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## The Fourteenth Amendment in its Relation to State Taxation of Intangibles

THE CLOSE dependence, illustrated by numerous decisions, of state taxation upon the Fourteenth Amendment,<sup>1</sup> requires frequent reappraisals of taxation laws in the light of changing interpretations of that amendment by the Supreme Court of the United States. This need is particularly urgent in California, where taxation has recently undergone thorough revision. To make this reëxamination of California laws relating to the taxation of intangibles, particularly as to how far these laws may be affected by recent Supreme Court decisions, is the purpose of this article.

The subject will be discussed under three general heads:

I. The present status of taxation of intangibles as declared in United States Supreme Court decisions.

II. The present status of taxation of intangibles as declared in California statutes and decisions.

III. State inheritance taxation upon intangibles.

### I. THE PRESENT STATUS OF TAXATION OF INTANGIBLES AS DECLARED IN UNITED STATES SUPREME COURT DECISIONS

The present inquiry is occasioned by *Farmers Loan & Trust Company as Executor of Henry R. Taylor v. Minnesota*,<sup>2</sup> decided January 6th, 1930, hereinafter for brevity referred to as the *Taylor* case. It presents the following facts:

Taylor, a resident of New York, died owning and having within his possession in New York, negotiable bonds and certificates of indebtedness issued by the State of Minnesota and certain Minnesota municipi-

<sup>1</sup> " . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . " (U. S. CONST. Art. XIV.)

<sup>2</sup> (1930) 280 U. S. 204, 50 Sup. Ct. 98. For enlightening comment on this case, taking a viewpoint somewhat different from that herein adopted, see Note (1930) 43 HARV. L. REV. 792; for a somewhat more critical viewpoint, see (1930) 30 COL. L. REV. 404. See also Note (1930) 30 COL. L. REV. 539; Note (1930) 16 VA. L. REV. 521.

palities. Some of these were registered, others payable to bearer. None had any connection with business carried on by or for Taylor in Minnesota. They passed under his will probated in New York, and the transfer was taxed there. Minnesota's assessment of an inheritance tax upon the same transfer, sustained by the Supreme Court of that state,<sup>3</sup> was disallowed by the United States Supreme Court, which held in an opinion written by Mr. Justice McReynolds that these were ordinary choses in action, taxable in New York under the maxim, *mobilia sequuntur personam*; that though *Blackstone v. Miller*<sup>4</sup> lends support to the doctrine that ordinary choses in action are subject to taxation both at the domicile of the debtor and that of the creditor, this view tends "to disturb good relations among the States and produce the kind of discontent expected to subside after establishment of the Union." The practical effect of this doctrine, the Court says, has been bad and *Blackstone v. Miller* is overruled. The Court says that "In this Court the presently approved doctrine is that no State may tax anything not within her jurisdiction without violating the Fourteenth Amendment," citing certain property taxation cases; "Also no State can tax the testamentary transfer of property wholly beyond her power," citing *Rhode Island Hospital Trust Company v. Doughton*,<sup>5</sup> "or impose death duties reckoned upon the value of tangibles permanently located outside her limits," citing *Frick v. Pennsylvania*.<sup>6</sup> The Court states that these principles became definitely settled subsequent to *Blackstone v. Miller* and are out of harmony with the reasoning supporting that decision; that it is not permissible broadly to say "that notwithstanding the Fourteenth Amendment two States have power to tax the same personalty on different and inconsistent principles, or that a State always may tax according to the fiction that in successions after death *mobilia sequuntur personam* and domicile govern the whole," citing certain property taxation cases and the *Doughton* case above referred to.

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<sup>3</sup> Estate of Taylor (1928) 175 Minn. 314, 221 N. W. 64. The court had previously (1928) 175 Minn. 310, 219 N. W. 153, held the bonds non-taxable on the theory that under United States Supreme Court decisions they were to be treated as tangibles, taxable where found, and not being within the State of Minnesota were not subject to its jurisdiction. After the decision in *Blodgett v. Silberman* (1928) 277 U. S. 1, 48 Sup. Ct. 410, the cause was re-argued and the Court, feeling constrained to adopt the view expressed in the *Silberman* case that bonds "are at most choses in action, and intangibles," annulled its former opinion, and held the bonds taxable. For comment on the Minnesota court's decision, see Note (1929) 27 MICH. L. REV. 447; (1929) 13 MINN. L. REV. 273.

<sup>4</sup> (1903) 188 U. S. 189, 23 Sup. Ct. 277.

<sup>5</sup> (1926) 270 U. S. 69, 46 Sup. Ct. 256.

<sup>6</sup> (1925) 268 U. S. 473, 45 Sup. Ct. 603.

"While debts have no actual territorial situs we have ruled that a State may properly apply the rule *mobilia sequuntur personam* and treat them as localized at the creditor's domicile for taxation purposes. Tangibles with permanent situs therein, and their testamentary transfer, may be taxed only by the State where they are found. And, we think, the general reasons declared sufficient to inhibit taxation of them by two States apply under present circumstances with no less force to intangibles with taxable situs imposed by due application of legal fiction. Primitive conditions have passed; business is now transacted on a national scale. A very large part of the country's wealth is invested in negotiable securities whose protection against discrimination, unjust and oppressive taxation, is matter of the greatest moment."<sup>7</sup>

Applying the principle of the *Union Refrigerator Transit Company* case,<sup>8</sup> giving tangible personalty more or less permanently severed from the owner's domicile, a situs of its own for purposes of taxation, the Court says that

"existing conditions no less imperatively demand protection of choses in action against multiplied taxation whether following misapplication of some legal fiction or conflicting theories concerning the sovereign's right to exact contributions. For many years the trend of decisions here has been in that direction.

"Taxation is an intensely practical matter and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences. We have determined that in general intangibles may be properly taxed at the domicile of their owner and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles."<sup>9</sup>

The Court refers to the property taxation case of *State Tax on Foreign-Held Bonds*,<sup>10</sup> on the point that debts are not property of debtors but are their obligations, possessing value only in the hands of the creditors; also to *New Orleans v. Stempel*,<sup>11</sup> and related cases, upon the point that "choses in action may acquire a situs for taxation other than at the domicile of their owner if they have become integral parts of some local business," adding that the present record gives no occasion to inquire whether such securities can be taxed a second time at the owner's domicile.

Mr. Justice Stone concurs in the result, preferring to leave undetermined whether or not control over a debt at the domicile of the debtor gives jurisdiction to tax the debt and pointing out that the Court is concerned not with a property tax but with an excise or privi-

<sup>7</sup> 280 U. S. at 211, 50 Sup. Ct. at 100.

<sup>8</sup> *Union Refrigerator Transit Co. v. Kentucky* (1905) 199 U. S. 194, 26 Sup. Ct. 36.

<sup>9</sup> 280 U. S. at 212, 50 Sup. Ct. at 100.

<sup>10</sup> (1872) 82 U. S. (15 Wall.) 300.

<sup>11</sup> (1899) 175 U. S. 309, 20 Sup. Ct. 110.

lege tax and that "to sustain a privilege tax the privilege must be enjoyed in the state imposing it." Minnesota, he says, though it created the contract transferred, cannot impair its obligation and therefore cannot withhold power of transfer nor prescribe its terms. He points out that the tax is not on the debt but only on the transfer of it and that neither analogies drawn from the law of property taxes nor the attempt to solve the problem by ascribing to a legal relationship a fictitious situs, goes far toward solving it. He states that the fact that taxation is double has not been deemed to affect its constitutionality, citing numerous Supreme Court cases where the principle has been upheld or at least recognized.

Mr. Justice Holmes, Mr. Justice Brandeis concurring, dissents on the ground that the law of Minnesota is necessary to the continuance of the obligation, ending with the ironic comment:

"A good deal has to be read into the Fourteenth Amendment to give it any bearing upon this case. The Amendment does not condemn everything that we may think undesirable on economic or social grounds."<sup>12</sup>

The following is thought fairly to summarize the reasoning of the majority opinion:

1. Debts, under the *mobilia sequuntur* maxim, are localized for taxation purposes at the creditor's domicile.

2. They are, accordingly, "found" only at the domicile and, following the analogy of tangibles with permanent situs, are taxable only there.

3. It is economically undesirable and the Court says tending "to disturb good relations among the states" to permit multiple taxation.

4. It is recognized, following *New Orleans v. Stempel*,<sup>13</sup> that choses in action may acquire a situs for taxation other than the domicile of the owner where they have acquired a business situs elsewhere. The question whether they can be taxed again at the domicile is not presented.

#### *Comment on the Taylor Case*

##### *A. The Overruling of Blackstone v. Miller.*

The majority and minority opinions will be admired or condemned according to the reader's agreement or disagreement with the economic theories underlying them. The present writer, deeming neither acclaim nor disparagement any part of his task and concerned only with understanding this decision, with deference suggests that the same result might have been reached without overruling *Blackstone v. Miller*. In that case, a transfer tax levied by New York upon an ordinary debt

<sup>12</sup> 280 U. S. at 218, 50 Sup. Ct. at 103.

<sup>13</sup> *Supra* n. 11.

owing to an Illinois resident from a New York resident, and an account in a New York bank belonging to the same non-resident, was upheld. These debts, it will be observed, were ordinary contract debts, not evidenced by negotiable instruments as in the *Taylor* case. Counsel in the *Taylor* case seem to have made no point of the fact that some of the bonds there involved were registered; however, different views may be entertained as to the immateriality of this circumstance.<sup>14</sup>

It must be remembered that Minnesota was taxing not property, but a privilege of transfer.<sup>15</sup> Leaving aside the fact of registration, it is manifest that Minnesota conferred no privilege in respect of the transfer of these bonds. The quality of negotiability, imparted *in limine* by Minnesota laws and protected against impairment by the contract clause of the United States Constitution, made transfer dependent on the law of the holder's domicile.<sup>16</sup>

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<sup>14</sup> The first opinion of the Minnesota court in the *Taylor* case (1928) 175 Minn. 310, 314, 219 N. W. 153, 154, refers to this circumstance, saying that the bonds, though registered, were still negotiable; that "The matter of registration relates to the things to be done to effectuate the negotiation so as to preclude an equitable defense by the maker against the transferor. Aside from this the registration has no significance, except for the benefit and protection of the holder. The registered bonds may be successfully transferred time and time again by endorsement and delivery regardless of the want of registration." For a forceful statement of the opposing view, see *Bliss v. Bliss* (1915) 221 Mass. 201, 109 N. E. 148. The court holds that succession to a registered bond (in this case, of the State of Massachusetts) can be taxed in the place where the succession of necessity must take place, where the effectual transfer of legal title as manifested by the essential factor of change of registration can be consummated. Cases involving notes and bonds passing by delivery are distinguished. See also *Royal Trust Co. v. Attorney General of Alberta* [1930] A. C. 144; *Erie Beach Co. v. Attorney General of Ontario* [1930] A. C. 161.

<sup>15</sup> See cases cited, *infra* n. 26 and 29.

<sup>16</sup> *Commonwealth v. Huntington* (1927) 148 Va. 97, 138 S. E. 650, where bonds of Virginia corporations owned by a California resident secured by mortgage on Virginia realty and physically kept in New York, were held not subject to inheritance tax in Virginia. The court points out that the bonds may have been frequently transferred legally since the death of the owner and that no power in Virginia could prevent it; that there had been no transfer or delivery in Virginia and that it was not necessary to invoke any law of Virginia to vest any individual with legal title. Cases to like effect, some of them cited by the Virginia court, are: *Wilkins v. Ellett* (1883) 108 U. S. 256, 2 Sup. Ct. 641, referred to *infra* n. 21; *Chambers v. Mumford* (1921) 187 Cal. 228, 201 Pac. 588, 42 A. L. R. 342; *Walker v. People* (1918) 64 Colo. 143, 171 Pac. 747, 8 A. L. R. 855; *Bliss v. Bliss*, *supra* n. 14; *State v. Chadwick* (1916) 133 Minn. 117, 157 N. W. 1076, L. R. A. 1916E 1288; *In re Bronson* (1896) 150 N. Y. 1, 44 N. E. 707, 34 L. R. A. 238 (right of succession to New York corporation bonds secured by New York real estate but owned by California resident, accrued under laws of California, where owner resided); *In re Fearing* (1911) 200 N. Y. 340, 93 N. E. 956; *Tax Commission of Ohio v. Farmers Loan & Trust Co.* (1928) 119 Ohio St. 410, 164 N. E. 423, 60 A. L. R. 546; *Fuller v. South Carolina Tax Commission* (1924) 128 S. C. 14, 121 S. E. 478; *McLaughlin v. Cluff* (1925) 66 Utah 245, 240 Pac.

This view is aided by, but in no respect dependent upon, a doctrine still maintainable unless impaired by *Blodgett v. Silberman*,<sup>17</sup> that intangibles such as notes and bonds are in such concrete form that they constitute a species of property in themselves, taxable wherever found.<sup>18</sup> The decisions referred to support the view that the negotiable instruments in question in the *Taylor* case might, under some circumstances at least, acquire situs in New York for taxation purposes if physically located there, even though the owner's domicile were in a different state.

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161, 42 A. L. R. 347. The foregoing cases are not dependent upon the doctrine, possibly at variance with *Blodgett v. Silberman*, *supra* n. 3 (see n. 18), that the bonds in question are to be treated as tangibles taxable wherever found, but are based upon the theory that the state of the obligor confers no privilege in respect of the succession. See also concurring opinion of Mr. Justice Stone in the *Taylor* case, *supra* n. 2, citing authorities to the point generally that the transfer of choses in action is governed by the law of the place of transfer. Some courts, though recognizing this doctrine as to bonds, restrict it as to other forms of negotiable paper. See *Hoyt v. Keegan* (1918) 183 Ia. 592, 167 N. W. 521; *State v. Probate Court* (1915) 128 Minn. 371, 150 N. W. 1094, L. R. A. 1916A 901; *Estate of Taylor*, *supra* n. 3; *State v. Jones* (1927) 80 Mont. 574, 261 Pac. 356, 60 A. L. R. 551. In general, see *Notes* (1920) 8 A. L. R. 863, (1926) 42 A. L. R. 354, (1929) 60 A. L. R. 565. See *infra* n. 27.

<sup>17</sup> *Supra* n. 3.

<sup>18</sup> *New Orleans v. Stempel*, *supra* n. 11; *Metropolitan Life Insurance Co. v. New Orleans* (1907) 205 U. S. 395, 27 Sup. Ct. 499. The business situs doctrine, discussed later, was involved in these two cases. *Wheeler v. Sohmer* (1914) 233 U. S. 434, 34 Sup. Ct. 607, a case applying generally to negotiable paper the doctrine, traditionally associated with bonds, of identifying the paper with the debt. *Scottish U. & N. Ins. Co. v. Bowland* (1905) 196 U. S. 611, 25 Sup. Ct. 345; *Selliger v. Kentucky* (1909) 213 U. S. 200, 29 Sup. Ct. 449; *Iowa v. Slimmer* (1918) 248 U. S. 115, 39 Sup. Ct. 33; *De Ganay v. Lederer* (1919) 250 U. S. 376, 39 Sup. Ct. 524; *Maguire v. Trefry* (1920) 253 U. S. 12, 40 Sup. Ct. 417; *Bliss v. Bliss*, *supra* n. 14; but see *Buck v. Beach* (1907) 206 U. S. 392, 27 Sup. Ct. 713. *Blodgett v. Silberman*, *supra* n. 3, stated under I (5) *infra*, though often cited to the contrary, is believed not to overrule these holdings. It could not in fact overrule them, as the case concerned, not taxation at the situs, but a claim of exemption from inheritance tax at the domicile because the bonds in question were physically present in another jurisdiction. To say that the domicile *could* tax is vastly different from saying that the situs *could not*, or at least that is a difference which could have been affirmed with confidence prior to the decisions in the *Taylor* and *Safe Deposit & Trust Co.* cases, *supra* n. 2 and *infra* n. 61. Even if the distinction just suggested no longer exists, that fact does not, it seems, impair the thesis sought to be maintained in the text, namely, that for inheritance tax purposes there are inherent differences between taxation at the domicile of the debtor, of debts represented by negotiable paper and ordinary choses in action. But see argument of Mr. Justice Stone in the *Taylor* case, *supra* n. 2. For comment on the *Silberman* case, *supra* n. 3, upholding the view under the law as then interpreted, that physical presence of negotiable instruments is sufficient basis for inheritance tax, see *Powell*, Book Review (1929) 42 HARV. L. REV. 718. For further comment on the *Silberman* case see *Note* (1928) 2 So. CALIF. L. REV. 178; (1928) 28 COL. L. REV. 827; (1928) 41 HARV. L. REV. 1066.

Let us examine the case of a simple contract debt. Suppose Taylor had died owning a bank account in a Minneapolis bank or that a Minneapolis citizen had owed him money on open account. The situation then would have been that presented in *Blackstone v. Miller*. In the *Taylor* case, Minnesota was obliged to pay (aside from the question of registration) to bearer. Even a thief from the rightful owner could have presented the bonds and by surrendering them have given a valid acquittance.<sup>19</sup>

But in the case of simple contract debts, the situation is entirely different. Under principles universally accepted, simple contract debts are, for purposes of founding administration, assets where the debtor resides.<sup>20</sup>

As *Murphy v. Crouse*<sup>20</sup> shows, even an assignment by the foreign administrator confers no rights on the assignee as against a local administrator.<sup>21</sup> In the case supposed, Taylor's New York executor could not have brought suit in Minnesota to collect the debts owing Taylor, for it is well settled, and nowhere more firmly than in the Supreme Court of the United States, that an executor or administrator has no enforceable rights but only certain privileges extended through comity, to collect assets in a state other than that of his appointment.<sup>22</sup> These rights can be enforced as against resident debtors only by an administrator appointed in the state where the debtor resides; and between this administrator and the domiciliary administrator there is in law no privity.<sup>23</sup> It is true that it would be the ordinary practice, in the case supposed, for the administrator appointed to collect Minnesota debts,

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<sup>19</sup> *Goodman v. Simonds* (1857) 61 U. S. (20 How.) 343, 365; *Michigan Bank v. Eldred* (1869) 76 U. S. (9 Wall.) 544, 551; *Shaw v. Railroad Co.* (1879) 101 U. S. 557, 563.

<sup>20</sup> *Murphy v. Crouse* (1901) 135 Cal. 14, 66 Pac. 971. But see *Wyman v. United States* (1884) 109 U. S. 654, 3 Sup. Ct. 417; *New England Mutual Life Insurance Co. v. Woodworth* (1884) 111 U. S. 138, 4 Sup. Ct. 364; *Maxwell v. Bugbee* (1919) 250 U. S. 525, 40 Sup. Ct. 2.

<sup>21</sup> There is no conflict between this principle and that stated in *Wilkins v. Ellett*, *supra* n. 16, to the effect that the domiciliary administrator can assign and the assignee sue in his own name if debts are negotiable, or if the state where suit is brought permits the assignee to sue in his own name. See *McCully v. Cooper* (1896) 114 Cal. 258, 46 Pac. 82.

<sup>22</sup> *Vaughan v. Northup* (1841) 40 U. S. (15 Pet.) 1; *Johnson v. Powers* (1891) 139 U. S. 156, 11 Sup. Ct. 525; *Lawrence v. Nelson* (1892) 143 U. S. 215, 12 Sup. Ct. 440; *Baker v. Baker, Eccles & Co.* (1917) 242 U. S. 394, 37 Sup. Ct. 152; *In re Ortiz* (1890) 86 Cal. 306, 24 Pac. 1034; *McCully v. Cooper*, *supra* n. 21; *Union Trust Company v. Pacific T. & T. Co.* (1916) 31 Cal. App. 64, 159 Pac. 820; *Winbigler v. Shattuck* (1920) 50 Cal. App. 562, 195 Pac. 707.

<sup>23</sup> *Brown v. Fletcher* (1908) 210 U. S. 82, 28 Sup. Ct. 702; *Ingersoll v. Coram* (1908) 211 U. S. 335, 29 Sup. Ct. 92; *Richards v. Blaisdell* (1909) 12 Cal. App. 101, 106 Pac. 372.

to remit the assets to New York for distribution; however, this practice is by no means invariable and there would be no obligation on the part of the Minnesota court to distribute in this manner rather than directly to the heirs or legatees.<sup>24</sup>

As the authorities just cited show, if distribution is governed by the *lex domicilii*, it is not because of any requirement of the Federal Constitution but because the states have adopted this principle from the common law.

As a result, then, of the overruling of *Blackstone v. Miller*, we have the following situation presented on the appointment of an administrator in Minnesota to collect debts there owing to the New York testator: Suits, if any are necessary, must be prosecuted in Minnesota courts; the assets must be administered upon and distributed according to Minnesota law, its adoption for this purpose of the law of the domicile being an accidental and immaterial circumstance. Though Minnesota is charged with all these duties and responsibilities regarding the succession, it can impose no tax. If Minnesota, deeming the burden unprofitable, seeks to escape, it cannot do so, for only the states have control over the estates of deceased persons, the federal courts having no probate jurisdiction.<sup>25</sup> It would seem then in the case supposed that the privilege being enjoyed in Minnesota and conferrable only by its laws, would be taxable there.<sup>26</sup>

The distinction sought to be made is briefly this: In the *Taylor* class of cases, the heirs and legatees represented by the domiciliary administrator are asking nothing of Minnesota or its laws. The continued validity of originally valid bonds is guaranteed by the Constitution of the United States. In the *Blackstone v. Miller* class of cases, the heirs and legatees are dependent entirely upon the laws of Minnesota — assuming the debtor resides there — not only in order to realize upon an asset but for its ultimate distribution. The fact that the debtor may voluntarily pay the domiciliary administrator is immaterial. The

<sup>24</sup> *Baker v. Baker, Eccles & Co.*, *supra* n. 22; *Iowa v. Slimmer*, *supra* n. 18; *Frick v. Pennsylvania*, *supra* n. 6; Note (1926) 14 CALIF. L. REV. 225.

<sup>25</sup> *Yonley v. Lavender* (1874) 88 U. S. (21 Wall.) 276; *Byers v. McAuley* (1893) 149 U. S. 608, 13 Sup. Ct. 906; *O'Callaghan v. O'Brien* (1905) 199 U. S. 89, 25 Sup. Ct. 727.

<sup>26</sup> *Campbell v. California* (1906) 200 U. S. 87, 26 Sup. Ct. 183; *Keeney v. New York* (1912) 222 U. S. 525, 32 Sup. Ct. 105, 38 L. R. A. (N. S.) 1139; *Kansas City, Ft. S. & M. Ry. Co. v. Botkin* (1916) 240 U. S. 227, 36 Sup. Ct. 261; *Maxwell v. Bugbee*, *supra* n. 20; *Cream of Wheat Company v. County of Grand Forks* (1920) 253 U. S. 325, 40 Sup. Ct. 558; *Stebbins v. Riley* (1925) 268 U. S. 137, 45 Sup. Ct. 424, 44 A. L. R. 1454; *Frick v. Pennsylvania*, *supra* n. 6; *Saltonstall v. Saltonstall* (1928) 276 U. S. 260, 48 Sup. Ct. 225; *Blodgett v. Silberman*, *supra* n. 3; *Estate of Dillingham* (1925) 196 Cal. 525, 238 Pac. 367; *In re Rothchild's Estate* (1929) — *Ida.* —, 283 Pac. 598.



point is that *the obligation cannot be realized upon and the property can never reach the heirs and legatees except with Minnesota's aid.*<sup>27</sup>

The foregoing considerations suggest that the overruling of *Blackstone v. Miller* may have wider implications than at first glance might be supposed. Carried to its logical extreme, it may mean that debts have no situs for administration at the domicile of the debtor—a somewhat startling proposition which the Court probably will not uphold. Just how far short of it the Court will stop, it would be unprofitable to inquire.

*B. Do Inheritance and Property Taxes Stand on the Same Jurisdictional Footing?*

The opinion does not in terms answer this inquiry in the affirmative, but the argument proceeds on that assumption.<sup>28</sup> The Court has heretofore carefully distinguished between property and privilege taxes.<sup>29</sup> *United States v. Perkins*<sup>29</sup> is a striking illustration of the distinction between these two kinds of taxation, holding a bequest of personal property to the United States subject to the New York Inheritance Tax. Manifestly, the tax could not have been upheld as a property tax.<sup>30</sup>

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<sup>27</sup> Cases may be imagined where the distinction between the two classes of cases would tend to disappear as, for example, if the domiciliary administrator actually sought to collect or found it necessary to bring suit upon the bonds in Minnesota; or, on the other hand, the domiciliary administrator might, through proper proceedings at the domicile, transfer even a non-negotiable chose in action and the assignee might sue the Minnesota debtor (see *supra* n. 21). Since, however, there is nothing to prevent a state by laws not retroactive in operation, from limiting the assignability of choses in action, the state where the debtor resides may, for the protection of its own citizens, recognize an administrator appointed at the domicile of the debtor in preference to the domiciliary administrator's assignee. *Murphy v. Crouse*, *supra* n. 20. See *McCully v. Cooper*, *supra* n. 21; 24 C. J. 1121; 11 R. C. L. 449; Note (1926) 14 CALIF. L. REV. 225. But to recognize any such doctrine respecting negotiable paper would destroy the fundamental quality of negotiability. The distinction for tax purposes sometimes made between various classes of negotiable paper (see *supra* n. 16) seems insubstantial.

<sup>28</sup> This view has received some countenance in California (*Chambers v. Mumford* (1921) 187 Cal. 228, 201 Pac. 588, 42 A. L. R. 342), the court applying the same test for inheritance as for property tax purposes, namely, whether the property whose transfer was sought to be taxed was "property within the state" within the contemplation of the California Inheritance Tax Act of 1913, which followed a corresponding provision of the California Constitution, article XIII, section 1. See also *First Trust & Savings Bank of Pasadena v. Los Angeles County* (1929) 77 Cal. Dec. 162 and 343, 273 Pac. 1066. For a similar expression, see *Rhode Island Hospital Trust Co. v. Doughton*, *supra* n. 5.

<sup>29</sup> *United States v. Perkins* (1896) 163 U. S. 625, 16 Sup. Ct. 1073. See cases cited, *supra* n. 26; also, *Magoun v. Illinois Trust & Savings Bank* (1898) 170 U. S. 283, 18 Sup. Ct. 594; *Knowlton v. Moore* (1900) 178 U. S. 41, 20 Sup. Ct. 747.

<sup>30</sup> *California v. Central Pacific Railroad Company* (1888) 127 U. S. 1, 8 Sup. Ct. 1073; *Macallen Company v. Massachusetts* (1929) 279 U. S. 620, 49 Sup. Ct. 432.

*Maxwell v. Bugbee*<sup>31</sup> also brings out this distinction plainly, upholding the inheritance tax law of New Jersey fixing the rate on a transfer of property in New Jersey on the same basis as though the testator's entire estate had been in New Jersey. Considered as a tax on property, the tax could not have been upheld because the bulk of the decedent's property was outside of New Jersey, and he was not a resident of that state. Nevertheless, it was held that the entire estate, though located elsewhere, might be used as the measure by which the tax on the privilege of transmission was computed. The Court says that to say that this is a levy on a foreign estate is to distort the statute from its purpose to tax the privilege, into a property tax.

The apparent assimilation of property to privilege taxes which the Court makes in the *Taylor* decision, flowing from the *argument* of the Court rather than from the actual decision, cannot be too implicitly relied upon. There were two questions actually before the Court: First, was this property within the State of Minnesota? If so, it could no doubt tax either the property or the privilege of succeeding to it. Under the decision in the case of *State Tax on Foreign-Held Bonds*<sup>32</sup> these bonds were not property within the state. Second, did Minnesota confer any privilege in respect of these bonds? Upon this question the Court divides, the majority saying, "no." So far as the bonds had not lost their negotiable character through registration, it seems that the result arrived at by the Court can be reached without disturbing previous decisions; and even in the case of registered bonds, since registration affects not the right of transfer but only the evidence by which the fact of transfer must be shown, possibly the same doctrine applies.

There is nothing, therefore, in the decision which requires a holding that a tax on property and on succession stand on the same footing. Mr. Justice Stone's concurring opinion — in practical effect a dissent from the Court's principal conclusions — seems to express the correct view upon this point.

#### *In General Regarding Taxation of Intangibles*

A summary of Supreme Court decisions upon this topic is necessary to a reasonably adequate treatment of it.

##### (1) *Business situs cases.*<sup>33</sup>

The Supreme Court, in a long line of cases, has held that where choses in action become integral parts of a foreign business, they may

<sup>31</sup> *Supra* n. 20.

<sup>32</sup> *Supra* n. 10.

<sup>33</sup> For an excellent discussion of this topic see Dennis, *Notes on Some Recent Supreme Court Cases Relating to the Situs of Intangible Personal Property for Purposes of Taxation* (1915) 15 Col. L. Rev. 377; Powell, *The Business Situs of Credits* (1922) 28 W. Va. L. Q. 89.

be taxed in the foreign jurisdiction. The leading case, *New Orleans v. Stempel*,<sup>34</sup> has been followed in a number of cases.<sup>35</sup>

Of the cases cited, the *Liverpool & London & Globe Insurance Company* case, in an opinion by Mr. Justice, now Chief Justice, Hughes, goes further than any of the others, upholding Louisiana taxation on amounts due a foreign insurance company by Louisiana policy holders for premiums on which a credit of thirty or sixty days had been extended, though not evidenced by a note of the debtor. The principle of these cases is recognized in the *Taylor* case and the *Liverpool & London & Globe Insurance Company* case cited, though a query may be indulged in as to whether it is altogether in harmony with doctrines now favored by the Supreme Court.

Where, however, negotiable instruments belonging to a New York resident, but part of a business of lending money carried on by him through an agent in Ohio, were kept in Indiana except when required in Ohio for business purposes, it was held in *Buck v. Beach*<sup>36</sup> that they were exempt from taxation in Indiana, the fact that they were so kept for the purpose of dodging taxation in Ohio being held immaterial. This case would be regarded as of doubtful authority in view of the comments upon it in *Wheeler v. Sohmer*<sup>37</sup> were it not for the fact that *Wheeler v. Sohmer* is itself under suspicion in view of certain inferences from the *Taylor* decision.

As will be shown below, the California decisions recognize to the fullest extent the doctrine of business situs.

(2) *Taxability at Domicile of Intangibles which Have Acquired Business Situs Elsewhere.*

In the case of incorporeal rights, it has been held that they may be taxed both at the domicile of the owner and where exercised. This conclusion follows from putting together the two cases of *Citizens National Bank v. Durr*<sup>38</sup> and *Rogers v. Hennepin County*.<sup>39</sup> In the *Durr* case, a resident of Ohio was held taxable there upon a New York Stock Exchange seat owned by him. The Court says it is immaterial if New York can also tax the seat, citing the *Rogers* case and stating that ex-

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<sup>34</sup> *Supra* n. 11.

<sup>35</sup> *Bristol v. Washington County* (1900) 177 U. S. 133, 20 Sup. Ct. 585; *State Board of Assessors v. Comptoir National D'Escompte* (1903) 191 U. S. 388, 24 Sup. Ct. 109; *Metropolitan Life Insurance Company v. New Orleans* (1907) 205 U. S. 395, 27 Sup. Ct. 499; *Liverpool & London & Globe Insurance Company v. Board of Assessors* (1911) 221 U. S. 346, 31 Sup. Ct. 550; but see *Board of Assessors v. New York Life Insurance Co.* (1910) 216 U. S. 517, 30 Sup. Ct. 385.

<sup>36</sup> *Supra* n. 18.

<sup>37</sup> (1914) 233 U. S. 434, 34 Sup. Ct. 607.

<sup>38</sup> (1921) 257 U. S. 99, 42 Sup. Ct. 15.

<sup>39</sup> (1916) 240 U. S. 184, 36 Sup. Ct. 265.

emption from double taxation is not guaranteed by the Fourteenth Amendment. The *Rogers* case is the converse, the Court there holding that Minnesota had power to tax against non-resident owners, memberships in a Chamber of Commerce incorporated under the laws of Minnesota.

The *Durr* and *Rogers* cases go far to sustain taxation at the domicile of intangibles with business situs elsewhere. In *Fidelity and Columbia Trust Company v. Louisville*,<sup>40</sup> it was held that where a Kentucky resident kept in St. Louis banks accruing subject to his order, deposits from a business carried on by him in Missouri, and not used by him in the business, they were taxable to him in Kentucky. It is not clear that this was a business situs case, though the Court concedes that the deposits may have been taxable to him in Missouri. The case hardly stands for any more than the proposition that bank deposits kept in a foreign state, subject to the owner's withdrawal at any time, are taxable to him at the domicile.

In *Cream of Wheat Company v. County of Grand Forks*,<sup>41</sup> a case holding that the state may tax one of its own corporations on the value of its outstanding capital stock although the corporation's property and business are located entirely in another state, the Court adds, by way of *dictum*, that an owner may be taxed at the domicile on property taxable in another state by virtue of having acquired a business situs there. The *Fidelity and Columbia Trust Company* case is cited which, as above pointed out, does not go quite that far. The Court also refers to *Hawley v. Malden*,<sup>42</sup> where it was held that a Massachusetts resident may be taxed on shares of stock held by him in foreign corporations which do no business and have no property in Massachusetts.

The California courts, as will be shown later, have renounced taxation on intangibles acquiring business situs elsewhere though due to recent statutory changes it is possible that the matter has not been finally settled.

### (3) *Taxation of Intangibles Represented by Evidences Physically Present within the Jurisdiction.*

In the business situs cases above discussed, the paper evidences of debt were in some cases actually kept within the jurisdiction and in others were kept, except when actually required for business purposes within the state, at the foreign domicile of the owner.<sup>43</sup> Suppose, however, the paper evidences of debt are kept within the jurisdiction for

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<sup>40</sup> (1917) 245 U. S. 54, 38 Sup. Ct. 40.

<sup>41</sup> *Supra* n. 26.

<sup>42</sup> (1914) 232 U. S. 1, 34 Sup. Ct. 201.

<sup>43</sup> *Bristol v. Washington County*, *supra* n. 35.

safekeeping or for some other purpose not coming within the business situs doctrine. There are authorities holding such property taxable where the paper evidences are found, though *Buck v. Beach*,<sup>44</sup> already commented upon, arrived at the contrary result under the facts there involved. In *Wheeler v. Sohmer*,<sup>45</sup> above referred to, the New York inheritance tax on promissory notes made by an Illinois resident, secured by Illinois property, and left in a New York safe deposit box was involved; also promissory notes of a Virginia corporation. Both were held subject to the New York inheritance tax, the Court pointing out that it must be taken that the safe deposit box in which the notes were found was their permanent resting place, the implication being that if they were there only for some temporary purpose, the rule announced would not apply.

Bonds deposited by a foreign insurance company with a State Superintendent of Insurance have been held subject to local taxation.<sup>46</sup>

(4) *Taxation of Corporate Stock and Stock Transfers.*

It is well settled that the transfer of stock may be taxed at the domicile of the corporation.<sup>47</sup> The stock itself may also be taxed there.<sup>48</sup> The owner domiciled within the jurisdiction may be taxed on the stock, regardless of the corporate domicile.<sup>49</sup>

If, as the Supreme Court strongly suggests in the *Safe Deposit & Trust Co. v. Virginia*<sup>50</sup> and in the *Taylor* cases, taxation of intangibles must be limited to one state, we still have to determine which state may exercise the privilege. Since the legal considerations supporting

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<sup>44</sup> *Supra* n. 18.

<sup>45</sup> *Supra* n. 37.

<sup>46</sup> *Scottish U. & N. Insurance Company v. Bowland*, *supra* n. 18. Cf. *People v. Home Insurance Company* (1866) 29 Cal. 533.

<sup>47</sup> *Baker v. Baker, Eccles & Co.*, *supra* n. 22; *Frick v. Pennsylvania*, *supra* n. 6; *McDougald v. Lilienthal* (1917) 174 Cal. 698, 164 Pac. 387, L. R. A. 1917F 267. The rule stated follows from the principle now universally recognized that certificates of stock represent such corporate interests as the laws of the corporate domicile allow, corporate charters and privileges being, by legislation and constitutional enactment since the decision in the *Dartmouth College* case ((1819) 17 U. S. (4 Wheat.) 518), subject to amendment or repeal. California Constitution, article XII, section 1. *McGowan v. McDonald* (1896) 111 Cal. 57, 43 Pac. 411; *Rhode Island Hospital Trust Co. v. Doughton*, *supra* n. 5, recognizes the principle but holds it confers no power to tax devolution of stock in a foreign corporation owned by a non-resident of the taxing state, merely because the bulk of the corporation's property was in that state.

<sup>48</sup> *Tappan v. Merchants' National Bank* (1873) 86 U. S. (19 Wall.) 490; *Corry v. Baltimore* (1905) 196 U. S. 466, 25 Sup. Ct. 297.

<sup>49</sup> *Hawley v. Malden*, *supra* n. 42 (property tax); *Blodgett v. Silberman*, *supra* n. 3 (inheritance tax); *Kidd v. Alabama* (1903) 188 U. S. 730, 23 Sup. Ct. 401; *Commonwealth v. Sunbury Converting Works* (1926) 286 Penn. 545, 134 Atl. 438, 48 A. L. R. 992. See *Frick v. Pennsylvania*, *supra* n. 6.

<sup>50</sup> (1929) 280 U. S. 83, 50 Sup. Ct. 59; see *infra* I (8).

either view seem almost equally cogent, we may infer that the answer will depend on considerations of policy, a somewhat uncertain element. Certain arguments pro and con are referred to below.<sup>51</sup>

(5) *To What Extent Will Analogies Relating to Situs of Tangible Personal Property Be Followed in Case of Intangibles?*

The Supreme Court has consistently applied the doctrine that tangibles acquiring a permanent situs in a foreign jurisdiction are not taxable at the domicile.<sup>52</sup>

In order to obtain this exemption, two things must concur: First, the tangibles in question must be permanently separated from the domicile, and second, they must have acquired an actual situs elsewhere. Because the second requirement was lacking, exemption was denied in *Southern Pacific Company v. Kentucky*,<sup>53</sup> where a Kentucky

<sup>51</sup> As pointed out in Note (1925) 38 HARV. L. REV. 809, it is possible for five states to tax stock transfers: (1) Domicile of the stockholder; (2) Domicile of the corporation; (3) Any state in which tangible property of the corporation is located (but see *Rhode Island Hospital Trust Co. v. Doughton*, *supra* n. 5); (4) Any state in which certificates of stock are located at death of owner; and (5) State in which the stock transfer books are kept. For an argument supporting the view that the state where the stockholder resides is the proper state to tax the shares, see Note (1930) 43 HARV. L. REV. 792, suggesting that reasons of convenience and fairness dictate the choice of the domicile of the owner as against the domicile of the corporation; of convenience, because from the stockholder's standpoint it is preferable to pay a single tax to the state of his domicile rather than to many states where corporations in which he owns stocks may be domiciled; of fairness, because the state of domicile of the corporation can compensate for its loss of revenue by raising the corporation tax. *Cf.* *Hawley v. Malden*, *supra* n. 42; *Frick v. Pennsylvania*, *supra* n. 6. If taxation is to be limited to the domicile of the stockholder, it will remove a present advantage of incorporating in certain states, for example, Delaware or Nevada. In a recent case in the Privy Council, *Erie Beach Co. v. Attorney General of Ontario*, *supra* n. 14, it was held that the proper situs of shares of stock for taxation purposes is the place where they can be most effectively dealt with, which the court holds to be the place where the register of shareholders is kept, as a transfer can take place only there. Also see *Commonwealth v. Sunbury Converting Works*, *supra* n. 49; *Rhode Island Hospital Trust Co. v. Doughton*, *supra* n. 47; Note (1926) 14 CALIF. L. REV. 225; (1930) 30 COL. L. REV. 404.

<sup>52</sup> *Frick v. Pennsylvania*, *supra* n. 6. See Isaacs, *The Subject and Measure of Taxation* (1926) 26 COL. L. REV. 939; Note (1925) 11 CORN. L. Q. 69 (approving); Note (1925) 39 HARV. L. REV. 250 (same); Note (1925) 24 MICH. L. REV. 50 (same); Note (1925) 74 U. OF PA. L. REV. 73 (same); Note (1925) 12 VA. L. REV. 62 (criticizes case); see also Note (1928) 25 COL. L. REV. 967; Note (1926) 35 YALE L. J. 357; see also, Seefurth, *Recent Limitations on the Power to Impose Inheritance and Estate Taxes* (1925) 25 COL. L. REV. 870; Wickersham, *Double Taxation* (1926) 12 VA. L. REV. 185. The leading case is *Union Refrigerator Transit Company v. Kentucky* (1905) 199 U. S. 194, 26 Sup. Ct. 36. See also *Old Dominion Steamship Company v. Virginia* (1905) 198 U. S. 299, 25 Sup. Ct. 686; *Delaware, L. & W. Railroad Company v. Pennsylvania* (1905) 198 U. S. 341, 25 Sup. Ct. 669; *Western Union Telegraph Company v. Kansas* (1910) 216 U. S. 1, 30 Sup. Ct. 190. *Cf.* *Maxwell v. Bugbee*, *supra* n. 20 (inheritance tax case).

<sup>53</sup> (1911) 222 U. S. 63, 32 Sup. Ct. 13.

corporation was taxed in Kentucky on steamships which never visited Kentucky, it being in fact impossible for them to do so, where they had acquired no permanent situs elsewhere. The converse of *Southern Pacific Company v. Kentucky* is *Hays v. Pacific Mail Steamship Co.*,<sup>54</sup> where ships, the property of a New York corporation but continuously employed on the Pacific Coast and repaired from time to time at Benicia, California, were held not taxable in California, not having acquired a permanent situs here.

Under the latest expression of the Supreme Court regarding tangibles, it seems that very slight separation from the domicile is sufficient to exempt from taxation there. In *Blodgett v. Silberman*<sup>55</sup> a small amount of bank notes and coin kept by a Connecticut resident in a New York safe deposit box was held "so definitely fixed and separated in its actual situs from the person of the owner" as to fall within the rule of the *Frick* case<sup>56</sup> and to be exempt from inheritance tax in Connecticut. The view was pressed that a like exemption should be accorded in Connecticut to bonds payable to bearer, kept by the owner in safe deposit boxes in New York City and never physically present in Connecticut. The Court rejects this view, holding that these and other intangibles involved were taxable at the domicile and that the principle *mobilia sequuntur personam* "is not to be shaken by the inquiry into the question whether the transfer of such intangibles like specialties, bonds or promissory notes, is subject to taxation in another jurisdiction." This property had actually been subjected to an inheritance tax in New York, where the paper evidences of it were kept. As the case involved only Connecticut taxation, naturally the propriety of New York taxation was not before the Court, but the latter seems clearly sustained by *Wheeler v. Sohmer*,<sup>57</sup> though as already observed, it may be doubted whether, in view of the *Taylor* case by implication at least making the domicile the exclusive taxing jurisdiction, the *Sohmer* case would now be followed.

Similar to the *Silberman* case and referred to in the opinion, is *Estate of Hodges*,<sup>58</sup> where California was held to have power to tax certain chattels and intangibles of a California resident, though physically located in Massachusetts and distributed in probate there under the jurisdiction of the Massachusetts courts. The *tendency* would seem to be to refer taxation of *tangibles* more and more to the *situs* exclusively, and taxation of *intangibles* more and more to the *domicile*. Some

<sup>54</sup> (1855) 58 U. S. (17 How.) 596.

<sup>55</sup> *Supra* n. 3. Also see n. 18.

<sup>56</sup> *Supra* n. 6.

<sup>57</sup> *Supra* n. 37.

<sup>58</sup> (1915) 170 Cal. 492, 150 Pac. 344.

of the difficulties in making a thorough-going application of this latter rule have already been pointed out.

(6) *Double Taxation.*

The Court says in the *Taylor* opinion:

"Nor is it permissible broadly to say that notwithstanding the Fourteenth Amendment two States have power to tax the same personalty on different and inconsistent principles, or that a State always may tax according to the fiction that in successions after death 'mobilia sequuntur personam' and domicile govern the whole."<sup>59</sup>

and again:

"We have determined that in general intangibles may be properly taxed at the domicile of their owner and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place, similar to that accorded to tangibles."<sup>60</sup>

In *Safe Deposit & Trust Company v. Virginia*<sup>61</sup> the Court says:

"It would be unfortunate, perhaps amazing, if a legal fiction originally invented to prevent personalty from escaping just taxation, should compel us to accept the irrational view that the same securities were within two States at the same instant and because of this to uphold a double and oppressive assessment."

The majority opinions in these two cases are undoubtedly hostile to multiple taxation. Are these opinions to be construed as going to the extent of holding that such taxation is prohibited by the Fourteenth Amendment?

The desirability of exemption from multiple taxation was pointed out by Mr. Justice Holmes twenty-seven years ago,<sup>62</sup> but the Court has repeatedly refused to recognize this exemption as required under the Fourteenth Amendment.<sup>63</sup>

Notwithstanding a natural reluctance to accept the conclusion that the Court, according to its present views, has been denying due process of law to its suitors for more than a quarter of a century, and a disinclination to credit the further accusation of the Court against itself, that its contrary views have been "irrational," these last two decisions leave little room to doubt that the present majority deems the Four-

<sup>59</sup> 280 U. S. at 210, 50 Sup. Ct. at 100.

<sup>60</sup> 280 U. S. at 212, 50 Sup. Ct. at 100.

<sup>61</sup> (1930) 280 U. S. 83, 94, 50 Sup. Ct. 59, 61, stated under I (8) *post*.

<sup>62</sup> *Kidd v. Alabama*, *supra* n. 49.

<sup>63</sup> *Tappan v. Merchants National Bank*, *supra* n. 48; *Savings and Loan Society v. Multnomah County* (1898) 169 U. S. 421, 18 Sup. Ct. 392; *Kidd v. Alabama*, *supra* n. 49; *Hawley v. Malden*, *supra* n. 42; *St. Louis Southwestern Railroad Company v. Arkansas* (1914) 235 U. S. 350, 35 Sup. Ct. 99; *Rogers v. Hennepin County*, *supra* n. 39; *Bullen v. Wisconsin* (1916) 240 U. S. 625, 36 Sup. Ct. 473; *Fidelity & Columbia Trust Company v. Louisville* (1917) 245 U. S. 54, 38 Sup. Ct. 40; *Cream of Wheat Company v. County of Grand Forks*, *supra* n. 26; *Blodgett v. Silberman*, *supra* n. 3.



teenth Amendment an adequate weapon to strike down multiple taxation. Neither case is of such character that its decision necessarily denies the legality of double taxation under proper circumstances,<sup>64</sup> but the tendency is clear.<sup>65</sup>

(7) *Taxation at Domicile Generally.*

A number of cases illustrative of the power of the states to tax intangibles at the domicile of the owner are cited below.<sup>66</sup>

(8) *Taxation of Interests in Foreign Trusts.*

*Bullen v. Wisconsin*<sup>67</sup> held where a Wisconsin resident created a trust of intangibles in a foreign state, reserving to himself income and right of control and revocation, the corpus on his death may be subjected to an inheritance tax in Wisconsin.

Where, however, a resident's only interest in a foreign trust is a

<sup>64</sup> See comments on the Taylor case, *supra* n. 3 and on the Safe Deposit & Trust Company case, *infra* n. 70.

<sup>65</sup> *In re Smith's Estate* (1930) — 1a. —, 228 N. W. 638 (following and applying the Taylor case); Note (1930) 43 HARV. L. REV. 792; (1930) 30 COL. L. REV. 404. On double taxation in general, see SELIGMAN, DOUBLE TAXATION AND INTERNATIONAL FISCAL COOPERATION (1928); Powell, Book Review (1929) 42 HARV. L. REV. 718; Wickersham, *Double Taxation* (1926) 12 VA. L. REV. 185. For a popular discussion of these questions see *The Minnesota Tax Case* (1930) 202 SATURDAY EVENING POST 24.

<sup>66</sup> *Kirtland v. Hotchkiss* (1879) 100 U. S. 491 (domicile can tax owner on a bond of a non-resident and secured by property in foreign jurisdiction); *Hawley v. Malden*, *supra* n. 42 (Massachusetts resident held taxable on shares of stock held by him in foreign corporations, doing no business and having no property in Massachusetts); *Cream of Wheat Company v. Grand Forks*, *supra* n. 26 (state may tax domiciled corporation on value of outstanding corporate stock, though property and business entirely in foreign jurisdiction); *Tappan v. Merchants National Bank*, *supra* n. 63 (state within which national bank is situated may tax all shareholders, both resident and non-resident); *Corry v. Baltimore*, *supra* n. 48 (non-resident stockholder of Maryland corporation may be made personally liable for taxes on stock); *Bonaparte v. Tax Court* (1882) 104 U. S. 592 (state may tax a resident's holdings in the registered public debt of another state); *New York v. Miller* (1906) 202 U. S. 584, 26 Sup. Ct. 714 (franchise tax on domestic railroad corporations sustained where based on capital stock without deduction because of considerable proportion of rolling stock always out of state); *Kansas City, Ft. S. & M. Ry. Co. v. Botkin*, *supra* n. 26 (capital stock tax at domicile upheld though value based on railway lines extending into other states). The last two cases cited are privilege, not property, tax cases. Cf. *Adams Exp. Co. v. Ohio State Auditor* (1897) 165 U. S. 194, 17 Sup. Ct. 305, 166 U. S. 185, 17 Sup. Ct. 604; also *Chicago, B. & Q. Ry. Co. v. Babcock* (1907) 204 U. S. 585, 27 Sup. Ct. 326 (property tax cases). On equitable conversion by will as affecting inheritance taxes, see *Land Title & Trust Co. v. S. C. Tax Comm.* (1925) 131 S. C. 192, 126 S. E. 189, 42 A. L. R. 417, and Note (1926) 42 A. L. R. 426.

<sup>67</sup> *Supra* n. 63. A similar case is *Estate of Dillingham*, *supra* n. 26. See also connected case of *First Trust & Savings Bank of Pasadena v. Los Angeles County*, *supra* n. 28 (property tax case).

right to income for life, he cannot be taxed upon the corpus,<sup>68</sup> although he may be taxed upon the income.<sup>69</sup>

In the recent case of *Safe Deposit & Trust Company of Baltimore v. Virginia*,<sup>70</sup> it was held that where Virginia residents have the right upon arriving at a certain age, to receive corpus and accumulated income of a Baltimore trust, they are not taxable in Virginia upon the corpus. Business situs cases are mainly relied on. This case does not involve a denial of the *mobilia sequuntur* maxim, because the persons sought to be taxed in Virginia were not, as the Court viewed the case, actually owners of the property. They had no right to its possession, no control over it, and no present right of enjoyment. Justices Stone and Brandeis concur on the ground that the tax was attempted to be imposed upon the foreign trustee and the securities held by it in trust, and not upon the beneficiaries, measured by their equitable interests in the trust. Mr. Justice Holmes dissented, expressing the view that the whole title was in the beneficiaries though possibly subject to be divested.

(9) *Reciprocal Exemption of Intangibles from Inheritance Taxation.*

As Mr. Justice McReynolds observes in the *Taylor* case, multiple taxation has been to a considerable extent obviated by laws enacted by the various states exempting from inheritance taxes intangibles within their jurisdiction belonging to non-residents, where the state of the decedent's domicile affords a like exemption in favor of residents of the state of the situs. This movement, initiated by Pennsylvania in 1925, has gained such headway that these reciprocal provisions now exist in some form in twenty-seven states and one territory.<sup>71</sup> These statutes tend to minimize as between the states in which they are in force, the questions involved in the *Taylor* case though not eliminating them

<sup>68</sup> *Brooke v. Norfolk* (1928) 277 U. S. 27, 48 Sup. Ct. 422.

<sup>69</sup> *Maguire v. Trefry*, *supra* n. 18.

<sup>70</sup> *Supra* n. 50. For comment on this case see Notes (1930) 39 YALE L. J. 589; (1930) 78 U. OF PA. L. REV. 532; (1930) 43 HARV. L. REV. 668. Counsel for the trustee did not contend that Virginia could not tax the interests of the beneficiaries as such, but contended that the tax was on the *entire* trust res and a trustee, both beyond the jurisdiction. See 280 U. S. at 85. The opposing contention, sustained by the state court (*Trust Company of Norfolk v. Commonwealth* (1928) 151 Va. 883, 145 S. E. 326) was that the two Virginia residents and the administrator of their father's estate were the real owners of the fund and that by the *mobilia sequuntur* fiction, its situs followed them.

<sup>71</sup> According to PRENTICE-HALL, INHERITANCE TAX SERVICE (1930) 701, these are the following: Arkansas (stock in Arkansas corporations only), California, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Washington, West Virginia, Wisconsin, Wyoming. To these may be added those which impose no tax on intangibles: Colorado, Connecticut, New Jersey, Rhode Island, Tennessee,

altogether because of the varying terms of the reciprocal statutes, the variant rulings as to what constitutes tangible and intangible property, and the varying interpretations placed by the courts of one state upon the exemption laws of others.<sup>72</sup> After making allowance for these imperfections, hardly surprising in machinery so recently set up, practical experience with the reciprocal laws shows that on the whole they work extremely well. The fact that in five years they have been so widely adopted, and by many states whose self-interest would dictate the contrary policy shows that the problem was well on the way to solution before the decision in the *Taylor* case accelerated the solution by apparently declaring the problem non-existent.

## II. THE PRESENT STATUS OF TAXATION OF INTANGIBLES AS DECLARED IN CALIFORNIA STATUTES AND DECISIONS

The pertinent provisions of the California Constitution and Statutes are quoted below.<sup>73</sup>

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Vermont and Virginia, and those in which no inheritance taxes are levied: Alabama, District of Columbia, Florida, Nevada. The following are not reciprocal: Alaska, Arizona, Kansas, Kentucky, Louisiana, Minnesota, Montana, Nebraska (no tax on personal property of non-residents unless in connection with transfer of Nebraska realty), North Dakota, Oklahoma, South Dakota, Utah. The California statute (section 6½ California Inheritance Tax Act as amended Cal. Stat. 1929, c. 844) is perhaps typical and reads as follows: "Reciprocal provision respecting intangible property. The tax imposed by this act in respect of intangible personal property shall not be payable if the decedent is a resident of a state or territory of the United States or a foreign state or country which at the time of his death imposed a legacy, succession or death tax in respect of intangible personal property within said state or territory or foreign state or country of residents of said state or territory or foreign state or country, but did not impose a legacy or succession tax or a death tax of any character in respect of intangible personal property within said state or territory or foreign state or country of residents of this state, or if the laws of the state or territory or foreign state or country of residence of the decedent at the time of his death contained a reciprocal provision under which non-residents were exempted from legacy or succession taxes or death taxes of every character in respect of intangible personal property providing the state or territory or foreign state or country of residence of such non-residents allowed a similar exemption to residents of the state or territory or foreign state or country of residence of such decedent. For the purposes of this act the District of Columbia shall be considered a territory of the United States."

<sup>72</sup> For a recent illustration of this sort of misunderstanding see *City Bank Farmers Trust Co. v. New York Central Railroad Co.* (1930) 253 N. Y. 49, 170 N. E. 489; also see *Smith v. Loughman* (1927) 245 N. Y. 486, 157 N. E. 753. In general see *Legislation* (1928) 28 COL. L. REV. 806; *Note* (1928) 13 CORN. L. Q. 610; *Legislation* (1930) 43 HARV. L. REV. 641.

<sup>73</sup> CAL. CONST. art. XIII, § 1. "1. All property in the state except as otherwise in this constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided. The word 'property', as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal and mixed, capable of private ownership; . . ."

The salient points of these provisions are:

Under article XIII, section 1, "all property in the State" is to be taxed. The new section 16 of article XIII merely provides a special rate of taxation for intangibles.

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1928 Amendment adds section 16 to article XIII. Sub-section 4 of section 16 is as follows: "Notes, debentures, shares of capital stock, bonds, solvent credits, deeds of trust, mortgages, and any legal or equitable interest therein, of the classes now taxable to the owner thereof and not otherwise taxed under subdivisions (a) or (b) of section 14 or under section 15 of this article, shall be declared in a manner to be prescribed by law and shall be taxed upon their actual value," etc. (The exceptions referred to, relating to the taxation of certain public utilities, insurance companies and stage lines, are not important to the present inquiry.)

The 1929 Amendment to section 3617 of the Political Code defines "situs" as follows: "Seventh—The term 'situs' for notes, debentures, shares of capital stock, bonds, solvent credits, deeds of trust, mortgages, and any legal or equitable interest therein, for the purpose of taxation under the provisions of this code, shall be the domicile of the owner or claimant thereof, regardless of the physical presence of instruments evidencing the same; *provided*, that any notes, debentures, deeds of trust, mortgages, solvent credits and any legal or equitable interest therein, not otherwise exempt under the laws of this state, owing to a person, association, copartnership or corporation, having its domicile outside of this state but arising out of business transacted in California, regardless of the place where such notes, debentures, solvent credits, deeds of trust, mortgages and any legal or equitable interest therein are payable and of the physical presence of instruments evidencing such indebtedness, shall have their situs at the place of business within this state where such notes, debentures, solvent credits, deeds of trust, mortgages and any legal or equitable interest therein are managed or controlled." (In effect April 6, 1929. Cal. Stat. 1929, c. 54.)

Section 3627a of the Political Code, as amended in 1929, provides: "3627a. Notes, debentures, shares of capital stock, bonds, deeds of trust, mortgages, and any legal or equitable interest therein, of the classes taxable to the owner thereof on the date of the adoption of section 16 of article thirteen of the constitution of this state . . . are hereby taxed upon their actual value at the rate of two-tenths of one per cent. Solvent credits, of the class taxable to the owner thereof on the date of the adoption of section 16 of article thirteen of the constitution of this state . . . are hereby taxed upon their actual value at the rate of one-tenth of one per cent.

"Property taxable under the provisions of this section shall be taxed to the owner or possessor of the fee simple or life estate therein, if such estate has its situs within this state. If any property taxable under the provisions of this section is held in trust by any person, association or corporation domiciled or the principal place of business of which is located in this state, such property shall be taxable solely to the trustee thereof. Such tax to the possessor of such property or owner of the fee simple estate or life estate therein, or trustee, shall be deemed to include the entire tax upon all legal or equitable interest in such property. If the property taxed at its situs in this state is a legal or equitable interest in property in which the fee simple estate or the major portion thereof has its situs outside the state, but taxable if within this state, such legal or equitable interest shall be taxed to the owner or possessor or trustee thereof at the actual value of such interest. In determining the actual value of an equitable or legal interest in such property there shall be considered as determining the value of said equitable or legal interest only that property which would be taxable if it had its situs within this state." (In effect March 2, 1929. Cal. Stat. 1929, c. 14.)

Political Code section 3617 may be summarized as follows: (a) the situs of intangibles and any interest therein is, for taxation purposes, the domicile of the owner, regardless of physical presence of instruments evidencing ownership; (b) debts, however evidenced, owing to non-residents but arising out of California business, have their situs for taxation at the place of business in California where they are managed or controlled, regardless of where payable or of the physical presence of the instruments.

(1) *Situs*.

The statute quoted announces the familiar rule that the situs of intangibles for taxation is at the domicile. This principle has been recognized in numerous cases.<sup>74</sup>

There is nothing peculiar either in the statutory rule now in force or in the doctrine previously prevailing in California regarding this point, except that the Supreme Court of the state in *Chambers v. Mumford*,<sup>74</sup> an inheritance tax case, pointed out in effect that California has followed in a more thorough-going manner than other jurisdictions, the doctrine that the situs of choses in action follows the domicile of the owner. This was held in a case presenting facts almost identical with *Blackstone v. Miller*. California's right to exact an inheritance tax under those circumstances was denied. The Court did not suggest, however, that in refusing to follow *Blackstone v. Miller* it was protecting rights under the Fourteenth Amendment which the Supreme Court of the United States had denied, but says, while conceding that the rule recognizing as the situs of contract debts the place where the debtor resides may be supported by reason and sound policy, that the adoption of this rule would be a modification of the *mobilia sequuntur* doctrine as theretofor interpreted in this state.<sup>75</sup>

The statute quoted goes further, however, than merely fixing taxation situs of intangibles at the domicile. It says that the situs for intangibles "*and any legal or equitable interest therein*" is the domicile of the owner. This doubtlessly is intended to carry out the provisions

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<sup>74</sup> *Chambers v. Mumford* (1921) 187 Cal. 228, 201 Pac. 588, 42 A. L. R. 342; *Estate of Fair* (1900) 128 Cal. 607, 61 Pac. 184; *Mackay v. San Francisco* (1896) 113 Cal. 392, 45 Pac. 696; *Mackay v. San Francisco* (1900) 128 Cal. 678, 61 Pac. 382; *Stanford v. San Francisco* (1900) 131 Cal. 34, 63 Pac. 145; *Westinghouse Co. v. Los Angeles* (1922) 188 Cal. 491, 205 Pac. 1076; *First Trust & Savings Bank of Pasadena v. Los Angeles County*, *supra* n. 28. The foregoing were property tax cases. The same principle has been applied in inheritance tax cases: *McDougald v. Low* (1912) 164 Cal. 107, 127 Pac. 1027; *Chambers v. Mumford*, *supra*; *Estate of Hodges* (1915) 170 Cal. 492, 150 Pac. 344; *Estate of McCahill* (1915) 171 Cal. 482, 153 Pac. 930; *Estate of Dillingham*, *supra* n. 26.

<sup>75</sup> See, however, *Lowry v. Los Angeles* (1918) 38 Cal. App. 158, 175 Pac. 702, on the point that jurisdiction for *probate* and for *taxation* of property rest on different principles. See *supra* n. 20 to 26.

of the 1928 constitutional amendment above quoted, which for the first time introduces this expression into tax terminology in California. The quoted provision of section 3617 of the Political Code must be considered in connection with the corresponding provision of section 3627a which provides that "if the property taxed at its situs in this state is a legal or equitable interest in property in which the fee simple estate or the major portion thereof has its situs outside the state . . . such legal or equitable interest shall be taxed to the owner or possessor or trustee thereof at the actual value of such interest." Under section 3617 situs is referred to domicile and this situs includes equitable interests in intangibles. Under section 3627a such interest is taxable to the owner or possessor (domiciled in California) though "the fee simple estate or the major portion thereof has its situs outside the state." The expression "has its situs" seems rather unfortunate, but apparently it refers to cases where the fee simple estate is actually held or owned outside the state. In other words, a person domiciled here is taxable on legal or equitable interests owned by him in property actually held outside the state. The expression "the fee simple estate or the major portion thereof" raises interesting questions of construction, but as they are not particularly important for the present purpose, the inquiry need not be pursued further.<sup>76</sup>

(2) *Business Situs.*

In *Lowry v. Los Angeles*<sup>77</sup> it was held that stock in a foreign corporation owned by a resident testator, which had been transferred to non-resident trustees under full power to control the stock, sell, transfer it, etc., with income payable to the testator, acquired a situs at the domicile of the trustees and was no longer subject to property taxation here. The trust was revocable at any time with the consent of the trustees. The court says that the fact that the situs of the stock was fixed in California for purposes of probate does not necessarily imply that the stock was taxable to the decedent (or to his executor) here. Though involving a trust, this case really applies the doctrine of business situs which has been often recognized by the California courts, though only in one other case has it been carried to the extent of renouncing, upon that ground, the right of taxation.<sup>78</sup>

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<sup>76</sup> For comment on these constitutional and statutory provisions, see McLAREN & BUTLER, CALIFORNIA TAX LAWS OF 1929 (1929) p. 292 ff.

<sup>77</sup> *Supra* n. 75.

<sup>78</sup> *Hinckley v. San Diego* (1920) 49 Cal. App. 668, 194 Pac. 77. Other cases stating or recognizing this doctrine are: *Estate of Fair*, *supra* n. 74; *Mackay v. San Francisco*, *supra* n. 74; *Mackay v. San Francisco*, *supra* n. 74; *Stanford v. San Francisco*, *supra* n. 74; *Estate of Hodges*, *supra* n. 74; *Estate of McCahill*, *supra* n. 74; *Westinghouse Company v. Los Angeles*, *supra* n. 74. Cf. *People v. Home Insurance Co.* (1866) 29 Cal. 533.

The new statute, section 3617, of the Political Code, insofar as it taxes intangibles arising out of California business and managed or controlled within this state, is clearly within the constitutional rights of the state as declared in numerous United States Supreme Court decisions.<sup>79</sup> As to whether "solvent credits" not evidenced by written instruments may have a domicile here for purposes of taxation, some question may arise, though the right of taxation in such cases is supported by *Liverpool & London & Globe Insurance Company v. Board of Assessors*.<sup>80</sup>

A question arises respecting California taxation of intangibles of California residents which have acquired a business situs elsewhere. Two questions are presented: first, is the statute construable so as to include such property, and second, if so, is it constitutional? The first question, that of construction, seems fairly debatable, though possibly the reference to classes of property "taxable to the owner thereof" on the date of adoption of the 1928 constitutional amendment is intended to preserve limitations previously established by judicial decision. If the statute is construed against the inclusion of such property, no constitutional question arises, but assuming the statute may be otherwise construed, we will then have presented the questions discussed above.<sup>81</sup> The right to tax a resident owner on intangibles which have acquired a business situs elsewhere, is upheld not only by *dicta* of the United States Supreme Court but by actual decisions.<sup>81</sup> Whether in view of the attitude of the Court now prevailing toward double taxation, especially bearing in mind Mr. Justice McReynolds' reference in the *Safe Deposit & Trust Company* case to the opposing view as "irrational," these former expressions will be overruled, or distinctions made having the same practical effect, remains to be seen.

### (3) *Taxability of Foreign Trusts.*

As already observed, the effect of sections 3617 and 3627a of the Political Code is to tax intangibles held in trust outside the state to the resident owner of legal or equitable interests in such property. It seems clear that as to property held outside the state which the California resident cannot take into his possession or control, the right to tax in this state will be denied under *Brooke v. Norfolk*<sup>82</sup> and *Safe Deposit & Trust Company v. Virginia*.<sup>83</sup> However, neither of these cases presents squarely the right of a state to tax to the resident bene-

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<sup>79</sup> *Supra* n. 35.

<sup>80</sup> (1911) 221 U. S. 346, 31 Sup. Ct. 550.

<sup>81</sup> See *supra* I (2).

<sup>82</sup> *Supra* n. 68.

<sup>83</sup> *Supra* n. 61. In this case there was no present right of enjoyment in the beneficiaries in Virginia where the tax was levied.

ficiaries, *their beneficial interests as such*, held in a foreign trust. This is brought out clearly in the concurring opinion of Mr. Justice Stone in the *Safe Deposit & Trust Company* case.<sup>84</sup> The right of a state to tax a resident beneficiary on the *income* from such a trust has been upheld in *Maguire v. Trefry*.<sup>85</sup> It seems it would be carrying this doctrine but a step further to tax the resident beneficiary upon the beneficial interest itself, because this beneficial interest is a valuable right owned by the resident and has a bearing upon his ability to pay, which is one of the criteria by which the right of taxation is measured.<sup>86</sup> Whether the tax on the beneficial interest is measured by income from it or by some other standard having a relation to its value and the beneficiary's ability to pay, would seem not highly material.

Where the local resident has the right to take into his possession at any time property held for him in trust elsewhere, the right to tax may depend upon the questions, first, whether such property has acquired a business situs elsewhere, and second, whether the acquirement of such situs exempts from taxation at the domicile. That this is a debatable question has been suggested above. The case does not seem substantially different in principle from *Fidelity & Columbia Trust Co. v. Louisville*.<sup>87</sup> That property so held is subject to *inheritance* taxes in the state of the domicile is indicated by *Bullen v. Wisconsin*.<sup>88</sup> The Supreme Court of the United States in the *Taylor* case seems disposed to minimize or ignore any distinction between situs for property and for inheritance tax purposes, but for reasons fully developed above, it is believed that there is a substantial distinction between these classes of cases which in appropriate instances should be observed. As suggested below, the business situs doctrine does not afford a perfect analogy in the case of a trust held in a foreign jurisdiction for, and subject to the control of, a resident of the taxing jurisdiction.

### III. STATE INHERITANCE TAX UPON INTANGIBLES

The pertinent provisions of the California Inheritance Tax Act are set forth below.<sup>89</sup>

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<sup>84</sup> *Supra* n. 18.

<sup>85</sup> *Supra* n. 18.

<sup>86</sup> *Maguire v. Trefry*, *supra* n. 61. See *Kirtland v. Hotchkiss*, *supra* n. 66; *Fidelity & Columbia Trust Co. v. Louisville*, *supra* n. 63.

<sup>87</sup> *Supra* n. 63.

<sup>88</sup> *Supra* n. 63. See *supra* n. 67.

<sup>89</sup> Inheritance Tax Act, section 1, sub-section 2. "The words 'estate' and 'property' as used in this Act shall be taken to mean the real and personal property or interest therein of the testator, intestate, grantor, bargainor, vendor or donor passing or transferred to individual legatees, devisees, heirs, next of kin, grantees, donees, vendees, or successors, and shall include all personal property within or without the state or subject to the jurisdiction thereof." (Cal. Stat. 1925, p. 471.)

"Section 2. Tax on transfer of property, when. A tax shall be and is hereby



As already observed, the California court, while claiming to the fullest extent the right to tax intangibles of resident decedents held elsewhere under circumstances not coming under the business situs doctrine,<sup>90</sup> has renounced in *Chambers v. Mumford*,<sup>91</sup> the right of taxation under circumstances parallel to those of *Blackstone v. Miller*. In *Estate of Dillingham*,<sup>92</sup> the California court held a foreign trust, revocable at any time by the California trustor who received the income, subject to inheritance tax here. This holding is clearly in accordance with *Bullen v. Wisconsin*.<sup>93</sup> The California court, however, in *Estate of Bowditch*,<sup>94</sup> held that California had no power to tax a California resident on the exercise by will of a power of appointment directing the disposition of a remainder interest in a trust created by a resident of and held by a trustee in a foreign jurisdiction, since the property had no actual or constructive situs in California. This case is cited and its principle recognized in *Wachovia Bank & Trust Company v. Doughton*.<sup>95</sup> Applying stringently the *mobilia sequuntur personam* doctrine, California also renounced, in *Estate of McCahill*<sup>96</sup> its right to tax bonds held for safekeeping in a California safe deposit box. That this was a self-denying decision, not required under the Fourteenth Amendment as then understood, is indicated by *Wheeler v. Sohmer*.<sup>96</sup>

It is believed that in view of the restraint characterizing the attitude heretofore maintained by the California courts regarding inheritance taxes, recent United States Supreme Court decisions do not affect doctrines prevailing in California upon this subject.

### Summary

By way of summarizing the foregoing discussion of state taxation of intangibles, the following concrete situations may be imagined:

(1) A California resident owning intangibles held for safekeeping in a foreign jurisdiction will be taxable upon them in California. Con-

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imposed upon the transfer of any property, real, personal or mixed, or of any interest therein or any income therefrom in trust or otherwise . . . in the following cases: (1) When the transfer is by will or by the intestate or homestead laws of this state, from any person dying seized or possessed of the property while a resident of the state, . . . (2) When the transfer is by will or intestate laws of property within this state and the decedent was a non-resident of the state at the time of his death . . . " (Cal. Stat. 1929, c. 844.)

<sup>90</sup> *Estate of Hodges*, *supra* n. 74, cited in the Silberman case, *supra* n. 3.

<sup>91</sup> *Supra* n. 74.

<sup>92</sup> *Supra* n. 26. See Note (1926) 14 CALIF. L. REV. 225. See connected property tax case, *First Trust & Savings Bank of Pasadena v. Los Angeles County*, *supra* n. 28.

<sup>93</sup> (1922) 189 Cal. 377, 208 Pac. 282, 23 A. L. R. 735.

<sup>94</sup> (1926) 272 U. S. 567, 47 Sup. Ct. 202.

<sup>95</sup> *Supra* n. 74.

<sup>96</sup> *Supra* n. 37.

versely, if belonging to a non-resident and held in safekeeping here, they will be exempt.

(2) Is a California trustor, beneficial owner of intangibles held by a trustee in a foreign jurisdiction with income and right of revocation reserved to the trustor, taxable in California upon this property? Doubt arises here because of the possible application of the business situs doctrine. In the case of property held in a foreign jurisdiction under a trust revocable at any time, it would seem that the business situs doctrine may not apply — at least so as to exempt at the domicile, if the doctrine has under any circumstances that effect — because though the property is invested and reinvested in the foreign state, it is not employed there in connection with any business. The mere fact of its being employed in a business necessarily implies a certain degree of permanency, lacking in the case of a revocable trust. If property acquiring a business situs elsewhere may be taxed at the domicile (see below), it would seem that, *a fortiori*, property held under a revocable trust may be.<sup>97</sup> The question is open. Apparently we must choose between situs and domicile, and any present answer must be largely conjecture. On principle, because of the legal relationship existing between the economic interest involved and the two jurisdictions,<sup>98</sup> and on the Supreme Court's former rulings<sup>99</sup> it would seem that both situs and domicile might tax.

(3) Where there are intangibles owned by a California resident and employed by him in a foreign jurisdiction in such manner as to come within the business situs doctrine, the authorities are much less clear and satisfactory as to the exemption of such property at the domicile than they are to its taxability at the situs. *Dicta* of the United States Supreme Court, as well as the principle of certain decisions, uphold taxation at the domicile. The present tendency of United States Supreme Court decisions is undoubtedly toward exempting such property at the domicile. In this connection must be considered the point of construction adverted to above, namely, whether California's new taxation scheme makes any attempt to tax property having a business situs elsewhere, a point as to which there may be some question.

(4) Intangibles arising out of California business and managed and controlled within the state are taxable here under the business situs doctrine and it is thought that this would include solvent credits not evidenced by written instruments but otherwise conforming to the

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<sup>97</sup> See *Fidelity & Columbia Trust Co. v. Louisville*, *supra* n. 63.

<sup>98</sup> See concurring opinion of Mr. Justice Stone in the *Taylor* case, 280 U. S. at 214, 50 Sup. Ct. at 101.

<sup>99</sup> See *supra* n. 38 to 42.

above requirements. This conclusion is supported by at least one Supreme Court decision.<sup>100</sup>

(5) Property held in trust within this state is taxable to the trustee regardless of the residence of the beneficiaries. This situation may present the converse of that supposed under (2) above. Manifestly, if a non-resident trustor under a California trust with right of revocation is taxable at his domicile and the property is taxed here, there may be double taxation. That the present attitude of the United States Supreme Court is in general hostile to this practice has been sufficiently indicated above. Nevertheless, it will require a very clear holding to justify any theory which would exempt from California taxation property held and invested here and protected by California laws, even though not so held strictly in connection with a "business" of the owner and even though it may be taxed to the beneficial owner at his domicile.<sup>101</sup>

(6) A California resident owning a beneficial interest in a foreign trust entitling him to income or other benefits but without present right of revocation or to take the property into his possession, is not taxable upon the property itself.<sup>102</sup>

(7) As to whether a California resident owning a beneficial interest in a foreign trust entitling him to income or other benefits but without present right of revocation or to take the property into his possession, may be taxed in California upon his beneficial interest, *quaere*. The spirit, though not the actual holding, of *Safe Deposit & Trust Company v. Virginia* is contrary to such right of local taxation but there are strong arguments upholding it. The California statute apparently attempts to tax no interest less than a life estate. Such an estate is a valuable right; its situs is wherever its owner resides. It has a bearing on the owner's ability to pay, on his economic value and consequently on the value to him of the security afforded by the laws of his domicile. On principle, it seems that it should be taxable,<sup>103</sup> and the same applies, *a fortiori*, where the equitable interest owned here is of a higher quality

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<sup>100</sup> *Liverpool & London & Globe Insurance Company v. Board of Assessors*, *supra* n. 80.

<sup>101</sup> The writer hazards the guess that in this case and that supposed under (2) above, situs will prevail as against domicile if the Court, as now seems likely, limits to one of them the power to tax; that is, the more realistic view — extension of business situs — will prevail over the fiction, *mobilia sequuntur personam*.

<sup>102</sup> *Brooke v. Norfolk*, *supra* n. 68; *Safe Deposit & Trust Company v. Virginia*, *supra* n. 61.

<sup>103</sup> See cases cited under II (3), *supra* n. 82 to 88.

than a life estate.<sup>104</sup> The question must be considered as an open one with present odds favoring compulsory exemption at the domicile of such interests.

(8) As to corporate stock, it is believed that the considerations applicable have been sufficiently adverted to above.<sup>105</sup>

The writer, claiming no prophetic gifts, advances with considerable diffidence the foregoing conclusions, tentative though they may be. Some of these inquiries, passing beyond the realm of legal speculation, depend upon intensely practical considerations such, for example, as the temperament of justices who within the not distant future, may be appointed to places on the United States Supreme Court. In questions relating to the application of the Fourteenth Amendment to state legislation, especially where state taxation is concerned, we are in a no-man's-land between theories purely legal on one hand and those primarily social and economic on the other. Manifestly, an attempt at categorical answers to all questions which may arise under any system of taxation would establish nothing but the ignorance and presumption of the oracle. The foregoing comments will have served their purpose if they have succeeded in pointing out some of the principles to be taken into consideration in arriving at whatever result is finally attained.

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<sup>104</sup> This article, concerned with the power to tax rather than with the machinery provided to make taxation effective, does not purport to deal with the interesting questions which may arise in connection with the attempted levy and enforcement of taxes under the new statutes. A defect in machinery, unlike a lack of power, may always be remedied. For jurisdictional tests as depending on power to enforce see *Shaffer v. Carter* (1920) 252 U. S. 37, 40 Sup. Ct. 221.

<sup>105</sup> See I (4); *supra* n. 47 to 51.

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