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## Inheritance Taxation--Intangibles--Determination of Situs-- Constitutional Law

Theodore S. Wecker

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## TAX COMMENT

Editor—THEODORE S. WECKER

INHERITANCE TAXATION—INTANGIBLES—DETERMINATION OF SITUS—CONSTITUTIONAL LAW.—“A *constitution* states or ought to state not rules for the passing hour, but principles for the expanding future.”<sup>1</sup> Thus, in the interpretation of due process, “the meaning of today is not always the meaning of tomorrow.”<sup>2</sup> A striking demonstration for this theorem may be derived from the trend, evidenced in recent Supreme Court decisions,<sup>3</sup> to construe the due process clauses so as to do away with “the evils of multi-state taxation”<sup>4</sup> of the same economic interest, resulting in the overthrow of fairly definite preconceptions about the operation of the Fourteenth Amendment on jurisdiction to tax intangibles.<sup>5</sup>

The first indication of the scope of the changes to be wrought by the *Farmers Loan and Trust Co.* case<sup>6</sup> and subsequent decisions of the Supreme Court<sup>7</sup> was the decision in *Safe Deposit & Trust Co. v. Virginia*,<sup>8</sup> where the court held that intangibles having a permanent situs are taxable in that state. A trust having been established in Virginia, the beneficiaries being domiciled in Maryland and having no control over the corpus, the court held that the trust had acquired a situs in Virginia and that the Fourteenth Amendment could be applied to a decision of the case.<sup>9</sup> Although Justice Stone

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<sup>1</sup> CARDOZO, NATURE OF THE JUDICIAL PROCESS (1921) p. 83.

<sup>2</sup> *Ibid.* at 84.

<sup>3</sup> *Safe Deposit and Trust Co. v. Virginia*, 280 U. S. 83, 50 Sup. Ct. 59 (1929); *Farmers Loan and Trust Co. v. Minnesota*, 280 U. S. 204, 50 Sup. Ct. 98 (1930), (1930) 4 ST. JOHN'S L. REV. 322; *Baldwin v. Missouri*, 281 U. S. 586, 50 Sup. Ct. 436 (1930), (1930) 5 ST. JOHN'S L. REV. 136; *Beidler v. So. Carolina Tax Comm.*, 282 U. S. 1, 51 Sup. Ct. 54 (1930), Note (1930) 5 ST. JOHN'S L. REV. 288; *Susquehanna Power Co. v. State Tax Comm.*, 283 U. S. 297, 51 Sup. Ct. 436 (1931), Note (1931) 6 ST. JOHN'S L. REV. 173, 175; *First National Bank of Boston v. State of Maine*, 52 Sup. Ct. 174 (1932).

<sup>4</sup> See Note (1928) 28 COL. L. REV. 806; Note (1930) 43 HARV. L. REV. 641. The writers enumerate the serious difficulties and burdens of multiple state taxation, and propose legislative reform.

<sup>5</sup> See Mason, *Jurisdiction for the Purpose of Imposing Inheritance Taxes* (1931) 29 MICH. L. REV. 324; Lowndes, *Bases of Jurisdiction in State Taxation of Inheritances and Property* (1931) 29 MICH. L. REV. 850, 851. For a history of the development of the vexatious problems of jurisdiction to tax personal property, see Beale, *The Exercise of Jurisdiction in Rem to Compel Payment of a Debt* (1913) 27 HARV. L. REV. 107; Beale, *Jurisdiction to Tax* (1919) 32 HARV. L. REV. 587; Powell, *Extra-territorial Inheritance Taxation* (1920) 20 COL. L. REV. 1.

<sup>6</sup> *Supra* note 3.

<sup>7</sup> *Supra* note 3.

<sup>8</sup> *Supra* note 3.

<sup>9</sup> *Safe Deposit & Trust Co. v. Virginia*, *supra* note 3 at 93, 50 Sup. Ct. at 61: “Here we must decide whether intangibles—stocks, bonds—in the hands of the

concurring in the result, he did not agree with the reasoning of the court,<sup>10</sup> thus definitely foreshadowing the forthcoming split in the unity of the Supreme Court on the question of multiple state taxation.<sup>11</sup>

A radical change in the law of taxation was effected when the Supreme Court in the *Farmers Loan and Trust Co.* case<sup>12</sup> held that an inheritance tax could be assessed against a debt only at the domicile of the creditor, and not at that of the debtor.<sup>13</sup> Following this case, the Supreme Court denied Missouri the right to levy an inheritance tax upon the transfer of bonds and promissory notes physically present in Missouri at the time of the non-resident owner's death, or upon credits for deposits in Missouri banks owned by her at the time of her death.<sup>14</sup> In other words, the mere presence of a promissory note or a bond, which represent mere symbols and not the tangible property, did not alone confer jurisdiction to tax. In *Beidler v. South Carolina Tax Comm.*,<sup>15</sup> the court held that the mere fact that the debtor was domiciled within the state gave it no jurisdiction to impose an inheritance tax upon the transfer of the debt from a decedent who was domiciled in another state, overthrowing the theory that a state could exact a *quid pro quo* in a form analogous to a privilege tax for the protection accorded to the debt.<sup>16</sup> In this case, as well as in the cases of *Farmers Loan and Trust Co. v. Minnesota* and *Baldwin v. Missouri*, the court explicitly refused to rule on the

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legal title with definite taxable situs at its residence, not subject to change by the equitable owner, may be taxed at the latter's domicile in another state. We think not."

<sup>10</sup> *Safe Deposit & Trust Co. v. Virginia*, *supra* note 3 at 95, 50 Sup. Ct. at 61, Justice Stone in his concurring opinion said: "I concur in the result. \* \* \* But the question whether the Fourteenth Amendment forbids a tax on the beneficiaries, \* \* \* seems to me not to be presented by the record, and so \* \* \* ought not to be decided."

<sup>11</sup> In the *Farmers Loan and Trust Co.* case, *supra* note 3, Justices Holmes and Brandeis dissented; in *Baldwin v. Missouri*, *supra* note 3, Justices Holmes, Stone and Brandeis dissented; in the decision of *Beidler v. So. Carolina Tax Comm.*, *supra* note 3 at 10, 51 Sup. Ct. at 55, Justice Holmes wrote: "The decisions of last term cited by the Chief Justice seem to sustain the conclusion reached by him. Therefore, Mr. Justice Brandeis and I acquiesce, without repeating reasoning that did not prevail with the court"; in *First National Bank of Boston v. State of Maine*, *supra* note 3, Justices Holmes, Stone and Brandeis dissented.

<sup>12</sup> *Supra* note 3.

<sup>13</sup> For a discussion of the interstate economic factors involved in allowing either creditor or debtor states to tax, see *Loundes*, *supra* note 5 at 878 *et seq.*; *Rottschaeffer, Power of the States to Tax Intangibles* (1931) 15 MINN. L. REV. 741.

<sup>14</sup> *Baldwin v. Missouri*, *supra* note 3.

<sup>15</sup> *Supra* note 3.

<sup>16</sup> *Mason*, *supra* note 5 at 338: "Jurisdiction no longer may be tested only by an inquiry whether the state renders an equivalent to the taxpayer by furnishing a law governing or controlling the transfer, but the scheme of inheritance taxation adopted by many of the states of the Union must be revoked to conform to a new doctrine that due process of law prohibits the exaction of more than one tax in return for the privilege incident to the transfer."

question of whether intangibles, having acquired a business situs in a state, are to be taxed in the domestic or foreign state,<sup>17</sup> and it is because of the *caveat* contained in the reservation of this question that great uncertainty exists as to the law involved.<sup>18</sup>

For the last sixty years,<sup>19</sup> it had been undisputed that corporate stocks owned by non-residents were taxable at the domicile of the stockholder<sup>19a</sup> and also at the domicile of the corporation,<sup>19b</sup> and this doctrine had been restated during the last decade.<sup>20</sup> Whether the trend shown by the recent Supreme Court decisions<sup>21</sup> implied a negative upon the jurisdiction of the state of incorporation was a question which admitted of much doubt,<sup>22</sup> and the situation was further complicated by the decision of the Supreme Court in the case of *Susquehanna Power Co. v. State Tax Comm.*<sup>23</sup> However, the issue was squarely met in *First National Bank of Boston v. State of Maine*,<sup>24</sup> and was decided in favor of the stockholder's domicile, a decision which was in accord with the thoughts of writers.<sup>25</sup> In the same manner that the situation before *Farmers Loan and Trust*

<sup>17</sup> *Farmers Loan and Trust Co. v. Minnesota*, *supra* note 3 at 213, 50 Sup. Ct. at 101; *Baldwin v. Missouri*, *supra* note 3 at 594, 50 Sup. Ct. at 438; *Beidler v. So. Carolina Tax Comm.*, *supra* note 3 at 8, 9, 51 Sup. Ct. at 55.

<sup>18</sup> Beale, *The Exercise of Jurisdiction in Rem to Compel Payment of a Debt*, *supra* note 5 at 107, 113, contending that the assignment of a situs to a debt is a fiction. See also Carpenter, *Jurisdiction over Debts for the Purposes of Administration, Garnishment, and Taxation* (1918) 31 HARV. L. REV. 905; Moore, *The Doctrine of the Federal Courts as to the Situs of Personal Property for Purposes of Taxation* (1927) 14 VA. L. REV. 31. For a critical and detailed analysis of the problem here involved, see Powell, *The Business Situs of Credits* (1922) 28 W. VA. L. Q. 89.

<sup>19</sup> *Tappan v. Merchant's National Bank*, 19 Wall 490 (U. S. 1873).

<sup>19a</sup> *Hawley v. Malden*, 232 U. S. 1, 12, 34 Sup. Ct. 201, 202 (1914).

<sup>19b</sup> *Corry v. Baltimore*, 196 U. S. 466, 472, 25 Sup. Ct. 297, 298 (1915).

<sup>20</sup> See *Frick v. Pennsylvania*, 268 U. S. 473, 45 Sup. Ct. 603 (1925); *In re Hallenback's Estate*, 231 N. Y. 409, 132 N. E. 131 (1931); *Benson v. State*, 236 N. W. 626 (Minn. 1931).

<sup>21</sup> *Supra* note 3.

<sup>22</sup> Lowndes, *Bases of Jurisdiction in State Taxation of Inheritances and Property*, *supra* note 5 at 893: "The restriction of jurisdiction to tax shares of stock to the stockholder's domicile seems desirable. However, jurisdiction to a tax where the corporation is incorporated is so firmly imbedded in the practice and divisions on the subject that little short of judicial dynamite can effect the change."

<sup>23</sup> *Supra* note 3. The Maryland Court of Appeals had asserted that since Maryland had power to create the corporation, it could fix the situs of the corporate shares within the state. *Susquehanna Power Company v. State Tax Comm.*, 159 Md. 334, 151 Atl. 29 (1930). The Supreme Court, while it affirmed the decision of the State Court, did not affirm its reasoning, but dealt with the question as one involving the distinction between tax subject and tax measure. For a discussion of the problem of tax subject and tax measure, see Isaacs, *The Subject and Measure of Taxation* (1926) 26 COL. L. REV. 939.

<sup>24</sup> 52 Sup. Ct. 174 (1932).

<sup>25</sup> *Supra* note 22; Rottschaefter, *Power of States to Tax Intangibles*, *supra* note 13 at 749 *et seq.*; Beale, *Jurisdiction to Tax*, *supra* note 5 at 602; Note (1925) 38 HARV. L. REV. 809, 811, 815; Note (1926) 39 HARV. L. REV. 485; GOODRICH, *CONFLICT OF LAWS* (1929) 92.

Co. presented the vexatious possibility of four jurisdictions taxing the transfer of credits and bonds,<sup>26</sup> a problem which was solved by that decision, so the *First National Bank v. Maine* case determines which of five possible jurisdictions shall tax the inheritance of a share of stock.<sup>27</sup>

In this case, Maine sought to levy an inheritance tax upon property consisting of shares of stock in a Maine corporation, which had most of its property in that state. Maine, allowing as a credit the tax for which Massachusetts, the state of testator's domicile, had already made his estate liable by a statute akin to that of Maine, brought an action of debt for the balance. Applying the maxim *mobilia sequuntur personam*, the Supreme Court denied Maine the right to tax the property, restricting the right of taxation to the state where the owner of the shares had been domiciled. The court, reaffirming most strongly its determination to obviate multi-state taxation, stated:

"In its application to death taxes, the rule rests for its justification upon the fundamental conception that the transmission from the dead to the living of a particular thing, whether corporeal or incorporeal, is an event which cannot take place in two or more states at the same time."<sup>28</sup>

All of the reasons which previously existed for granting to the domicile of the corporation the right to tax<sup>29</sup> were swept away by the court:

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<sup>26</sup> Previous to the decision in the *Farmers Loan and Trust Co.* case, *supra* note 3, the following four jurisdictions could subject the transfer of credits and bonds to inheritance taxes: 1. The state of the debtor's domicile. *Blackstone v. Miller*, 188 U. S. 189, 23 Sup. Ct. 277 (1903); 2. The state wherein the notes of a non-resident were kept for safe-keeping. *Wheeler v. Sohmer*, 233 U. S. 434, 34 Sup. Ct. 607 (1914); 3. The state in which credits had a business situs. *Bristol v. Washington County*, 177 U. S. 133, 20 Sup. Ct. 585 (1900); *Met. Life Ins. Co. v. B'd of Assessors*, 221 U. S. 346, 31 Sup. Ct. 550 (1911); see *Powell, The Business Situs of Credits, supra* note 18; 4. The creditor's domicile. That the only state entitled to tax should be that of the creditor's domicile was argued by Beale, *Jurisdiction to Tax, supra* note 5 at 587; *Dennis, Notes on Some Recent Supreme Court Cases Relating to the Situs of Intangible Property for Purposes of Taxation* (1915) 15 *Col. L. Rev.* 377, 381; *Goodrich, supra* note 25 at 110.

<sup>27</sup> *Lowndes, Bases of Jurisdiction in State Taxation of Inheritances and Property, supra* note 5 at 890 *et seq.*, discusses the following possibilities of jurisdiction: 1. The domicile of the stockholder, see *Hawley v. Malden, supra* note 19a. 2. The domicile of the corporation, see *Corry v. Baltimore, supra* note 19b. 3. The presence of the corporate property. This possibility was negated by *Rhode Island Hospital Trust Co. v. Doughton*, 270 U. S. 69, 46 Sup. Ct. 256 (1926). 4. The presence of the stock certificates. This was negated by *Baldwin v. Missouri, supra* note 3. 5. The presence of the transfer office. See *Masury v. Arkansas Nat. Bank*, 87 Fed. 381 (W. D. Ark., 1898).

<sup>28</sup> *First Nat. Bank of Boston v. Maine, supra* note 24 at 176, 177.

<sup>29</sup> Among the arguments that have been advanced is the distinction between stocks and bonds; while bondholders are creditors, the bond merely existing as a symbol, the stockholders own undivided interests in corporate property.

"A distinction between stocks and bonds for the essentially practical purposes of taxation is more fanciful than real. Certainly, for such purposes, the differences are not greater than the differences between tangible and intangible property, or between bonds and credits. When things so dissimilar as bonds and household furniture may not be subjected to contrary rules in respect to the number of states which may tax them, there is a manifest incongruity in declaring that bonds and stocks, possessing for the most part the same or like characteristics, may be subjected to contrary rules in that regard."<sup>30</sup>

The court points out that "the reciprocal inheritance statutes now in force in a preponderating number of states of the Union make no distinction between the various classes of intangible personal property."<sup>31</sup>

The chain of decisions fixing one situs for the taxation of intangibles, that situs being the domicile of the owner, seems now to be almost complete. The last link will have been added when the court considers the situs of intangibles which have been given by the owner a business situs in a state other than that of the owner's domicile, the lack of agreement among the members of the court making this an extremely speculative question. Even if complete prohibition of multi-state taxation be taken as already achieved, there remains the question of how the court will determine future cases which may present the problem of whether a single economic interest is presented for review, and whether some single economic interests may be treated as supporting a series of legally recognized interests therein.<sup>32</sup>

THEODORE S. WECKER.

#### STATE TAXATION—INTERSTATE PEDDLING.

From early times in England and America there have been statutes regulating the occupation of itinerant peddlers and requiring

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DEWING, FINANCIAL POLICY OF CORPORATIONS (1929) c. I. Another argument is that the state, having created the corporation and protected it, it should be allowed to tax its own creature.

<sup>30</sup> *Supra* note 24 at 177.

<sup>31</sup> *Ibid.* at 177, citing the GEN. LAWS OF N. Y. 1930, Sec. 249-m (g) which includes "deposits in banks, mortgages, debts, receivables, *shares of stock*, bonds, notes, credits, evidences of an interest in property, evidences of debt, and choses in action generally." (Italics ours.)

<sup>32</sup> This problem is analyzed very closely by Rottschaeffer, *Power of the States to Tax Intangibles*, *supra* note 13 at 748 *et seq.*