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## JURISDICTION TO TAX—ANOTHER WORD

MAURICE H. MERRILL†

SOME constitutional decisions of the Supreme Court of the United States merely apply familiar principles to fact situations of little novelty or importance. Others, extending the application of those principles to new facts, mark milestones in the progress of the law upon familiar roads. In still others what had been dictum becomes ratio decidendi and again the frontiers of the law expand. At other times limitations or explanations imposed upon prior decisions serve to define more sharply the expanded boundary. Occasionally an overruling opinion marks a withdrawal from realms theretofore occupied. Into one or another of these classes fall the common run of constitutional cases. Upon rare occasions, however, a decision, either because it suggests the occupation of so wide a territory by the doctrines it sets forth, or because it overturns directly or by implication so much that had been regarded as settled constitutional dogma, opens wide vistas of speculation and invites examination of the possibilities that lie half-hidden therein. To the second division of this last type of constitutional cases belong the recent significant cases involving the problem of jurisdiction for purposes of taxation.<sup>1</sup> So epochal seemed these cases in their effect upon the taxing power of the states that it is not surprising they have evoked a bountiful crop of comment.<sup>2</sup> A fitting sense of inability to

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1. The most significant of these decisions are: *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204 (1930); *Baldwin v. Missouri*, 281 U. S. 586 (1930); *First National Bank v. Maine*, 284 U. S. 312 (1932); *Lawrence v. State Tax Comm.*, 286 U. S. 276 (1932).

2. There are two books: HARDING, *DOUBLE TAXATION OF PROPERTY AND INCOME* (1933); STIMSON, *JURISDICTION AND POWER OF TAXATION* (1933). The more ephemeral material in legal periodicals is voluminous. The following articles have come to my attention: Bonner, *Single Situs for Inheritance Taxation of Intangibles* (1932) 16 MINN. L. REV. 335; Galland, *Jurisdiction for Taxation of Shares of Stock* (1931) 4 ROCKY MT. L. REV. 20; Gruenberg, *The Supreme Court Limits the State Power to Tax Intangibles* (1930) 7 N. Y. U. L. Q. REV. 728; Harper, *Jurisdiction of the States to Tax—Recent Development* (1930) 5 IND. L. J. 507; Howard, *Recent Developments and Tendencies in the Taxation of Intangibles* (1931) 44 U. OF MO. BULL. L. SER. 5; Lowndes, *Basis of Jurisdiction in State Taxation of Inheritances and Property* (1931) 29 MICH. L. REV. 850; Lowndes, *Jurisdiction to Tax Debts* (1931) 19 GEO. L. J. 427; Lowndes, *The Passing of Situs—Jurisdiction to Tax Shares of Corporate Stock* (1932) 45 HARV. L. REV. 777; Lowndes, *State Jurisdiction to Tax Income* (1932) 6 TEMPLE L. Q. 486; Mason, *Jurisdiction for the Purposes of Inheritance Taxes—Special Reference to Montana* (1930) 3 ROCKY MT. L. REV. 25; Nossaman, *The Fourteenth Amendment in its Relation to State Taxation of Intangibles* (1930) 18 CALIF. L. REV. 345; Nowlin, *Jurisdictional Features of State Taxation—Property and Succession Taxes* (1931) 9 TEX. L. REV. 352; Peppin, *Power of the States to Tax Intangibles or their Transfer* (1930) 18 CALIF. L. REV. 638; Rottschaefer, *The Power of the States*

add anything of value to what has been said already would impel me to silence, were it not that the prior discussion does not seem to me to lay adequate stress upon certain factors of history and of expedience, and that the more recent cases indicate that possibly the earlier decisions do not have implications quite so extensive as many of us at first reading thought.

*The Past — More or Less Outmoded*

By way of introducing our discussion, a brief résumé of the constitutional doctrine of jurisdiction to tax as it existed before 1930 seems helpful. In our federal polity, combining commercial unity with governmental decentralization, it was inevitable that two or more states frequently should find themselves in position to exact tax tribute from the same "economic interest"<sup>3</sup> and the perpetual need for increasing funds from which to finance the expanding activities ventured upon by our statesmen made it equally inevitable that such opportunities should be seized upon with avidity. The Supreme Court has taken upon itself the task of policing this quest for revenue; and, if it does not actually temper the wind to the shorn lamb, it does attempt to see that the shearers are not too many and not wholly strangers to the range.

To accomplish this some foundation in the constitution of the United States is necessary. Conflict of laws doctrines concerning jurisdiction are inadequate since the injustices which it is most important to remedy may be perpetuated effectually without essential impairment of those principles.<sup>4</sup> In the face of positive legislation, constitutional restraints afford the taxpayer his one secure refuge. During the nineteenth century the Supreme Court appeared somewhat doubtful as to the exact constitutional foundation upon which this sanctuary could be erected and its essays in that direction were sporadic and hesitant. There seem not more than six cases wherein state taxing power was denied,<sup>5</sup> and a handful more wherein, although the taxes assailed were upheld, the Court, by solemn consideration of the argument based on a jurisdic-

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*to Tax Intangibles* (1931) 15 MINN. L. REV. 741, (1931) 9 N. C. L. REV. 415; Rottschaefers, *State Jurisdiction of Income for Tax Purposes* (1931) 44 HARV. L. REV. 1075; Rottschaefers, *State Jurisdiction to Impose Taxes* (1933) 42 YALE L. J. 305.

3. Stone, J. concurring in *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204, 215 (1930).

4. See STIMSON, *op. cit. supra* note 2, at 1-4; GOODRICH, *CONFLICT OF LAWS* (1927) 64.

5. *Hays v. Pacific Mail Steamship Co.*, 17 How. 596 (U. S. 1854); *Northern Central Ry. Co. v. Jackson*, 7 Wall. 262 (U. S. 1868); *St. Louis v. Wiggins Ferry Co.*, 11 Wall. 423 (U. S. 1870); *State Tax on Foreign Held Bonds*, 15 Wall. 300 (U. S. 1872); *Morgan v. Parham*, 16 Wall. 471 (U. S. 1872); *Dewey v. Des Moines*, 173 U. S. 193 (1899). The *Wiggins Ferry Case* has been explained as being merely an interpretation of the Missouri statute rather than an exposition of constitutional limitation upon state power. *Diamond Match Co. v. Ontonagon*, 188 U. S. 82, 91 (1903).

tional incapacity of states to tax property beyond their borders, tacitly agreed to the validity of the objection when supported by a proper showing of fact.<sup>6</sup> In two of these cases, dealing with the taxation of vessels engaged in interstate trade the Court appears to find the constitutional foundation for curtailing taxing power in a theory of burden upon interstate commerce by such a tax.<sup>7</sup> In *Dewey v. Des Moines*,<sup>8</sup> an action to foreclose a tax lien upon a lot with an application for a deficiency judgment against the nonresident owner, the refusal to permit that judgment seems to be placed upon the doctrine in *Pennoyer v. Neff*<sup>9</sup> as to jurisdiction to render personal judgments against nonresidents. In all the other cases there is no articulate recognition of any particular constitutional provision as the foundation of decision. There is merely an assumption, specific or tacit, that an American state may not tax persons or property beyond its "jurisdiction."

As the end of the century drew near, however, the ever-increasing usefulness of the due process clause of the Fourteenth Amendment as a foundation for judicial nullification of too oppressive state action led astute counsel to invoke it in defense of those beset by multiplied tax-gatherers. Thrice during these closing years assertions that taxes had been imposed without jurisdiction were given a constitutional underpinning by the argument that to do so would be to deprive the taxpayer of property without due process. The Court, by considering the tax question upon the merits with a finding in each case that the bounds of state jurisdiction had not been passed, tacitly agreed to this method of investing the doctrine of jurisdictional limits with constitutional sanctity.<sup>10</sup> In 1903 it became a definite ground of decision in *Louisville & Jeffersonville Ferry Company v. Kentucky*.<sup>11</sup> Two years later came *Union Refrigerator Transit Company v. Kentucky*,<sup>12</sup> frequently referred to as the first case to apply the new theory. While this is inaccurate, it remains true that this decision, by reason of its full and lucid expo-

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6. *The Delaware Railroad Tax*, 18 Wall. 206 (U. S. 1873); *Kirtland v. Hotchkiss*, 100 U. S. 491 (1879); *Bonaparte v. Tax Court*, 104 U. S. 592 (1881); *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18 (1891); *Cleveland, Cincinnati, Chicago and St. Louis Ry. Co. v. Backus*, 154 U. S. 439 (1894); and see *Marye v. Baltimore & Ohio Rr. Co.*, 127 U. S. 117, 121 (1888). Very likely such cases as the *State Railroad Tax Cases*, 92 U. S. 575 (1875), *Western Union Telegraph Co. v. Taggart*, 163 U. S. 1 (1896), and *New Orleans v. Stempel*, 175 U. S. 309 (1899), should also be included, although in all these cases, with the possible exception of the last, there seems not a clearly articulate discussion of the problem from this viewpoint.

7. *Hays v. Pacific Mail Steamship Co.*; *Morgan v. Parham*, both *supra* note 5.

8. 173 U. S. 193 (1899).

9. 95 U. S. 714 (1877).

10. *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194 (1897); *Savings & Loan Society v. Multnomah County*, 169 U. S. 421 (1898); *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70 (1899).

11. 188 U. S. 385 (1903).

12. 199 U. S. 194 (1905).

sition of the concept of due process as a basic requirement of taxing jurisdiction, rightly deserves to be ranked the leading case upon the subject. Once established, due process excluded all other constitutional theories in this branch of the law, and so handy a tool did it prove that the twentieth century in its first three decades has produced a multitude of decisions developing and rounding out the doctrine, a body of learning which appeared to be seriously threatened at many points by the line of cases starting with decisions in 1930.<sup>13</sup>

Now the due process notion in American constitutional law is one of reasonableness, of a prohibition by the fundamental law against arbitrary and oppressive governmental action, to be administered by the courts as expounders of the Constitution. The question occurs, then, what is the test by which we may determine whether it is reasonable for a state to exercise taxing jurisdiction? To this *Union Refrigerator Transit Company v. Kentucky*<sup>14</sup> presents a definite answer in the benefit theory of taxation. Judge Brown's language is specific.

"The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another state, to which it may be said to owe an allegiance, and to which it looks for protection, the taxation of such property within the domicil of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court beyond the power of the legislature, and a taking of property without due process of law."<sup>15</sup>

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"Not only is the operation of state laws limited to persons and property within the boundaries of the state, but property which is wholly and exclusively within the jurisdiction of another state receives none of the protection for which the tax is supposed to be the compensation."<sup>16</sup>

This presents a somewhat indefinite but fairly comprehensible standard by which to test the reasonableness of the exercise of taxing power. If the state is in a position to render some benefit to the person taxed in

13. See cases cited *supra* note 1.

14. 199 U. S. 194 (1905).

15. *Id.* at 202, citing *Northern Central Ry. v. Jackson*, 7 Wall. 262 (U. S. 1868); *State Tax on Foreign Held Bonds*, 15 Wall. 300 (U. S. 1872); *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490 (U. S. 1873); *Delaware, Lackawanna and Western Rr. Co. v. Pennsylvania*, 198 U. S. 341 (1905).

16. *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 204 (1905).

respect of the object of taxation, the exaction is reasonable and jurisdiction exists; if the converse is true, jurisdiction, in the sense of the due process concept of reasonableness, is absent. Recognition, of course, is accorded to the practical necessities of revenue gathering. Lack of children is no answer to the demand for a school tax; want of a vehicle will not excuse contribution to the road fund.<sup>17</sup> The benefit theory of jurisdiction is not to be pressed to the point of requiring a quid pro quo for each payment. It is enough that the state be in a position to render the service. It is not requisite that the taxpayer make use of it. Around this fundamental conception the cases prior to 1930 can be arranged in a consistent fashion. A summary of the application that has been made of the principle in these cases will aid us in understanding the system which the recent decisions appeared to overthrow.

In the case of real estate, clearly the jurisdiction where the land lies is in a position to render protection and benefit. Taxation by it will be consistent with due process.<sup>18</sup> Taxation by any other state will deny due process.<sup>19</sup>

Tangible personalty follows much the same rule. The state where it is permanently located may tax it, since it is given protection.<sup>20</sup> A state in which it is not found, though the domicil of the owner, may not tax.<sup>21</sup> It affords the owner no protection nor benefit with respect to this particular property. Unlike land, however, personalty may go a-traveling and may be found in more than one state during the taxable year. Some of it, such as that employed in interstate commerce, is constantly shifting and passing from state to state. From each state through which it travels it receives the boon of protection and of government. Reason would appear to suggest that each state wherein the property remains

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17. *Id.* at 203. See also *Southern Pacific Co. v. Kentucky*, 222 U. S. 63, 76 (1911).

18. *Savings & Loan Society v. Multnomah County*, 169 U. S. 421 (1898); *Paddell v. City of New York*, 211 U. S. 446 (1908); *Central Railroad Company of New Jersey v. Jersey City*, 209 U. S. 473 (1908).

19. Attempts to tax lands beyond the border seem not to have been made. At least they have not found their way into the reports. The only cases which can be cited for this principle, therefore, involve incorporeal hereditaments which are regarded as so closely associated with land as to be governed by the same ruling. *Louisville and Jeffersonville Ferry Co. v. Kentucky*, 188 U. S. 385 (1903) (ferry franchise); *North Side Canal Co. v. State Board of Equalization*, 17 F. (2d) 55 (C. C. A. 8th, 1926), cert. denied, 274 U. S. 740 (1927) (water rights appurtenant to land).

20. *Henderson Bridge Co. v. Henderson*, 173 U. S. 592 (1899); *Carstairs v. Cochran*, 193 U. S. 10 (1904); *Old Dominion Steamship Co. v. Virginia*, 198 U. S. 299 (1905); *Thompson v. Kentucky*, 209 U. S. 340 (1908); *Hannis Distilling Co. v. Baltimore*, 216 U. S. 285 (1910); *Great Northern Ry. Co. v. Minnesota*, 278 U. S. 503 (1929).

21. *Delaware, Lackawanna & Western Rr. v. Pennsylvania*, 198 U. S. 341 (1905); *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194 (1905); *Selliger v. Kentucky*, 213 U. S. 200 (1909); *Union Tank Line Co. v. Wright*, 249 U. S. 275 (1919); *Wallace v. Hines*, 253 U. S. 66 (1920).

for a substantial period be allowed to require a contribution to the support of its government.<sup>22</sup> In the case of railroad cars this has been the Supreme Court's attitude. States other than the owner's domicil are permitted to tax upon a basis reflecting the fair average value of the property within their borders.<sup>23</sup> Where the owner was domiciled within the state, permission was extended to tax all the cars found there during the year—at least if not so continuously in any other state as to be taxable there.<sup>24</sup> The basis for a distinction either upon the domicil of the owner or upon the gaining of taxable situs elsewhere is not apparent on the benefit theory of reasonableness. If specific cars are within the state long enough to be accorded substantial protection, it would seem logically consistent with the benefit theory to permit taxation of all of them, regardless of the owner's residence or of the average amount within the borders; and if the state does furnish substantial protection surely it should be able to exact the tax which is deemed to be an equivalent therefor regardless of whether other states may also be in a position to claim a similar privilege. In a recent decision, however, the Court has ruled definitely that taxation must be limited to "the number of cars which on the average were found to be physically present within the state."<sup>25</sup>

Strangely enough, ships voyaging from state to state, though upon a fixed route and observing regularity of schedule, have not been treated in the same manner as rolling stock. The Court has refused to regard regular visits as sufficiently conferring jurisdiction, despite the obvious furnishing of police and other protection during their stay.<sup>26</sup> Instead it has leaned toward a theory of taxation by the state of the home port,<sup>27</sup> or, if no home port is apparent, then by the state of the owner's domicil though the ship has never been there and mayhap never can reach it.<sup>28</sup>

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22. See *Marye v. Baltimore & Ohio Rr. Co.*, 127 U. S. 117, 121 (1888); cf. *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34, 46 (1886).

23. *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18 (1891); *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70 (1899); *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149 (1900).

24. *New York Central Ry. v. Miller*, 202 U. S. 584 (1906).

25. *Johnson Oil Refining Co. v. Oklahoma*, 290 U. S. 158 (1933).

26. *Hays v. Pacific Mail Steamship Co.*, 17 How. 596 (U. S. 1854); *St. Louis v. Wiggins Ferry Co.*, 11 Wall. 423 (U. S. 1870); *Morgan v. Parham*, 16 Wall. 471 (U. S. 1872); *Ayer & Lord Tie Co. v. Kentucky*, 202 U. S. 409 (1906). In the latter case, presence in the state in the course of receiving cargo, buying stores, employing seamen, and for other purposes, was held to be insufficient. It is rather difficult to see why as much service is not rendered by a state to a vessel under such circumstances as to a railroad car traversing lines within its borders.

27. See *Hays v. Pacific Mail Steamship Co.*, at 599; *St. Louis v. Wiggins Ferry Co.*, at 431; *Morgan v. Parham*, at 476, 478, all *supra* note 10.

28. *Southern Pacific Co. v. Kentucky*, 222 U. S. 63 (1911).

In these ship cases the benefit theory of jurisdiction to tax seems not to receive logical application.

This one exception, however, serves merely to emphasize the rule. Elsewhere it has been given full sway. In addition to the examples already given we may cite the cases involving property transferred permanently from one state to another during the taxing year. There the new abode is permitted to impose its levy<sup>29</sup> with no apparent anxiety on the part of the Court as to whether or not anything has been exacted by the domain of origin.<sup>30</sup> So also, in *United States v. Bennett*,<sup>31</sup> we find the capacity of the federal government to render service to its citizens abroad employed to buttress the argument for a taxing power in that government which will extend, unlike that of the states, to property situated beyond its territorial limits.

Tangible property, however, after all is said remains of a comparatively stable and stay-at-home nature. Ordinarily but one state is likely to be in position to afford it protection or other service and thereby to acquire dominion for purposes of taxation. Railroad cars, steamships, and motor trucks, with all their errant proclivities, form so small a portion of the great mass of tangibles as hardly to present an appreciable number of exceptions to the rule of one thing, one tax. It is in relation to intangible property that the benefit theory of due process has been most fruitful in multiplying taxes. Here the *facile maxim*, *mobilia sequuntur personam*, has retained the vitality which was shorn from it by decisions attacking jurisdiction to tax tangibles to their physical location. For this the benefit theory has a plausible reason. A chose in action has no true location of its own. A mere advantage which the law will protect, nay enforce, for its owner, it can have no real existence, in legal theory at least, apart from him. The state of his domicile, protecting him in the exercise of his faculties, in the enjoyment of his wealth, in the acquisition, assertion, and exploitation of these intangible rights, confers benefit upon him in respect to them and so may rea-

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29. *Brown v. Houston*, 114 U. S. 622 (1885); *General Oil Co. v. Crain*, 209 U. S. 211 (1908); and *Bacon v. Illinois*, 227 U. S. 504 (1913), may be cited as examples. *Griggsby Construction Co. v. Freeman*, 108 La. 435, 32 So. 399 (1902), puts the argument persuasively from a state court's standpoint.

30. The theory of protection received from a successive number of governmental units as involving a correlative power to tax is thus expressed by McKenna, J. in *Diamond Match Co. v. Ontonagon*, 188 U. S. 82, 90 (1903): "Nor is that power impugned by the principle that protection is the consideration of taxation. There is protection during the transit through the municipalities of the state and at its termination in the state—protection accommodated to the kind of property, and as efficient as links are to the continuity of a chain."

31. 232 U. S. 299 (1914).



sonably assert its claim to tax them.<sup>32</sup> The Supreme Court has upheld this view without exception or qualification.<sup>33</sup>

Other states, however, may well claim that they also furnish benefit in respect to this sort of property. It has been argued with much propriety that in the case of debts the state of the debtor's domicil should have jurisdiction to tax, because its law gives life to the obligation and its judicial machinery must be invoked to enforce it.<sup>34</sup> But in the only two cases where jurisdiction has been asserted upon the sole basis of the debtor's residence the Supreme Court has denied the assertion.<sup>35</sup> While the second of these cases<sup>36</sup> has been explained by the Court as involving an impairment of the obligation of contract,<sup>37</sup> this does not seem so apparent from the report, which indicates that the tax may have been authorized, although not at the exact rate later imposed, before the issuance of the obligations which were taxed.<sup>38</sup> If this is so, it seems arguable that the decision is based upon jurisdiction rather than upon obligation of contract, and it is in that light that it is treated by Mr. Justice McReynolds in *Farmers Loan and Trust Company v. Minnesota*.<sup>39</sup>

32. "The creditor, it is conceded, is a permanent resident within the jurisdiction of the state imposing the tax. The debt is property in his hands constituting a portion of his wealth, from which he is under the highest obligation, in common with his fellow citizens of the same state, to contribute for the support of the government whose protection he enjoys." *Kirtland v. Hotchkiss*, 100 U. S. 491, 498 (1879). See also *Dyer v. Osborne*, 11 R. I. 321, 327 (1876).

33. *Kirtland v. Hotchkiss*, 100 U. S. 491, 498 (1879) (bonded debt, secured by mortgage on land in another state); *Bonaparte v. Tax Court*, 104 U. S. 592 (1881) (registered public debt of another state); *Sturgis v. Carter*, 114 U. S. 511 (1885) (shares of stock in foreign corporation); *Kidd v. Alabama*, 188 U. S. 730 (1903) (same); *Wright v. Louisville & Nashville Rr. Co.*, 195 U. S. 219 (1904) (same); *Darnell v. Indiana*, 226 U. S. 390 (1912) (same); *Hawley v. City of Malden*, 232 U. S. 1 (1914) (same); *Fidelity & Columbia Trust Co. v. Louisville*, 245 U. S. 54 (1917) (deposits in bank in another state); *Cream of Wheat Co. v. County of Grand Forks*, 253 U. S. 325 (1920) (taxation by state of corporation's domicil of its intangible property interest, though arising out of business done in other states); *Citizens Nat. Bank v. Durr*, 257 U. S. 99 (1921) (taxation by Ohio of seat owned by Ohioan in New York stock exchange); *Schwab v. Richardson*, 263 U. S. 88 (1923) (tax on intangible value of domestic corporation engaged in interstate and foreign commerce). Analogous is *Ewa Plantation Co. v. Wilder*, 289 Fed. 664 (C. C. A. 9th, 1923), holding that income from corporate bonds and notes and deposits of money, owned by a Hawaiian corporation but held by its agent in California, was taxable by Hawaii under the rule of *mobilia sequuntur personam*.

34. See Carpenter, *Jurisdiction Over Debts for the Purpose of Administration, Garnishment and Taxation* (1918) 31 HARV. L. REV. 905, 922.

35. *Northern Central Ry. Co. v. Jackson*, 7 Wall. 262 (U. S. 1868); *State Tax on Foreign-Held Bonds*, 15 Wall. 300 (U. S. 1872).

36. *State Tax on Foreign-Held Bonds*, *supra* note 35.

37. See *Blodgett v. Silberman*, 277 U. S. 1, 13 (1928).

38. See *State Tax on Foreign-Held Bonds*, *supra* note 35, at 301, 302.

39. 280 U. S. 204, 212 (1930); see also *Liverpool & London & Globe Ins. Co. v. Board of Assessors*, 221 U. S. 346, 355 (1911).

At any rate, the first decision seems applicable and no case appears to the contrary. If, on the other hand, the creditor is constantly reinvesting his capital within the state, as by collecting the notes falling due through a local agent and again lending the proceeds; if, in fine, it becomes part of a business definitely assignable to and carried on in that particular commonwealth, whether in the manner specified or in some other way, the Court looks with a liberal eye upon the extension of the taxing power over the business thus carried on. In terms of benefit this is easy to explain. Obviously various special forms of protection are accorded the business in its home for which it is only fair that the owner should pay.<sup>40</sup> By way of analogy to the doctrine applicable to tangibles, it is said that the capital has acquired a "business situs" in the state where the business is transacted.<sup>41</sup> This theory has been applied to permit the taxation of credits arising from a money-lending business, whether evidenced by notes<sup>42</sup> or not,<sup>43</sup> of bonds deposited with a state official by a foreign insurance company for the protection of local policy-hold-

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40. "Persons are not permitted to avail themselves for their own benefit of the laws of a State in the conduct of business within its limits, and then to escape their due contribution to the public needs. . . ." *Bristol v. Washington County*, 177 U. S. 133, 144 (1900). "The insurance company chose to enter into the business of lending money within the state of Louisiana, and employed a local agent to conduct that business. . . . Under such circumstances they have a taxable situs in the state of their origin." *Metropolitan Life Insurance Co. v. New Orleans*, 205 U. S. 395, 402, 403 (1907). "The legal fiction expressed in the maxim *mobilia sequuntur personam*, yields to the fact of actual control elsewhere. And in the case of credits, though intangible, arising as did those in the present instance, the control adequate to confer jurisdiction may be found in the sovereignty of the debtor's domicile. The debt, of course, is not property in the hands of the debtor; but it is an obligation of the debtor, and is of value to the creditor because he may be compelled to pay; and power over the debtor at his domicile is control of the ordinary means of enforcement. . . . The credits would have no existence save for the permission of Louisiana; they issued from the business transacted under her sanction within her borders; the sums were payable by persons domiciled within the state, and there the rights of the creditor were to be enforced. If locality, in the sense of subjection to sovereign power, could be attributed to these credits, they could be localized there. If, as property, they could be deemed to be taxable at all, they could be taxed there." *Liverpool & London & Globe Ins. Co. v. Board of Assessors*, 221 U. S. 346, 354 (1911).

41. See *HARDING*, *op. cit. supra* note 2, at 76.

42. *New Orleans v. Stempel*, 175 U. S. 309 (1899); *Bristol v. Washington County*, 177 U. S. 133 (1900); *State Board of Assessors v. Comptoir National D'Escompte*, 191 U. S. 388 (1903); *Metropolitan Life Insurance Co. v. New Orleans*, 205 U. S. 395 (1907). In the first of these cases it was suggested that jurisdiction rested on the fact that notes were tangible in nature and could be regarded as property within the jurisdiction. But the later cases put it upon the ground elaborated in the text. Cf. *DeGanay v. Lederer*, 250 U. S. 376 (1919) (Federal income tax on securities owned by French citizen, domiciled in France).

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

ers,<sup>44</sup> of seats in a grain exchange,<sup>45</sup> of intangible values, over and above the physical property within the state, arising from the operation therein of part of a unitary business.<sup>46</sup> The mere location of the tangible evidence of intangible property within the state, however, has not been regarded as involving sufficient service to justify taxation,<sup>47</sup> a conclusion somewhat difficult to justify under the orthodox theory in view of the police protection furnished.<sup>48</sup> The service afforded by the state of incorporation in giving life to and assuring the continued existence of its corporate creations has been regarded, and rightly, as justifying a tax upon the shares of nonresident stockholders.<sup>49</sup> In the case of property held in trust the residence of the legal owner rather than that of the beneficial owner has been looked to in the application of the doctrine of taxation by the owner's domicil.<sup>50</sup> That a debt owed to a nonresident is secured by tangible property lying within the state has been held to justify a tax<sup>51</sup> but the statute was one by which the mortgage debt was deducted from the assessment of the property to the owner and so may properly be upheld as an apportioned tax upon tangible property.<sup>52</sup>

The decisions relating to inheritance taxes followed along much the same lines. There seems to have been substantial agreement in the proposition that land should be so taxed where situated. At least the

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44. *Scottish Union and National Ins. Co. v. Bowland*, 196 U. S. 611 (1905).

45. *Rogers v. Hennepin County*, 240 U. S. 184 (1916).

46. *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194 (1897), rehearing denied, 166 U. S. 185 (1897); *Cleveland, Cincinnati, Chicago and St. Louis Ry. Co. v. Backus*, 154 U. S. 439 (1894); *Western Union Tel. Co. v. Missouri*, 190 U. S. 412 (1903); *United States Express Co. v. Minnesota*, 223 U. S. 335 (1912); *St. Louis & Eastern St. Louis Electric Ry. Co. v. Missouri*, 256 U. S. 314 (1921); *Baker v. Druesedow*, 263 U. S. 137 (1923). Possibly earlier manifestations of this rule are *State Railroad Tax Cases*, 92 U. S. 575 (1875); *Western Union Tel. Co. v. Taggart*, 163 U. S. 1 (1896).

47. *Buck v. Beach*, 206 U. S. 392 (1907); *Selliger v. Kentucky*, 213 U. S. 200 (1909).

48. Dicta have suggested the propriety of taxing bonds where kept "because by a notion going back to very early law the obligation is, or originally was, inseparable from the paper or parchment which expressed it." *Selliger v. Kentucky*, 213 U. S. 200, 204 (1909). See also *Buck v. Beach*, 206 U. S. 392, 406 (1907). But they seem never to have ripened into decision in the Supreme Court. In a modern day there would seem to be equally as strong reasons for basing power to tax on the presence of any tangible evidence of intangible property.

49. *Corry v. Baltimore*, 196 U. S. 466 (1905). *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490 (U. S. 1873), is sometimes incorrectly cited for this doctrine. The protesting stockholders in that case were residents of the state and their contention was merely that the state should tax them at their domicil, and not at that of the bank.

50. *Taxation by state of trustee's domicil*: *Price v. Hunter*, 34 Fed. 355 (C. C. E. D. Pa. 1888); and notice *Glidden v. Harrington*, 189 U. S. 255 (1903); *No taxation by state of cestui's domicil*: *Brooke v. City of Norfolk*, 277 U. S. 27 (1928); *Safe Deposit & Trust Co. v. Virginia*, 280 U. S. 83 (1929).

51. *Savings & Loan Society v. Multnomah County*, 169 U. S. 421 (1898).

52. See Beale, *Jurisdiction to Tax* (1919) 32 HARV. L. REV. 587, 596.

Supreme Court appears not to have been faced with the proposition at all. *Mobilia sequuntur personam* in respect to tangible property survived much longer in inheritance levies than in property taxation. The conflict of laws rule that the law of the owner's domicil determines the succession to personalty wherever located<sup>53</sup> made it possible to argue very convincingly that the state of domicil, by providing a rule of intestate succession or a statute of wills, afforded a substantial service in the transmission even of tangible personalty located outside its borders sufficient to satisfy the requirements of the benefit theory of taxing jurisdiction.<sup>54</sup> It was not until 1925 that the Supreme Court, in *Frick v. Pennsylvania*<sup>55</sup> overthrew this view, pointing out that if the state wherein the property is situated does apply the rule of the domicil in matters of succession it does so only by virtue of its own common law rule to that effect. In essence, therefore, it is the law of the state of situs that governs.<sup>56</sup> By this reasoning the rule as to inheritance taxes upon tangible property becomes the same as the rule for property taxes. The state where the property is located may tax; others may not.

Jurisdiction to levy inheritance taxes upon intangibles likewise tended to follow the rules applying to property taxes. The state of the creditor's domicil might tax—*mobilia sequuntur personam*.<sup>57</sup> So might the state of business situs.<sup>58</sup> So might the state of incorporation with respect to the transfer of corporate stock.<sup>59</sup> But application of the benefit theory permitted taxation of inheritance by states which could not have sent their publicans against the property itself. The necessity of going to the state of the debtor's domicil to collect the claim for the estate was regarded as putting that state in a position to demand its tribute money.<sup>60</sup> A similar effect was given to the location of tangible evidences of the debt in a third state, resulting in ancillary proceedings to make them available.<sup>61</sup> The state of residence of the beneficiary of a trust who retained control over the distribution of income and a right of revocation might tax the transfer.<sup>62</sup> Even in this field there were limits,

53. See GOODRICH, *CONFLICT OF LAWS* (1927) §§ 158, 161.

54. See *Bullen v. Wisconsin*, 240 U. S. 625, 631 (1916).

55. 268 U. S. 473 (1925).

56. *Id.* at 491-493.

57. *Frick v. Pennsylvania*, 268 U. S. 473 (1925); *Blodgett v. Silberman*, 277 U. S. 1 (1928); see *Wachovia Bank & Trust Co. v. Doughton*, 272 U. S. 567, 574 (1926).

58. *Iowa v. Slimmer*, 248 U. S. 115 (1918).

59. *Baker v. Baker, Eccles & Co.*, 242 U. S. 394 (1917); *Frick v. Pennsylvania*, 268 U. S. 473 (1925).

60. "But it is plain that the transfer does depend upon the law of New York, not because of any theoretical speculation concerning the whereabouts of the debt, but because of the practical effect of its power over the debtor. . . . What gives the debt validity? Nothing but the fact that the law of the place where the debtor is will make him pay." *Blackstone v. Miller*, 188 U. S. 189, 205 (1903).

61. *Wheeler v. Sohmer*, 233 U. S. 434 (1914).

62. *Bullen v. Wisconsin*, 240 U. S. 625 (1916).

however. The residence of the donee of a power under the will of a nonresident testator was regarded as furnishing no jurisdictional assistance in the exercise of that power,<sup>63</sup> while the separate corporate personality produced a similar result in the case of attempted taxation of the transfer of the shares of a nonresident stockholder by the state wherein the corporate property was located.<sup>64</sup>

Taxes upon the person, on the benefit theory, could, of course, be imposed by the state of domicil.<sup>65</sup> But if one spends a considerable portion of the time in another jurisdiction, deriving therefrom protection of life and possessions, and particularly if a gainful occupation is there carried on, it would seem that the denarius could there be demanded also. *Haavik v. Alaska Packers Association*<sup>66</sup> apparently sustains this view. On the other hand where one is neither domiciled nor a substantial sojourner the benefit foundation for the taxing power is clearly absent.<sup>67</sup>

Income is so closely associated, at least in enjoyment, with the person receiving it that one assumes almost unconsciously that the state of the recipient's domicil, since it protects him in his enjoyment, may tax it. It has been so held, even though the income be derived from business carried on elsewhere<sup>68</sup> or from trust funds owned by a nonresident trustee.<sup>69</sup> On the other hand, the state where the business is carried on, or where the property is located, from which the income is derived with equal logic may assert the rendition of services justifying the imposition of an income tax. Repeatedly the Supreme Court has recognized the validity of such levies.<sup>70</sup> The wider sphere of serv-

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63. *Wachovia Bank & Trust Co. v. Doughton*, 272 U. S. 567 (1926).

64. *Rhode Island Hospital Trust Co. v. Doughton*, 270 U. S. 69 (1926).

65. The point appears to have been taken as obvious. The validity of a poll tax or other tax upon the person seems never to have been contested in the Supreme Court. Cf. *Fidelity & Columbia Trust Co. v. Louisville*, 245 U. S. 54, 58 (1917); "The present tax is a tax upon the person, . . . and is imposed, it may be presumed, for the general advantages of living within the jurisdiction."

66. 263 U. S. 510 (1924).

67. *Dewey v. Des Moines*, 173 U. S. 193 (1899); and see *Haavik v. Alaska Packers Ass'n*, 263 U. S. 510, 513 (1924).

68. *Ewa Plantation Co. v. Wilder*, 289 Fed. 664 (C. C. A. 9th, 1923); *Lawrence v. State Tax Commission*, 286 U. S. 276 (1932).

69. *Maguire v. Trefry*, 253 U. S. 12, 17 (1920). "The beneficiary is domiciled in Massachusetts, has the protection of her laws, and there receives and holds the income from the trust property. We find nothing in the Fourteenth Amendment which prevents the taxation in Massachusetts of an interest of this character, thus owned and enjoyed by a resident of the State."

70. *Shaffer v. Carter*, 252 U. S. 37 (1920); *Travis v. Yale & Towne Mfg. Co.*, 252 U. S. 60 (1920); *Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113 (1920); *Atlantic Coast Line Rr. Co. v. Doughton*, 262 U. S. 413 (1923); *Bass, Ratcliff & Gretton, Ltd. v. State Tax Commission*, 266 U. S. 271 (1924).

ice, internationally viewed, rendered by the federal government, permits it to tax, consistently with due process under the Fifth Amendment, incomes earned abroad by its citizens of foreign domicil.<sup>71</sup>

Poll taxes furnish the strongest case for imposition by the domiciliary state. It is but natural that we find no case challenging such a levy.<sup>72</sup> Yet one may remain a substantial period in a state other than his domicil deriving therefrom important governmental benefits. Upon the basis of reasonableness heretofore prevailing, the state should have an equally valid claim to exact a poll tax; and such, it appears to me, is the effect of the decision in *Haavik v. Alaska Packers Association*.<sup>73</sup> Whether the residence be for gain, as in that case, or for pleasure would seem to be immaterial. The important thing is that it be residence, though of a non-domiciliary character, as distinguished from a mere transitory presence.<sup>74</sup> On the other hand clearly no tax based upon the person may be levied where complete absence from the territorial limits makes the rendition of personal benefit an impossibility.<sup>75</sup>

Excise taxation presents a fairly consistent application of the benefit theory. The state where the act is performed may tax.<sup>76</sup> A state wherein no part of the action takes place may not, though it be the domicil of the actor.<sup>77</sup>

Such is the picture whose outlines are formed by the decisions prior to 1930. In it the one dominant concept is that jurisdiction to tax is dependent upon the reasonableness of the claim to exercise that jurisdiction and that reasonableness in turn is dependent upon potentiality of benefit. The problem is viewed from the standpoint of the states. If a state is in position to render some benefit in respect to the object of taxation surely it is reasonable to demand a contribution to the support of its government. With such a concept of reasonableness it should, of course, be immaterial that some other state, also a purveyor of service, may be equally justified in a similar demand. Both may properly

71. *Cook v. Tait*, 265 U. S. 47 (1924).

72. Possibly *The Delaware Railroad Tax*, 18 Wall. 206 (U. S. 1873), sustaining a tax imposed on a domestic corporation based on the cash value of the shares, presents such an attack. The case seems more properly classified with those under note 76 *infra*.

73. 263 U. S. 510 (1924).

74. See *Haavik v. Alaska Packers Ass'n.*, 263 U. S. 510, 514 (1924).

75. *Dewey v. Des Moines*, 173 U. S. 193 (1899).

76. *The Delaware Railroad Tax*, 18 Wall. 206 (U. S. 1873) (exercise of corporate privilege); *Hatch v. Reardon*, 204 U. S. 152 (1907) (transfer of stock); *Keehey v. New York*, 222 U. S. 525 (1912) (transfer of property); *Equitable Life Assurance Society v. Pennsylvania*, 238 U. S. 143 (1915) (performance of contract); *Kansas City, Ft. Scott & Memphis Ry. v. Botkin*, 240 U. S. 227 (1916) (exercise of corporate privilege); *Kansas City, Memphis & Birmingham Rr. Co. v. Stiles*, 242 U. S. 11 (1916) (same).

77. *Provident Savings Life Assurance Soc. v. Kentucky*, 239 U. S. 103 (1915); *St. Louis Cotton Compress Co. v. Arkansas*, 260 U. S. 346 (1922).

claim taxing jurisdiction. The claim of neither rightfully may be denied. Repeated utterances of the Court, borne into practice by decision, support this assertion that double taxation, in the sense of the taxation of the same object by more than one state, encountered no barriers whatever in the judicial exposition of due process of law.<sup>78</sup> A survey of the course of decision reviewed in the preceding pages will reveal numerous examples.<sup>79</sup>

### *The Recent Decisions*

First in point of time of the recent series of unsettling decisions was *Farmers Loan & Trust Company v. Minnesota*.<sup>80</sup> A New York decedent left behind him negotiable bonds and certificates of indebtedness issued by the state of Minnesota and by the municipalities of St. Paul and Minneapolis. The transfer was taxed in New York. Minnesota likewise imposed a tax which, after some hesitation, was upheld by the state supreme court.<sup>81</sup> Thereupon the executor under the will took the case to the Supreme Court of the United States. From that tribunal it secured a decision denying, upon Fourteenth Amendment grounds, Minnesota's jurisdiction to tax.

Mr. Justice McReynolds, speaking for the majority, recognized that *Blackstone v. Miller*<sup>82</sup> stood squarely in the way of the result reached. As he said, that case "and certain approving opinions, lend support to the doctrine that ordinarily choses in action are subject to taxation both at the debtor's domicile and at the domicile of the creditor; that two

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78. "The real grievance . . . is that, more than probably, they are taxed elsewhere. But with that the state of Alabama is not concerned. No doubt it would be a great advantage to the country and to the individual states if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided. But the Constitution of the United States does not go so far." *Kidd v. Alabama*, 188 U. S. 730, 732 (1903). "No doubt this power on the part of two states to tax on different and more or less inconsistent principles, leads to some hardship. . . . But these inconsistencies infringe no rule of constitutional law." *Blackstone v. Miller*, 188 U. S. 189, 204 (1903). But liability to taxation in one state does not necessarily exclude liability in another. *Fidelity & Columbia Trust Co. v. City of Louisville*, 245 U. S. 54, 58 (1917). "Exemption from double taxation by one and the same state is not guaranteed by the Fourteenth Amendment . . . much less is taxation by two states upon identical or closely related property interests falling within the jurisdiction of both forbidden." *Citizens Nat. Bank v. Durr*, 257 U. S. 99, 109 (1921). "To this it is sufficient to say that the Fourteenth Amendment does not prohibit double taxation." *Cream of Wheat Co. v. County of Grand Forks*, 253 U. S. 325, 330 (1920).

79. Cf. the list given by Stone, J. concurring in *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204, 215 (1930).

80. 280 U. S. 204 (1930).

81. *In re Estate of Taylor*, 175 Minn. 310, 219 N. W. 153 (1928), *aff'd* 176 Minn. 634, 222 N. W. 528 (1928).

82. 188 U. S. 189 (1903).

states may tax on different and more or less inconsistent principles the same testamentary transfer of such property without conflict with the Fourteenth Amendment."<sup>83</sup> But, he argued, the result of that view is bad; its "inevitable tendency" is "to disturb good relations among the states and produce the kind of discontent expected to subside after establishment of the Union."<sup>84</sup> "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>85</sup> Many states, "perhaps two-thirds . . . have endeavored to avoid the evil by resort to reciprocal exemption laws."<sup>86</sup> "In this court the presently approved doctrine is that no state may tax anything not within her jurisdiction without violating the Fourteenth Amendment."<sup>87</sup> "Tangibles with permanent situs therein, and their testamentary transfer, may be taxed only by the state where they are found."<sup>88</sup> "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>89</sup> "*Blackstone v. Miller* no longer can be regarded as a correct exposition of existing law; and to prevent misunderstanding it is definitely overruled."<sup>90</sup> By way of imposing further emphasis upon the "one thing, one tax" dogma thus expounded we are reminded "that the right of one state to tax may depend somewhat upon the power of another so to do."<sup>91</sup> Moreover, while the business situs cases are too numerous to be overruled as summarily as *Blackstone v. Miller*, "The present record gives no occasion for us to inquire whether such securities can be taxed a second time at the owner's domicile."<sup>92</sup>

Concurring, Mr. Justice Stone sounds a warning against the broad doctrine that multiple taxation by different states is within the prohibitions of the Fourteenth Amendment, pointing out that there are "many situations in which a single economic interest may have such legal relationships with different taxing jurisdictions as to justify its taxation in both. . . ." <sup>93</sup> He would reach the result of the case on the orthodox theory, urging that, since "the transfer was effected in New York by one domiciled there and is controlled by its law," the power of Minnesota, circumscribed by the obligation of contract clause, to affect the disposition of securities not even kept within its boundaries, is too puerile

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83. 280 U. S. 204, 209 (1930).

85. *Id.* at 211.

87. *Id.* at 210.

89. *Id.* at 212.

91. *Id.* at 211.

93. *Id.* at 215.

84. *Ibid.*

86. *Id.* at 209.

88. *Id.* at 211.

90. *Id.* at 209.

92. *Id.* at 213.



to afford any basis for a claim that the Gopher State, potentially or actually, plays any beneficial part in the transfer.<sup>94</sup> Mr. Justice Holmes and Mr. Justice Brandeis dissented.

It was possible for Mr. Justice Stone to reconcile the result of *Farmers Loan and Trust Company v. Minnesota* with the benefit theory of jurisdiction, and the writer is inclined to agree with that reconciliation. In *Baldwin v. Missouri*,<sup>95</sup> however, the benefit theory and the single jurisdiction theory came into irreconcilable conflict and Mr. Justice Stone joined the ranks of the dissenters. An Illinois decedent left deposits in a Missouri bank and coupon bonds and promissory notes kept in that state. "Most of these notes were executed by citizens of Missouri, and the larger part were secured by liens upon lands lying therein."<sup>96</sup> Ancillary administration proceedings were instituted in Missouri to assist the transfer. *Blackstone v. Miller*<sup>97</sup> would have supported a tax on the transfer of the deposits without the ancillary proceedings and *Wheeler v. Sohmer*<sup>98</sup> would have justified it so far as applied to those choses in action represented by tangible evidence located in Missouri particularly in view of the resort to ancillary administration. Six judges, for whom Mr. Justice McReynolds spoke, held the Missouri exaction invalid. Justices Holmes, Brandeis and Stone dissented in opinions written by the first and the third.<sup>99</sup>

The thesis of the majority is short and easily stated. The debts represented by the securities in question were intangible property whose transfer was taxable at the owner's domicile. The Fourteenth Amendment forbids any other state to tax. Reserved for consideration, however, is the question whether a state might tax "either the interest which a mortgagee as such may have in lands lying therein, or the transfer of that interest."<sup>100</sup> Relying upon the doctrines propounded in *Farmers Loan & Trust Company v. Minnesota*,<sup>101</sup> this decision applied them logically and in a manner definitely inconsistent with the benefit theory of jurisdiction.

Other cases followed. *Beidler v. South Carolina Tax Commission*<sup>102</sup> added little to the picture. It held merely that a debt arising from money lent on open account to a corporation by its majority stockholder, a nonresident of the state where the corporation was organized and

94. *Id.* at 214.

95. 281 U. S. 586 (1930).

96. *Id.* at 589.

97. 188 U. S. 189 (1903).

98. 233 U. S. 434 (1914).

99. Mr. Justice Holmes expresses the doleful view that the court has made the sky the limit of its powers under the Fourteenth Amendment, while Mr. Justice Stone's opinion is devoted to pointing out the inconsistency between the decision in the case and the anciently received doctrine.

100. *Baldwin v. Missouri*, 281 U. S. 586, 594 (1930).

101. 280 U. S. 204 (1930).

102. 282 U. S. 1 (1930).

transacted its business, did not have a business situs in that state so as to support a tax on its transfer at the stockholder's death.

*First National Bank v. Maine*,<sup>103</sup> however, brought the new theory of the unreasonableness of multi-state taxation to the forefront again. It denied the power of the state of incorporation to tax the transfer of stock owned by a nonresident decedent, impliedly approved in *Frick v. Pennsylvania*.<sup>104</sup> The Court divided in the accustomed manner, and the debate between the two parties was about as acrimonious as is consistent with judicial etiquette. The majority opinion insisted that "Due regard for the processes of correct thinking compels the conclusion that a determination fixing the local situs of a thing for the purpose of transferring it in one state carries with it an implicit denial that there is a local situs in another state for the purpose of transferring the same thing there."<sup>105</sup> The minority defended their intellectual competence by responding that "Only by a recourse to a form of words—saying that there is no taxable subject within the state, by reason of the fictitious attribution to the intangible interest of the stockholder of a location elsewhere,—is it possible to stigmatize the tax as arbitrary."<sup>106</sup> The distinction between the tests of due process employed is obvious. The prevailing opinion rests squarely upon a "rule of immunity from taxation by more than one state. . . ."<sup>107</sup> The dissenters insist that "control and benefit are together the ultimate and indubitable justification of all taxation."<sup>108</sup>

The implication to be drawn from these decisions was self-evident. While the cases themselves involved inheritance taxation only, the principles enunciated by the majority were not so limited. The analogy drawn to property tax cases, the insistence upon the iniquity of multi-state imposts, the generality with which the doctrine of "immunity against taxation at more than one place . . ."<sup>109</sup> was proclaimed, the solemn statement that "The rule of immunity from taxation by more than one state, deducible from the decisions in respect of these various and distinct kinds of property, is broader than the applications thus far made of it,"<sup>110</sup> all evidenced a new conception of due process in which reasonableness was to be determined, not from the standpoint of the states from whose protection the economic interest taxed derived some benefit, but from the viewpoint of the taxpayer protesting against contributing so much of his substance to so many different claimants. The almost unanimous opinion of legal scholars so interpreted it. Today the position of the Court seems not so certain.

103. 284 U. S. 312 (1932).

104. 268 U. S. 473 (1925).

105. 284 U. S. 312, 326 (1932).

106. *Id.* at 333.

107. *Id.* at 326.

108. *Id.* at 334.

109. *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204, 212 (1930).

110. *First Nat. Bank v. Maine*, 284 U. S. 312, 326 (1932).

*Lawrence v. State Tax Commission*<sup>111</sup> upset the apple cart. That case permitted Mississippi to tax a resident upon his income derived from business carried on in Tennessee. By cases so many in number, so recent in time, and so reasonable in result as to preclude any notion that the Court intended to overrule them, it is settled that Tennessee also might have levied contribution upon this revenue.<sup>112</sup> The decision upon this point was unanimous. Indubitably, the Supreme Court does not intend to apply in every field the rule that due process forbids multi-state taxation. It refused to apply it in this case.<sup>113</sup> Moreover, Mr. Justice Stone, who writes for this unanimous court, cites the decisions upholding property taxes by more than one state as living cases, saying that such double taxation "has been uniformly upheld."<sup>114</sup> Likewise, in his reasoning sustaining the tax he returns the Court, for whom he speaks officially, to benefit as the test of jurisdiction.<sup>115</sup>

So far as the present controversy is concerned, the remaining cases decided since 1930 are rather unimportant. *Klein v. Board of Tax Supervisors*<sup>116</sup> upheld a property tax levied by Kentucky upon shares held by a resident in a New Jersey corporation. This is consistent with either continued adherence to the benefit test or an extension of the rule of the inheritance tax decisions to property taxation. The point was not discussed as the case was fought along other lines. In *Hans Rees' Sons v. North Carolina*<sup>117</sup> a North Carolina tax on the income of a New

111. 286 U. S. 276 (1932).

112. See cases cited *supra* note 70, and in addition note *Hans Rees' Sons v. North Carolina*, 283 U. S. 123 (1931), in which the power of the state to tax income from business done in the state was conceded and the dispute was simply whether the taxing formula allotted too large a share to the state.

113. Of course those who approve the use of due process to prevent multi-state taxation think the Lawrence case is wrong. See HARDING, *op. cit. supra* note 2, at 218-227.

114. 286 U. S. 276, 280 (1932).

115. "Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable from the responsibility for sharing the costs of government." *Id.* at 279. "It is enough, so far as the constitutional power of the state to levy is concerned, that the tax is imposed by Mississippi on its own citizens with reference to the receipt and enjoyment of income derived from the conduct of business, regardless of the place where it is carried on. The tax, which is apportioned to the ability of the taxpayer to bear it, is founded upon the protection afforded to the recipient of the income by the state, in his person, in his right to receive the income, and in his enjoyment of it when received. These are rights and privileges incident to his domicile in the state and to them the economic interest realized by the receipt of income or represented by the power to control it, bears a direct legal relationship. . . . We can find no basis for holding that taxation of the income at the domicile of the recipient is either within the purview of the rule now established that tangibles located outside the state of the owner are not subject to taxation within it, or is in any respect so arbitrary or unreasonable as to place it outside the constitutional power of taxation reserved to the state." *Id.* at 280.

116. 282 U. S. 19 (1930).

117. 283 U. S. 123 (1931).

York corporation doing business in the Tarheel State was invalidated, because the formula employed to determine the North Carolina income allocated too large a share of the total revenue to that state. In its tacit recognition of the propriety of a North Carolina tax upon income arising from business and property within her boundaries the case adds to the significance of the decision in *Lawrence v. State Tax Commission*<sup>118</sup> as a repudiation of the notion that due process precludes taxation of the same income by more than one state. In *Graniteville Manufacturing Company v. Query*,<sup>119</sup> the court upheld the levy by South Carolina of an excise tax upon the signing of notes within the state, although the notes did not become effective as obligations until the payee outside the state approved the loan which they were to evidence and credited the proceeds to the maker's account. *Burnet v. Brooks*<sup>120</sup> undertakes to dissociate the restriction of Federal taxing power under the Fifth Amendment due process provision from the limitation developed from similar language in the Fourteenth Amendment as applied to the states. In so doing, it departs from the traditional benefit test, laying emphasis instead upon power over the subject of taxation. The result, however, is in no sense inconsistent with the benefit theory in its widest sense. *Johnson Oil Refining Company v. Oklahoma*<sup>121</sup> restricts taxation of railway cars by a state other than that of the owner's domicil to the average number present during the taxable period as against the claim to tax on the basis of the full value of each car in the state for any portion of the tax year. This fully accords with the application of the benefit theory in prior decisions. Some of the language employed indicated that a similar restriction might be imposed on the domiciliary state if the cars are constantly "on the go."<sup>122</sup> This is entirely consistent with the benefit principle; it likewise tends to reduce multi-state taxation.

*Watchman, What of the Night?*

To the lawyer, whether teacher or practitioner, the present state of the authorities upon the subject of jurisdiction to tax seems properly describable as one of encircling gloom. Such lights as glimmer upon

118. 286 U. S. 276 (1932).

119. 283 U. S. 376 (1931).

120. 288 U. S. 378 (1933) (upholding Federal estate tax upon securities held in New York and a bank deposit in that state, the property of a decedent who was a British subject resident in Cuba). As to a state tax on the transfer of shares of stock owned by a nonresident alien decedent in a corporation chartered under its laws, see *In re McCreery's Estate*, 220 Calif. 26, 29 P. (2d) 186 (1934), and Comment thereto in (1934) 23 CALIF. L. REV. 93.

121. 290 U. S. 158 (1933).

122. "When a fleet of cars is habitually employed in several states—the individual cars constantly running in and out of each state—it cannot be said that any one of the states is entitled to tax the entire number of cars regardless of their use in the other states." 290 U. S. 158, 162 (1933).

the pathway of future decisions are fitful and of little aid. The fire and brimstone so recently poured by the majority opinions in the *Minnesota*, the *Missouri* and the *Maine* cases upon the benefit theory still retain their baleful glare and definitely assure us that inheritance taxation will not be permitted to travel that road. The *Lawrence* case may be likened to a small bonfire lighting up a narrow area, that of income taxation. In that field, very obviously, the Court does not consider odious the possibility of multi-state taxation. With respect to all other forms of taxation, the safest answer to the question whether the ancient landmarks or the new trail will be followed appears to be, "I do not know." The profession doubtless will welcome the dawn of garish day, illumined by the light of the many decisions which will be necessary to dispel the present uncertainty. Meanwhile, writers, boldly invading domains shunned even by archangels, may be permitted the luxury of suggesting what seems the preferable course.

Conceivably, the inheritance tax cases might be abandoned in favor of a whole-hearted return to the former rule. This seems neither likely nor desirable. The late decisions are aimed at certain grave conditions which flourished under the application of the benefit theory of jurisdiction to tax inheritances. The nation and many of the states are committed to policies of progressive taxation in this field, with rather high rates in the upper brackets. If two, or three, or four states be permitted to tax the same estate, or parts of it, the possibility of almost complete confiscation where very large amounts are involved becomes more than a chimera of the imagination. Of even moderate estates major fractions might be exacted. Indubitably there is much to be said for the policy of restricting or even abolishing the privilege of transmitting property at death. But even our most leftwardly advanced systems of taxation do not purport to adopt the latter policy, and it is perhaps inconsistent with the position of the states in the Union to permit it to arise in practice by cumulating the exactions of several jurisdictions. Viewed in this light, the inheritance tax cases may bear some remote relationship to the doctrine of unconstitutional conditions.<sup>123</sup> The end sought by these decisions therefore seems a desirable one. Our doubts, like those of the dissenting judges, have been directed to the propriety of the means; particularly with respect to the far-flung application of the new doctrine suggested by the unrestraint of the language in which it was couched. Now that the result has been reached, retraction, with its unsettling effect upon doctrine and the encouragement thereby afforded the iconoclasts,<sup>124</sup> is inexpedient.

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123. Cf. Merrill, *Unconstitutional Conditions* (1929) 77 U. OF PA. L. REV. 879, 831, 892.

124. Cf. Lowndes, *Spurious Conceptions of the Constitutional Law of Taxation* (1934) 47 HARV. L. REV. 628.

Another possible course would be to regard *Lawrence v. State Tax Commission*<sup>125</sup> as an outmoded survivor of a dogma no longer tenable, to be overruled as soon as possible and to accept the "one thing, one tax" principle as one of the infinite transmogrifications of due process of law.<sup>126</sup> The argument for it is of course that outlined in *Farmers Loan and Trust Company v. Minnesota*,<sup>127</sup> namely, that the country has become economically a unit, that property and business interests should be protected against discriminatory and excessive taxation, that bad feeling is engendered between states by competing policies of taxation, that multi-state taxation is unjust. But there are many considerations that render the "one thing, one tax" principle of dubious expedience. Its thorough application would seriously affect the taxing systems of almost every state. It would involve the Supreme Court in the extremely delicate task of determining which states should be accorded power to levy various types of tax.<sup>128</sup> An improper choice may have serious repercussions upon problems of enforcement.<sup>129</sup> So far from working injustice, multi-state taxation in most instances results in securing that due contribution to the support of public activities in various parts of the country which should be borne by those whose economic affairs are conducted on the national scale.<sup>130</sup> Should the rule of taxation by but one jurisdiction become a part of our constitutional law, we shall be faced with the necessity of providing for that contribution in some other fashion. This will be so, whether the Court's choice be in favor of the so-called creditor states or of the so-called debtor states. The former have every reason to insist that their citizens and business organizations, enabled by their institutions and their laws to establish prosperous commercial and financial enterprises, and enjoying their governmental services, should pay a share to the support of the common-

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125. 286 U. S. 276 (1932).

126. This view is urged in HARDING, *op. cit. supra* note 2, at 214-229.

127. 280 U. S. 204 (1930).

128. Some notion of the magnitude of this task may be gained from the literature that has accrued on the subject. An entire book, with a most penetrating and scholarly analysis, has been devoted to working out a principle of "integration" by which to solve the problem of apportioning taxing power among the states on this basis. HARDING, *op. cit. supra* note 2. In addition see the articles cited *supra* note 2. Particularly interesting on this point are: Lowndes, *State Jurisdiction to Tax Income* (1932) 6 TEMPLE L. Q. 486; Peppin, *Power of the States to Tax Intangibles or their Transfer* (1930) 18 CALIF. L. REV. 638; Rottschaefer, *State Jurisdiction of Income for Tax Purposes* (1931) 44 HARV. L. REV. 1075; Rottschaefer, *State Jurisdiction to Impose Taxes* (1933) 42 YALE L. J. 305.

129. See STEINSON, *op. cit. supra* note 2, at 84-86.

130. "Apart from the question of jurisdiction, that one must pay a tax in two places, reaching the same economic interest, with respect to which he has sought and secured the benefit of the laws of both, does not seem to me so oppressive or arbitrary as to infringe constitutional limitations." Stone, J., dissenting in *Baldwin v. Missouri*, 281 U. S. 586, 597 (1930).

weal.<sup>131</sup> The debtor states have an equally valid claim. Our commercial and industrial centers have been built up on the basis of national free trade. Confine New York, or Chicago, or Philadelphia, or Detroit to the bounds of their own states, surround them with the tariff walls that criss-cross Europe, and their prosperity will be materially curtailed. The privilege of national trade carries with it the obligation to assist in supporting the government of the hinterland which sustains that trade.<sup>132</sup> The outcry against Federal aid legislation on the ground that it forces the "rich" states to give of their wealth to the "poor" is consummate impudence. Whence did the rich states draw their wealth? The necessary alternative to multi-state taxation of intangible economic interests would seem to be some device for a Federal tax levy to be apportioned to the local governments in accordance with an equitably arranged formula, probably the resultant of the opposing forces of the several states in Congress.<sup>133</sup> Such a program is fraught with danger to "state's rights," would be highly difficult to adjust, and might necessitate a constitutional amendment.<sup>134</sup> So long as we feel that a federal rather than a unitary governmental structure best fits our needs, it seems inexpedient to centralize authority over revenue too closely—and this regardless of whether the centralization occurs as the result of legislation or of adjudication.

The preferable course is to regard the inheritance tax cases simply as superimposing upon the orthodox rule of benefit as the test of jurisdiction to tax a limitation based solely on the peculiar hardships which the application of that theory creates in the particular field. This would be consistent with the Court's attitude in respect to area formulas in special assessment taxation.<sup>135</sup> It would explain the limitation of the new doctrine, as yet, to inheritance taxation, where the old rule did produce bizarre consequences, and the specific refusal to extend it to income taxation. It would prevent the wholesale abandonment of numerous precedents of long standing. It would maintain the freedom of the states to plan their own revenue systems without sacrificing the obligation of far-ranging enterprise to support government in all areas whence it draws sustenance.

If this should be the course which the Supreme Court follows, we may expect little, if any, extension of the doctrine of the inheritance

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131. See Kessler, *Some Legal Problems in State Personal Income Taxation* (1925) 34 *YALE L. J.* 863, 878; Rottschaefer, *State Jurisdiction to Impose Taxes* (1933) 42 *YALE L. J.* 305, 326.

132. Cf. STIMSON, *op. cit. supra* note 2, at 48.

133. See HARDING, *op. cit. supra* note 2, at 273; Note (1932) 10 *N. C. L. REV.* 189.

134. *Ibid.*

135. Compare *Gast Realty & Inv. Co. v. Schneider Granite Co.*, 240 U. S. 55 (1916), and *Withnell v. Ruecking Construction Co.*, 249 U. S. 63 (1919).

tax cases. Other types of revenue measures are not so subject to the evils which brought those decisions into being. Except as to income tax, progressive rates are not in vogue, and the high rates employed in inheritance taxation are not common in income levies. Moreover, save as to constantly shifting tangible personalty, the existing decisions under the benefit theory have permitted levies by no more than two states, whether the tax be one on property or on income or on the person.<sup>136</sup> As to shifting tangible personalty, *Johnson Oil Refining Company v. Oklahoma*<sup>137</sup> seems an adequate safeguard against abuse. Hence the excessive exactions, the possibility of which doubtless called for the inheritance tax decisions, are not to be feared in these other fields.<sup>138</sup> It therefore seems proper to hazard the prophecy that the benefit theory of jurisdiction to tax is not likely to be abandoned generally, despite the sweeping language in which the "one thing, one tax" principle was enunciated by the judges who spoke for the Supreme Court in the transfer tax cases. For the present, at least, the elder cases still state the law.<sup>139</sup>

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136. Of course there is a possibility, under the interpretation I have given to *Haavik v. Alaska Packers Ass'n*, 263 U. S. 510 (1924), that a man might find himself in such a relation to more than two states as to be subject to personal or poll taxes to each of them. There is a similar possibility in respect to corporate debts, under a combination of *mobilia sequuntur personam*, corporate domicile, and business situs theories. Such cases must necessarily be of extremely infrequent occurrence and need not disturb us.

137. 290 U. S. 158 (1933).

138. It has been suggested the evils calling forth the inheritance tax decisions "would exist in aggravated form with respect to multi-state property taxation of intangibles." Rottschaefel, *State Jurisdiction to Impose Taxes* (1933) 42 YALE L. J. 305, 320. This is based upon the premise that protection of intangible wealth against discrimination and unjust and oppressive taxation is just as important in respect to property taxation as in transfer taxes. This view does not seem to take into consideration the factors I have mentioned which obviate the possibility of oppressive taxation in the case of property taxes. The author cited also suggests that interference with the development of a capital market on a national scale and the bad feeling engendered by state competition in creating tax systems favorable to intangible wealth might be evils aimed at by the new doctrine. But the history of the country indicates no serious handicap to the nation-wide employment of capital under the old rules, and the new theory does not at all discourage the disgraceful habit of seeking to woo capitalists by favorable state laws. If anything, it encourages the practice.

139. Since the manuscript of this article was completed there has appeared an excellent discussion: Brown, *Multiple Taxation by the States—What is Left of it?* (1935) 48 HARV. L. REV. 407, in which the recent decisions are regarded as limiting state taxing powers much more narrowly than I have suggested. Nevertheless I adhere to the opinions which I have set out above. In the end, probably we both will be convicted of error by the Supreme Court.