the trustee and the testator were residents of another state, where the trust was administered.

168200 U.S. at 95.

169*Id.* at 96.

170Commonwealth v. Stewart, 338 Pa. 9, 12 A.2d 444 (1940), *aff'd*, Stewart v.

tax upon the equitable interest of a resident of that state in a New York trust of intangibles. *Curry v. McCanless*[171] *and Graves v. Elliott*,[172] cases in which multi-state death taxation of intangibles was upheld, comprised the judicial justification for the Pennsylvania action. *Safe Deposit* was distinguished on the ground that in that case the attempt of the state of the beneficiary was to impose a tax upon the full value of the property rather than upon the value of the beneficial interest.

Curiously, Justice Holmes, who dissented in *Safe Deposit* by taking the position that the domiciliary state of the beneficiary was entitled under the Federal Constitution to impose a property tax on the beneficial interest, apparently was of a different turn of mind in 1928. In *Brooke v. City of Norfolk*[173] the beneficial interest of a Virginia resident who was a life beneficiary of a Maryland trust was held not subject to what apparently was a Virginia property tax. The opinion, written by Justice Holmes, is brief and lacks clarity, although the principal reliance was on *Wachovia Bank and Trust Co. v. Doughton*,[174] a 1926 case that was expressly overruled in 1942.[175]

A valid conclusion appears to be that the present position of the Court is that the domiciliary state of the trustee, as well as that of the beneficiary, may impose a property tax on intangibles held in trust. The former may tax the entire corpus of the trust; the latter may tax the beneficial interest. So far as the Court has expressed itself, the values of the two interests are not the same, at least not in all cases. Some commentators[176] have taken the position that the *Safe Deposit and Trust Co.* case was overruled by *Curry v. McCanless* and *Graves v. Elliott*. This conclusion seems to be warranted only if the value of the legal property interest owned by the trustee is the same as that of the equitable interest owned by the beneficiary, as was contended by Justice Holmes in his dissent in *Safe Deposit*. To what extent the Court will go in distinguishing between the value of the two interests remains to be seen.

Pennsylvania, 312 U.S. 649 (1941).

[171]See note 178 *infra* and accompanying text.

[172]See note 179 *infra* and accompanying text.

[173]277 U.S. 27 (1928).

[174]272 U.S. 567.

[175]Graves v. Schmidlapp, 315 U.S. 657.

[176]See Morton & Cotton, *Limitations on State Jurisdiction to Levy Death Taxes*, 5 MIAMI L.Q. 449 (1951).

Death Taxes

The history of death taxation of intangibles held in trust, unlike that of property taxation, reveals no deviation by the Court from the principle that any state that renders benefits to the intangibles may impose a death duty. In 1916 a death tax by Wisconsin was sustained upon securities held in trust in Illinois with reference to which the Wisconsin decedent was a life beneficiary and the holder of a power of appointment.[177]

In 1939 the Court rendered two decisions on the same day which involved the issue of multi-state death taxation of intangibles held in trust. In *Curry v. McCanless*[178] the decedent, a resident of Tennessee, had transferred securities in trust to an Alabama trustee and reserved the power to dispose of the trust corpus by will. The settlor died, leaving a will disposing of the securities, a taxable event under Tennessee law. In *Graves v. Elliott*[179] the decedent settlor created a revocable trust of intangibles to be administered in Colorado. The settlor died domiciled in New York without revoking the trust.[180]

In both cases the Court was called upon to decide the constitutionality of death taxes imposed by the domiciliary states of the settlors, Tennessee and New York. The majority of the Court sustained the taxes imposed by these states and also held that the states in which the trustees were domiciled and in which the trusts were administered might impose death taxes on the intangibles held in trust. A degree of inconsistency was recognized between this conclusion and the decisions of 1930[181] in which multi-state death taxation of non-trust intangibles was disallowed, but the latter decisions were considered by the Court to be of limited application.[182]

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[177]Bullen v. Wisconsin, 240 U.S. 625. See note 185 *infra* and accompanying text concerning the Court's 1942 view of the 1926 case of *Wachovia Bank and Trust Co. v. Doughton.* In that case the laws of the domiciliary state of the decedent, who had exercised a power of appointment with reference to intangibles held in trust in another state, rendered no benefits that would warrant the imposition of a death tax.

[178]307 U.S. 357 (1939).

[179]307 U.S. 383 (1939).

[180]Pearson v. McGraw, 308 U.S. 313 (1939), held that when a settlor of a trust consisting of intangibles transfers the property to an out-of-state trustee in contemplation of the settlor's death, the domiciliary state of the settlor may impose a death duty upon the happening of that event.

[181]See note 155 *supra.*

[182]The 1930 decisions were overruled in 1942.

In these trust situations the Court was of the opinion that due process of law does not require the fixing of a single, exclusive place for death taxation of intangibles if two distinct sets of legal relationships have been created that involve protection of the laws of two states. The legal ownership of intangibles in the domiciliary state of the trustee is deemed an adequate basis for imposition of a death tax by that state. On the other hand, the benefits accorded by the law of the settlor's domicile, by virtue of which he exercises or may exercise a power over intangibles, furnish an adequate basis for the imposition of a death tax on the intangibles. Thus the doctrine that the fourteenth amendment precludes a death tax on any interest in the same intangibles in more than one state, which had been applied by the Court four times from 1930 to 1932[183] in non-trust situations, was expressly held not applicable in trust situations.

In 1942 the Court was afforded the opportunity to test the strength of its conviction that the course it was following concerning trust property was the proper one. In *Graves v. Schmidlapp*[184] a Massachusetts decedent left property in trust to Massachusetts trustees, with direction to pay the income to his son for life and with a general power in the life beneficiary to appoint by will. The son died domiciled in New York, where he had exercised the power by a will admitted to probate there. New York levied a death tax against the donee's estate, including in the gross estate the property appointed under the exercise of the power.

The Court thus was faced with a situation similar to that presented in 1926 in *Wachovia Bank and Trust Co. v. Doughton*,[185] in which the state of the donee's domicile was held to be without power to levy a death tax on the appointed property because the trust assets had no tax situs in that state and because under Massachusetts law the appointee takes from the donor rather than the donee. This type of reasoning no longer favorably impressed the Court, however. In addition to the legal relationship of Massachusetts law to the appointed property, the law of the donee's domiciliary state, New York, applied with equal clarity for two reasons: (1) the right to appoint the intangible was property in the donee's hands where he was domiciled, and such disposition furnished a proper occasion for a death tax no less than on the transfer of property that he fully owned; (2)

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[183]See notes 154-57 *supra*.
[184]315 U.S. 657 (1942).
[185]272 U.S. 567.

regardless of how the power might have been exercised, it was in fact executed by a will probated in the donee's domiciliary state, thus entitling the transfer to the protection and benefit of the law of that state. The express overruling of the *Wachovia* case was the natural result of this reasoning. The Court thereby exhibited a fortified conviction that there is no constitutional prohibition of multi-state death taxation of intangibles held in trust if more than one state is lending benefits to the intangibles through relationships to the owner or to the property itself. There has been no retreat from this position to date.

PART IV. PRIVILEGES

A state may impose a tax for the privilege of engaging in an activity within its borders.[186] Taxable activities are numerous and varied. They may consist of various privileges, such as operating under a franchise as a domestic corporation,[187] using an article,[188] engaging in an occupation,[189] receiving income,[190] selling goods,[191] using goods,[192] and a multitude of others. The exercise of the taxable privilege need produce nothing of substantial value. The mere formality of creating an instrument within the state, even though no rights arise therefrom, has been held to be a taxable activity.[193]

The tax on a privilege is classified as an excise tax.[194] One excise, the death tax, has already been considered in this article. This tax,

[186]Norton Co. v. Department of Revenue of Illinois, 340 U.S. 534 (1951). A privilege secured by the Constitution, such as the right of free speech or the right of intercourse among the states, may not be taxed by the state. Murdock v. Pennsylvania, 319 U.S. 105 (1943).

[187]Detroit Internat'l Bridge Co. v. Corporation Tax Appeal Bd., 294 U.S. 83 (1935).

[188]*E.g.*, Henneford v. Silas Mason Co., 300 U.S. 577 (1937).

[189]Cooney v. Mountain States Tel. & Tel. Co., 294 U.S. 384 (1935).

[190]New York *ex rel.* Cohn v. Graves, 300 U.S. 308 (1937).

[191]McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940).

[192]Eastern Air Transport, Inc. v. South Carolina Tax Comm'n, 285 U.S. 147 (1932).

[193]Graniteville Mfg. Co. v. Query, 283 U.S. 376 (1931).

[194]Flint v. Stone Tracy Co., 220 U.S. 107 (1911). The term *franchise tax* is sometimes used, *e.g.*, International Harvester Co. v. Evatt, 329 U.S. 416 (1947), and is particularly meaningful in the case of a corporation existing under the laws of a particular state. Detroit Internat'l Bridge Co. v. Corporation Tax Appeal Bd., 294 U.S. 83 (1935); Cornell Steamboat Co. v. Sohmer, 235 U.S. 549 (1915). The use of the term should be accepted with caution, however, since at times it has been construed to be concerned, in a particular situation, with a

which is on the receipt or transfer of property at death,[195] is so intimately associated with the property received and transferred that the law governing its imposition has been dictated largely by principles emanating from the law of property taxation,[196] or from consideration of the nature of the property received or transferred.[197] A treatment of death taxes in connection with property taxes, therefore, is considered appropriate, even though property tax principles are applicable with reference to some other excises.

In determining whether a privilege tax is within the constitutional power of a state, the Court professes to look at the operating incidence of the tax rather than the descriptive label that may be attached to it by a state court.[198] This incidence or taxable event must be within the boundaries of the state in order for the tax to be valid.[199] If it occurs outside the state, the tax is inconsistent with due process of law.[200]

The Court has often been called upon to decide whether a taxable event was created by activities that were carried on within a state by a corporation engaged in interstate commerce.[201] In its quest for the solution of the problem, deference has been accorded the well-established principle that the commerce clause of the Federal Constitution prohibits a state tax for the privilege of engaging in interstate commerce.[202] The Court has found, however, that in some situations a taxable event can be created within a state in spite of the fact that the corporation's business is of an interstate character.[203] When this takes place the due process of law clause, which governs jurisdiction to tax, and the commerce clause, which protects interstate commerce,

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tax on property and hence is a property, rather than an excise, tax. *E.g.*, Railway Express Agency v. Virginia, 358 U.S. 434 (1959). The same is true of a "capital stock" tax. Pullman's Palace Car v. Pennsylvania, 141 U.S. 18 (1891).

195New York Trust Co. v. Eisner, 256 U.S. 345 (1921).

196Frick v. Pennsylvania, 268 U.S. 473 (1925).

197Curry v. McCanless, 307 U.S. 357 (1939).

198International Harvester Co. v. Wisconsin Dep't of Taxation, 322 U.S. 435 (1944); Wisconsin v. J. C. Penney Co., 311 U.S. 435 (1944); *cf.* McLeod v. J. E. Dilworth Co., 322 U.S. 327 (1944), in which the Court apparently deviated from this well-established principle.

199McLeod v. J. E. Dilworth Co., 322 U.S. 327 (1944).

200Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77 (1938).

201*E.g.*, Nippert v. City of Richmond, 327 U.S. 416 (1946); Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U.S. 604 (1938).

202Atlantic and Pac. Tel. Co. v. Philadelphia, 190 U.S. 160 (1903).

203See McGoldrick v. Felt & Tarrant Mfg. Co., 309 U.S. 70 (1940), and cases cited therein.

play separate but intimately associated roles. Illustrations of the interplay between these two important constitutional provisions will be discussed with reference to some of the privileges the taxation of which has been subjected to frequent judicial consideration.

THE PRIVILEGE OF DOING BUSINESS

Intra-state Aspects of Interstate Business

A state may impose a tax for the privilege of engaging in a local business or occupation even though the local activities are mingled with interstate business. The tax, however, must not extend beyond the domestic aspects of the business.[204] Occupations such as generation of electrical energy,[205] mining of iron ore,[206] and production of natural gas[207] involve processes essentially local in character and are taxable, though the resultant products are immediately put into the stream of interstate commerce.

City of Chicago v. Willett Co.[208] is an interesting example of taxation of the intra-state aspect of an interstate business. A Chicago corporation's fleet of trucks was employed in an inseparable, commingled interstate and intra-state business by the daily transportation, in the same trucks, of goods destined for points inside Chicago and for other points outside the State of Illinois. Chicago imposed a graduated annual license tax on the corporation, varying in amount with the size of each truck and proportioned so as not to be a burden on interstate commerce. The Court upheld the tax, reasoning that the corporation's business was so intimately associated with the City of Chicago that it and the trucks, even though not confined to that city, had acquired a permanent situs there. The operation of the trucks was localized to the extent that it could be taxed by virtue of a formula that left the interstate part of the business untaxed.

The Court's opinion in this case is illustrative of the casual manner in which it has treated the aspects of tax jurisdiction in situations involving interstate commerce. The commerce clause was given express and exclusive consideration, but when the Court dealt with

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[204]Raley & Brothers v. Richardson, 264 U.S. 157 (1924); Postal Telegraph-Cable Co. v. City of Fremont, 255 U.S. 124 (1921).

[205]Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932).

[206]Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923).

[207]Hope Natural Gas Co. v. Hall, 274 U.S. 284 (1927).

[208]344 U.S. 574 (1953).

localization of the intra-state business in order to render it taxable, tacit recognition was given to the requirements of due process of law.

If the local activity is such an integral part of the interstate process that it cannot realistically be separated from the multi-state commerce, no tax may be imposed on it. *Michigan-Wisconsin Pipe Line Co. v. Calvert*[209] is in point. A tax was imposed upon the privilege of taking gas from an outlet of a local gasoline plant into the connecting pipes of an interstate pipeline company after production and processing had been accomplished. The Court ruled the tax unconstitutional as a burden on interstate commerce because the interstate transit had begun. The significant point was made that a local aspect of interstate transportation cannot be carved from an integral economic process; the attempt was but legislative whimsy.

The Court, although primarily concerned with the requirements of the commerce clause, did not overlook the due process clause. Much had been made by the taxing state of the benefits and protection that its laws afforded pipe line companies. The Court conceded this point but stated that such benefits were relevant only to show that the essential requirements of due process had been sufficiently met to justify the imposition of tax on the interstate activity. The Court pointed out that the challenge to the tax was not under the due process clause but under the different considerations of the commerce clause. Thus recognition was given to the fact that even though an activity may be localized to such an extent that a state's jurisdiction to tax under the due process clause is not questioned, still jurisdiction may not be exercised if the commerce clause will be violated.

Interstate Solicitation of Business

When the activities of a domiciliary of one state are extended into another, determination of the existence of a taxable event in the non-domiciliary state is attended by difficulties. Such activities on the part of corporations have given rise to a plethora of problems for the Court.

A familiar situation in this field of excise tax law is that of the itinerant salesman or "drummer" who sells goods for subsequent delivery by his out-of-state employer. As early as 1887, in *Robbins v. Shelby County Taxing Dist.*,[210] the Court decided that a tax for

[209]347 U.S. 157 (1954).
[210]120 U.S. 489.

the mere privilege of soliciting orders prior to their interstate shipment was prohibited by the commerce clause as a burden on interstate commerce. Many decisions to the same effect have followed this landmark case,[211] culminating in 1957 in *West Point Wholesale Grocery Co. v. City of Opelika.*[212] A Georgia wholesale grocery corporation solicited business within an Alabama municipality. The orders were transferred to its place of business in Georgia, and delivery of the goods was made to the buyers by truck. The Alabama municipality's flat-sum privilege tax, levied on all out-of-city wholesale grocers delivering goods within the city, was declared unconstitutional as placing a direct burden on the interstate business of the Georgia wholesaler.

It is of significance to note that the "drummer" cases were not decided on the basis of the due process clause. The activity of soliciting orders certainly furnishes a taxable event in so far as the due process clause is concerned. Again, however, the commerce clause is the constitutional factor prohibiting the state's exercise of such jurisdiction.

The itinerant salesman does not always fall into the "drummer" classification. If he carries goods with him for immediate delivery, he is in the category of a "peddler" and as such is engaged in the exercise of a local, taxable privilege.[213] The same is true of the peddler's modern counterpart, the foreign corporation that carries on sales activities in a non-domiciliary state in a manner devised to gain the advantage of a business outlet in that state.[214] Thus the maintenance of a branch office and warehouse in a non-domiciliary state, from which local sales were made and from which orders were solicited and received for out-of-state acceptance and shipment, was considered to form a nexus between the corporation's activities and the non-domicilary state, so that a taxable event was created within that state.[215]

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[211]*E.g.*, Nippert v. City of Richmond, 327 U.S. 416 (1946); Real Silk Hosiery Mills v. Portland, 268 U.S. 325 (1925); Stockard v. Morgan, 185 U.S. 27 (1902); Brennan v. Titusville, 153 U.S. 289 (1894).

[212]354 U.S. 390.

[213]Welton v. Missouri, 91 U.S. 275 (1875); Walling v. Michigan, 116 U.S. 446 (1886).

[214]Norton Co. v. Department of Revenue of Illinois, 340 U.S. 534 (1951); Dalton Adding Machine Co. v. Virginia *ex rel.* State Corp. Comm'n, 246 U.S. 498 (1918); Singer Sewing Machine Co. v. Brickell, 233 U.S. 304 (1914).

[215]Norton Co. v. Department of Revenue of Illinois, *supra* note 214; see Armstrong v. City of Tampa, 112 So. 2d 293 (Fla. 1959), in which the activities alone,

In view of the fact that the commerce clause and the due process of law clause are so closely related in the "peddler" type situation, it seems desirable to note certain distinctive premises apparently underlying the reasoning in the cases. The commerce clause will render the interstate occupation of itinerant selling immune from state taxation unless the incident upon which the tax operates is some local activity or event considered to be separate and distinct from the actual flow of interstate commerce. When the peddler carries goods with him for sale and immediate delivery he thereby localizes the activity of selling and satisfies the commerce clause. The same is true of the foreign corporation when it maintains within the non-domiciliary state a branch office and warehouse and carries on substantial sales activities in connection therewith.

The due process clause is more easily satisfied than the commerce clause in these situations. The benefits of the law of the non-domiciliary state are accorded an out-of-state peddler and a foreign corporation when solicitations are made by the peddler and the corporation's representative in the non-domiciliary state. The mere solicitation of orders constitutes a taxable event and thus establishes jurisdiction to tax, making unnecessary, for due process purposes, the presence of the additional factors required by the commerce clause. The right to exercise this jurisdiction, although established, now depends on whether any valid objection can rest on the commerce clause. Unless the taxable event is brought into existence in such a manner that the commerce clause is satisfied, no tax can be imposed, regardless of conformity to the due process clause. The all-important issue, therefore, is whether the activity in a particular case is one that is sufficiently severable from interstate commerce to constitute a taxable event. Such an issue, resolvable only by careful consideration of the facts of each case, is an open invitation to controversy and litigation.

Privileges in Connection with Interstate Commodities

A preceding phase of this discussion was concerned with the development of case law in regard to property taxation and commodities in the stream of interstate commerce.[216] In that context the commodities were found to be immune from taxation as long as they remained in the stream of interstate transit. At other times, however,

unsupported by the presence of a branch office and a warehouse, were considered of such a substantial nature that a taxable event was created.

[216]See Pt. II *supra*, subheading " (b). Commodities."

this property was considered taxable, namely, during stages preparatory to its entry into the stream of commerce, during an interruption in the interstate journey if the interruption was for the independent advantage of the owner rather than a mere incident of the interstate transportation, and after the interstate movement had terminated.

The law regarding taxation of privileges related to commodities that have been, are presently, or soon will be, in the stream of interstate commerce has developed along lines similar to those of property taxation. Accordingly, excise taxes for the privilege of manufacturing, processing or otherwise preparing goods before interstate shipment,[217] storing, withdrawing from storage, using the goods for the benefit of the owner during an interruption in the interstate trip,[218] and for dealing with such commodities after the interstate journey comes to an end[219] have been upheld.

Once the commerce clause is rendered inoperative by virtue of interruption of the interstate transit, or by its termination, the requirements for satisfying the due process clause with reference to an excise tax are not subject to the critical comments leveled at the imposition of a property tax. As indicated previously,[220] the Court, in upholding a property tax in these two situations, has not seemed sufficiently concerned with requiring the degree of permanency of location that it has specified for the establishment of a tax situs for tangibles in other situations. The assumption seems to have been that if the commerce clause no longer immunizes the tangibles from property taxation, the requirements of due process are also satisfied.

No such assumption is necessary with reference to an excise tax imposed for the exercise of a privilege in connection with tangibles recently released from the stream of interstate commerce. Since

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[217] *E.g.*, Chassaniol v. City of Greenwood, 291 U.S. 584 (1934); Federal Compress & Whse. Co. v. McLean, 291 U.S. 17 (1934); Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932).

[218] *E.g.*, Pacific Tel. & Tel. Co. v. Gallagher, 306 U.S. 182 (1939); Southern Pac. Co. v. Gallagher, 306 U.S. 167 (1939); Edelman v. Boeing Air Transport, Inc., 289 U.S. 249 (1933); Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249 (1933).

[219] *E.g.*, Caskey Baking Co. v. Virginia, 313 U.S. 117 (1941); Browning v. City of Waycross, 233 U.S. 16 (1914); Armour Packing Co. v. Lacy, 200 U.S. 226 (1906).

[220] See Pt. II *supra*, subheading "(b). Commodities." This comment, no doubt, has applicability to tangibles that have never been connected with interstate commerce, but it can have no reference to tangibles as the subject of death taxes, since the Court has required a permanent situs for the tangibles as a prerequisite for the imposition of a valid death tax. See discussion in Pt. II *supra* under heading "Death Taxes."

an excise tax is concerned with a privilege as the incidence of the tax rather than the property that may be involved in the exercise of the privilege, there seems no justifiable reason for concern over the question of the tax situs of property for purposes of determining the validity of an excise tax.

Receipt of Income

The receipt of income by a resident of a taxing sovereignty is universally recognized as a taxable event.[221] Domicile itself affords a basis for such taxation. Enjoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government.[222] These privileges bear a direct relationship to the economic advantage realized by the receipt of income and the power to control it.[223]

Neither the privilege nor the burden of receiving income is affected by the character of the source from which the income is derived. For this reason income is not necessarily clothed with the tax immunity enjoyed by its source.[224] A state may tax its residents upon net income from a business located wholly without the state and beyond its taxing power.[225] It may tax a domiciliary beneficiary's net income from bonds held in trust and administered in another state,[226] although it is doubtful that the entire value of the bonds can be taxed by the beneficiary's domiciliary state to the same extent.[227] It may tax the net income from operations in interstate commerce, although a tax on the commerce is forbidden.[228] This holding has been applied to domestic corporations,[229] to foreign corporations having a commercial domicile within the taxing state,[230] and to foreign corpora-

[221]New York *ex rel.* Cohn v. Graves, 300 U.S. 308 (1937).

[222]*Ibid.*

[223]See Virginia v. Imperial Coal Sales Co., 293 U.S. 15 (1934); Lawrence v. State Tax Comm'n of Miss., 286 U.S. 276 (1932); Maguire v. Trefry, 253 U.S. 12 (1920).

[224]New York *ex rel.* Cohn v. Graves, 300 U.S. 308 (1937).

[225]Lawrence v. State Tax Comm'n of Miss., 286 U.S. 276 (1932).

[226]Maguire v. Trefry, 253 U.S. 12 (1920).

[227]See note 166 *supra* and accompanying text.

[228]United States Glue Co. v. Town of Oak Creek, 247 U.S. 321 (1918).

[229]*Ibid.*

[230]Memphis Natural Gas Co. v. Beeler, 315 U.S. 649 (1942); Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920).

tions not incorporated or not having their principal place of business in the taxing state but carrying on substantial local activities there.[231]

It is evident that jurisdiction to tax the receipt of income is governed by different principles from those governing the taxation of property. The incidence of a tax on the receipt of income differs from that of a property tax. One is on the privilege of receiving; the other is on the property itself.[232] A tax on both, whether by the same or different states, does not constitute double taxation.[233] Accordingly, the Court has assumed the position that the due process clause should not be extended to mean that because a state is prohibited from taxing property that it neither protects nor controls, it is likewise prohibited from taxing the receipt and command of income from the property by its resident, who is subject to its control and enjoys the benefits of its laws.[234]

State jurisdiction to tax the receipt of income is not limited to the domiciliary state even when property is not the source of the income. Due process of law has been held to contemplate a state's jurisdiction to levy a tax on the income of a non-resident that is attributable to his activities within the taxing state.[235] In so holding the Court was impressed by the pertinence of some of the fundamental principles of tax law mentioned here. In this country the states have the power normally pertaining to governments to resort to all reasonable forms of taxation in order to defray governmental expenses. In so doing they are not limited to property taxation or to any particular form of excise. A state from whose laws property, business, and industry derive the protection and security without which production and gainful occupation would be impossible should not be barred from exacting a share of those gains in the form of income taxes for the support of the government. Thus the Court justified establishment of the jurisdiction of a non-domiciliary state to impose a tax on the receipt of income earned in that state.

In the companion cases of *Northwestern States Portland Cement Co. v. Minnesota* and *Williams v. Stockham Valves & Fittings, Inc.*,[236] decided in 1959, the Court judicially augmented the jurisdiction of

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[231]Norfolk & W.R.R. v. North Carolina, 297 U.S. 682 (1936); Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm'n, 266 U.S. 271 (1924).

[232]New York *ex rel.* Cohn v. Graves, 300 U.S. 308 (1937).

[233]*Ibid.*

[234]*Ibid.*

[235]Shaffer v. Carter, 252 U.S. 37 (1920).

[236]358 U.S. 450.

a non-domiciliary state to tax the receipt of income. The principle was laid down that net income from the interstate operations of a foreign corporation may be subjected to state taxation by a non-domiciliary state if the levy is not discriminatory and is properly apportioned to local activities within the taxing state that form a nexus sufficient to support the tax. The taxes in both cases were concededly non-discriminatory and fairly apportioned. The objections to the taxes were grounded on the commerce clause[237] and the due process clause of the fourteenth amendment.

In the *Northwestern States* case an Iowa corporation was engaged in the manufacture and sale of cement at its plant in Iowa about forty miles from the Minnesota border. The corporation regularly and systematically solicited orders in Minnesota. Each order was subject to acceptance by and delivery from the company's plant in Iowa. Sales were made only to dealers, and forty-eight per cent of the corporation's entire sales were made to Minnesota dealers. The corporation maintained a sales office in Minnesota under the supervision of a salesman. Two other salesmen and a secretary occupied this three-room office, and two more salesmen used it as a clearing house. The corporation maintained no bank account in Minnesota, owned no real estate, and warehoused no merchandise there. All sales were made on a delivered-price basis fixed in Iowa; no pick-ups were allowed at its plant. Minnesota orders were transmitted to the Iowa headquarters. Salesmen also took orders for local dealers, who in turn placed the orders with the corporation, to be filled in the regular manner. In addition, salesmen received and transmitted claims against the corporation for loss or damage in shipment of goods.[238]

In upholding Minnesota's jurisdiction to tax, the Court was concerned with the objection based on the due process of law clause. Notice was accorded the fact that taxes were levied only on that portion of the taxpayer's net income that arose from its activities within the taxing state. Consideration was then given to the substantial income-producing character of the local activities that were carried on by the corporation in this non-domiciliary state. These activities were considered to be of such a nature as to form a nexus between the tax and the transaction within the state. Thus Minnesota was said to be rendering opportunities, protection, and benefits

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[237]U.S. CONST. art. I, §8, cl. 3.

[238]The factual situation of the *Williams* case is not included in the text because of its similarity to that of the *Northwestern* case.

for which a tax could be imposed in conformity with due process of law. The Court found that the commerce clause did not prohibit such a tax. On the contrary, some of its prior decisions pointed logically to the *Northwestern* holding by recognizing the doctrine that the entire net income of a corporation, generated by interstate as well as intra-state activities, may be fairly apportioned among the states for tax purposes by formulae utilizing in-state aspects of interstate affairs.[239]

Three dissenting justices purported to base their differences with the majority on its construction of the commerce clause.[240] They reasoned that the pertinent decisions of the Court allow a state to impose an apportioned net income tax when interstate commerce is involved only if there is a definite intra-state incident within the taxing state in the unitary process. The income from the intra-state business can be taxed, but taxation of income from purely interstate commerce is prohibited by the commerce clause. The dissenters concluded that the factual situation presented only the taxation of interstate commerce. Implicit in the reasoning of the dissent is the assumption that the activities of the Iowa corporation carried on in Minnesota did not constitute intra-state business; consequently, there was no adequate basis for the tax. On the other hand, the majority apparently was satisfied with requiring less in respect to corporate activity within the state than it had previously required as a basis for imposition of an apportioned net income tax when all of the activities were in furtherance of interstate commerce.

Mr. Justice Frankfurter, in one of the dissenting opinions,[241] expressed apprehension with respect to the practical results of the liberal treatment accorded the states by the majority of the Court. His expectancy was that every state that had not already done so would devise a formula of apportionment to tax the income of enterprises carrying on interstate commerce; commerce would not be burdened hypothetically but practically. In addition, thousands of small or moderate-sized corporations would be forced into a multitude of expenditures in order to meet the diverse and variegated tax laws of all the states. The cost of complying with the requirements of the different states, reasoned Justice Frankfurter, might well

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[239]The same is true of gross receipts from an interstate enterprise. Canton R.R. v. Rogan, 340 U.S. 511 (1951).

[240]358 U.S. 450 at 477.

[241]*Id.* at 470.

exceed the burden of the taxes. In his opinion the Congress, not the Court, was the proper body to deal with problems of accommodating federal and state fiscal needs.

Justice Frankfurter's opinion was accurately prophetic, at least in part. Since the decision was issued three states have amended their tax laws in order to take advantage of the latitude granted them.[242] Federal legislation has also been enacted. In September 1959 executive approval was given to an act of Congress[243] that qualified the operation of the *Northwestern* and *Williams* decisions. The law sets up a standard of minimum activity which protects out-of-state businesses from income taxation in situations similar to these. Generally, an out-of-state business may (1) solicit orders for tangible personal property within a state, subject to approval or rejection and shipment or delivery from outside the state; (2) solicit orders within a state in the name of or for the benefit of a prospective dealer-customer if they are placed with the out-of-state business to be filled and delivered; and (3) use independent contractors such as commission agents or brokers, even those with offices within the taxing state, to solicit and accept orders. Presumably immunity from state net income taxation under the new law is not available if the business activities in the taxing state are not limited to those permitted. For example, the maintenance of a warehouse or stock of goods within the state apparently will cause forfeiture of immunity.

The *Northwestern* and *Williams* cases were not concerned with the extent to which the domiciliary state may impose a tax on the net income of her corporations that derive their income from interstate commerce. These decisions allow a non-domiciliary state to tax a portion of the income. Then what is the right of the domiciliary state? At present the Court is of the opinion that a state may tax the entire income of an individual domiciled there, even though the income is derived entirely from property or activities outside the state and therefore is subject to a tax at its source.[244] To this extent double taxation of income by the states has been approved.[245] Whether the Court will approve of double taxation in interstate commerce situations, now that the way has been made easier for the

[242]Idaho, Utah, and Tenn.; see Studenski, *State Taxation of Interstate Commerce*, 20 Tax Review No. 7 (July 1959).

[243]15 U.S.C. §381 (Supp. I, 1959).

[244]New York *ex rel.* Cohn v. Graves, 300 U.S. 308 (1937); Lawrence v. State Tax Comm'n, 286 U.S. 276 (1932).

[245]See note 244 *supra*.

non-domiciliary state to impose an apportioned net income tax, remains a matter of speculation.

PART V. CONCLUSION

A study of the case law of a state's jurisdiction to tax under the Federal Constitution reveals unabated controversy. A divided Court has been the rule rather than the exception in the momentous cases. Two reasons for the frequent lack of a unanimous decision stand out. First, no provision of the Constitution specifically outlines this important phase of a state's sovereignty. Consequently, the Court has found its only constitutional guide to a solution of these problems in the general due process clause of the fourteenth amendment. With very little to point the way, the Court has been forced to adopt operating principles based on what it considered at the time to be desirable policies. These policies have been born of the various and conflicting philosophies of the personnel of the Court. As the personnel changed the prevailing philosophies tended to vary, and in some cases the law followed suit. Second, jurisdiction to tax demands a subject upon which the tax is to operate. The nature of this subject has been the basis of many of the differences of opinion among the members of the Court with reference to determination of the taxability of the subject. Much of the divergence of opinion in regard to the location of a tax situs stems from conflicting views of where property and privileges are located for tax purposes.

These two reasons have not operated independently. Tangibles are taxable where they are permanently located and nowhere else. The nature of the property apparently has been the most important factor in making possible the implementation of this principle, since it is reasonably adaptable to localization. On the other hand, the nature of intangibles has proved more disturbing to a vacillating Court. Even judicial distaste for double taxation has proved insufficient to justify continued adherence to the Court's reasoning of the early 1930's whereby the peculiar characteristics of intangibles were ignored to the extent that the situs of the property was deemed to be in a single state. The present position, therefore, leaves the states to fend for themselves in preventing double taxation with reference to intangibles. They seem to be accomplishing this as they see fit through reciprocal exemption legislation.

At present there seems to be a lull in the Court's treatment of the double-taxation area, but litigation may be expected as long as the fourteenth amendment is construed to prohibit double taxation of tangibles and allow such taxation of intangibles. This is true regardless of recognized differences in the nature of various types of property. The advantages accorded by a state to its domiciliary owner of property are difficult to distinguish satisfactorily on the basis of the nature and location of property he owns; taxation of tangibles upon the assumption that these advantages have ceased because of the location of the property outside the domiciliary state is unrealistic.

The concession should be made, and adhered to, that any decision with reference to the acceptability of double taxation is basically one of policy. The adopted policy should be one that contemplates similar treatment of tangibles and intangibles. The availability of acceptable legal reasoning in support of either allowing or disallowing double taxation should cause little concern to the Court, since both positions have been assumed at one time or another. Dissimilarity of treatment would probably have greater repercussions if it were not for the fact that states have passed the previously mentioned reciprocal exemption legislation.

Scientific developments portend a continuation of problems involving the tax jurisdiction of a state. Novel situations in the wake of these developments will give rise to questions of tax situs not yet faced by the Court. In addition, interstate commerce invites the use of ingenuity in seeking judicial enlargement of a state's power to obtain revenue from a lucrative source. The Court's reactions will be interesting and probably not always welcome. Additional congressional curbs may be deemed necessary. Whatever the future may produce, the Court may deal with it without being bound by well-established precedent in so far as a state's jurisdiction is concerned.

TABLE OF HEADINGS AND SUBHEADINGS