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Davis W. Morton Jr.

Albert H. Cotton

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LIMITATIONS ON STATE JURISDICTION TO LEVY DEATH TAXES

DAVIS W. MORTON, JR.* AND ALBERT H. COTTON**

"The theoretical basis of some decisions in the very practical matter of taxation is not particularly satisfying. But a switch of abstract concepts is hardly to be expected without at least careful consideration of its impact on the very practical and concrete problems of states and taxpayers. Weighing the highly doctrinaire reasons advanced for this decision against its practical effects on our economy and upon our whole constitutional law of state taxation, I can see nothing in the court's decision more useful than the proverbial leap from the frying pan into the fire." Jackson, J., dissenting, in State Tax Commission of Utah v. Aldrich, 316 U.S. 174, 195 (1942).

The judicial protest quoted above highlights one of the most confusing problems arising under our constitutional system—the jurisdiction of one or more states to tax personal property transfers at death.

Actually, it is only because of congressional action that state death taxes have survived at all. In the early 1920's, some states, in an effort to attract wealthy residents, repealed their state death taxes. The movement seemed likely to spread, and it appeared that states which had traditionally used inheritance taxes as a source of revenue might be forced to repeal their taxes in self-defense. In 1924, to check this movement Congress granted a 25% credit on the federal estate tax to those states levying death taxes, and in 1926 this was raised to 80%.

This device was successful. Today all states levy death taxes which at least exhaust the federal credit, except Nevada.

State death taxes having been saved from extinction by congressional action, an old problem was intensified—how to prevent the states from going too far—how to prevent two, three, or even four states from taxing the same estate. Everyone agreed, including the most enthusiastic advocates of death taxes on social grounds, that one death tax was enough—that the burden of death taxes should be increased, if at all, by an increase in rates and not by a haphazard imposition of double taxation on a few estates. For a period, acting under the due process clause of the 14th Amendment, the Supreme Court assumed the responsibility for preventing

* A.B., L.L.B., Syracuse; L.L.M., Yale; Member of the New York Bar.
** A.B., L.L.B., Duke; Assistant Professor of Law, T. C. Williams School of Law, University of Richmond; Member of the North Carolina Bar.

2. The CCH STATE INHERITANCE, ESTATE & GIFT TAX SERVICE sets out, with statutory references, the "death taxes" enacted by each state.
double taxation. It was the court’s withdrawal from this field, so far as intangibles were concerned, that provoked Mr. Justice Jackson’s protest quoted above.

The Aldrich case involved the right of Utah to levy a death tax on stock in the Union Pacific Railroad owned by Edward S. Harkness, a resident of New York. The sole basis of Utah’s claim was that the Union Pacific had been incorporated in that state. Assuming that the situs of a share of stock is in the state of incorporation, Utah’s right to tax would be clear, if intangibles are to be treated in the same manner as tangible personal property was treated in Frick v. Pennsylvania. Assuming, however, that the maxim *mobilia sequuntur personam* applies, New York, and New York alone, would have the right to tax. Or is it any of the Supreme Court’s business anyway?

The court chose the third alternative. The right or duty of the court to attempt to prevent double taxation had been under a cloud from the beginning. In the early case of Union Refrigerator Transit Co. v. Kentucky, Mr. Justice Holmes said: “It seems to me that the result reached by the court probably is a desirable one, but I hardly understand how it can be deduced from the 14th Amendment. . . .” The doubt had persisted, and was repeated in later cases, including First National Bank of Boston v. Maine, the case specifically overruled by the Aldrich case.

The court was not unaware of the practical difficulties which its withdrawal from the field might cause. Mr. Justice Frankfurter, in a concurring opinion, suggested both reciprocal legislation and action under the Compact Clause. Mr. Justice Jackson warned that the decision might “give a new impetus to federal absorption of this revenue source and to federal incorporation of large enterprises.” Other proposals were made by students of the problem.

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5. 199 U.S. 194 (1905).
6. 284 U.S. 312 (1932).
8. Id. at 197.
9. The following proposals have been brought forward from time to time as possible solutions to this practical conflict between the taxing powers and revenue needs of the several states and the fiscal requirements of a unified national economy:
1. Continued state taxation of personal property at death buttressed by a power of arbitration granted to the taxing authorities of the individual states. This is the approach of the Uniform Arbitration of Death Taxes Act, 9 Uniform Laws Ann. 254 (Pocket Supp.) and similar statutes.
2. The imposition of one Federal Estate Tax and the granting of an 80% state death tax credit only to states imposing death taxes on intangibles in accordance with federal stipulations as to the scope of such taxes.
3. The federal incorporation of large enterprises, as suggested by Mr. Justice Jackson in the Aldrich dissenting opinion.
4. Interstate compacts, under the Compact Clause, U.S. Const. Art. I, § 10, cl. 3, as suggested by Mr. Justice Frankfurter in his concurring opinion in the Aldrich case.
5. Reciprocal legislation, also suggested by Mr. Justice Frankfurter, and actually the most widely adopted solution. Utah, for example, enacted a recipro-
The practical answer to the Aldrich case, of course, would be to re-incorporate the Union Pacific in a state such as Delaware, which does not assert a right to levy a death tax on the shareholders of its corporations, and give up the Utah charter. Utah forestalled such a result by amending its laws to give up the right to tax conferred by the Aldrich case. On the other hand, New York amended its laws to open the way to double taxation, since at the time of the Aldrich case it had given a credit for taxes paid to other states, so that New York, rather than the taxpayer, had been the actual loser.

The practical problem presented by the Aldrich case has been almost completely solved today. No state asserts the unqualified right to tax the intangible personal property of non-residents at death. In some cases this result is reached because the law is applied only to real and tangible

6. The exercise of legislative self-restraint, in not attempting to impose a death tax on the intangibles of non-domiciliaries.
7. Adoption of a United States Constitutional Amendment to apply the due process limitation of the 14th Amendment expressly to state jurisdiction to tax personalty at death.
8. An overruling of the Aldrich decision. This seems unlikely in the near future, since Mr. Justice Jackson was joined only by Mr. Justice Roberts in dissent.
For the distant future — the field is one which abounds in overruled cases.
10. The Del. Const. Art. IX, § 6 prohibits taxation of shares of stock of corporations incorporated in that state. New York had a similar constitutional provision denying itself the right to tax a trust because of the trustee's residence in the state. N.Y. Const. Art. XVI, § 3. In Delaware, the incorporation business, and in New York, the trust business, are of greater economic importance to the state than the revenue that might be raised by an attempt at double taxation.
12. N.Y.L. c. 710, § 1 (1930), amended, Laws 1934 c. 639, § 1; McKinney's Consol. Laws, c 60, Bk. 59, Tax Law, § 249-0. This section was repealed by Laws 1940, c. 138. For the present provision see McKinney, op. cit., Cum. Ann. Pt. § 249-0.
13. CCH State Inheritance, Estate and Gift Tax Service ¶ 12,080 summarizes the law of all American jurisdictions. Puerto Rico is the only one which does generally tax intangibles of non-residents. The Georgia act, Ga. Code § 92-3401(a) is the least satisfactory, since it is an apportionment rather than a reciprocity statute, and does not distinguish between tangibles and intangibles. It reads: "The amount of tax to be paid shall be in proportion to the amount of property located in this state as compared to the total located elsewhere." Obviously, it contemplates that all property shall have only one location, and, as administered, would not appear to create serious difficulties. The Attorney-General, for example, has ruled that bank deposits have a situs at the domicil of the depositor, thus eliminating double taxation in that instance. CCH State Inheritance, Estate and Gift Tax Service, Georgia, ¶ 1680.

The Nebraska law is also unsatisfactory, in that it does tax intangibles of non-residents if they have a business situs in the state, and the non-resident also owns real property in the state. Nebraska adopted the Uniform Reciprocal Transfer Act in 1945, Neb. Rev. Stat. §§ 77-2007.01, 77-2007.02, repealed it in 1949, and its re-enactment
personal property of non-residents. Some of these provisions were adopted when the court would have held any other provision unconstitutional, and were not changed after the Aldrich case. Others have been adopted since the court gave permission to tax.

Other states have adopted reciprocity provisions. A Uniform Reciprocal Transfer Act was proposed by the Commissioners on Uniform State Laws in 1928, and is in force at present in 15 states and two territories. The adoptions came immediately after the act was proposed. Of the states which have adopted reciprocity since the Aldrich case, only South Dakota has used the Uniform Act.

There are two difficulties with the reciprocity approach. The first is that in those states where the statute omits the section of the Uniform Act granting the exemption to those states which do not tax intangibles of non-residents, and contains only the reciprocity provision, it might be held that the statute grants reciprocity only to those states which have adopted reciprocity provisions were adopted when the court would have held any other provision unconstitutional, and were not changed after the Aldrich case. Others have been adopted since the court gave permission to tax.

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is now pending at the present session of the Nebraska Legislature. CCH STATE INHERITANCE, ESTATE AND GIFT TAX SERVICE ¶ 86501.

Other states having a business situs exception in their reciprocity statutes which may cause difficulty are the District of Columbia (but no tax on trusts or stocks) and Kentucky with a similar exemption. The North Carolina statute, N.C. GEN. STAT. § 105-2, relinquishes the power to tax intangibles of non-residents, unless North Carolina is the business situs, and specifically provides that trusts with a North Carolina trustee are not taxable. The Attorney-General has ruled that the fact of incorporation in North Carolina is not alone sufficient to give a North Carolina business situs (June 15, 1950) and that bonds of a North Carolina corporation kept in a safe deposit box outside the state do not have a North Carolina business situs. (June 20, 1950). CCH STATE INHERITANCE, ESTATE AND GIFT TAX SERVICE ¶¶ 17,227 and 17,228.

14. Virginia is typical of this group. Va. Code Section 58-189 levies the death tax on "real estate or tangible personal property" and Section 58-208 repeats that the tax applies to real and tangible personal property only. States which do not tax the intangible personal property of non-residents include Arizona, California, Connecticut, Delaware, Florida, Louisiana, Maine, Massachusetts, Minnesota, Missouri, Nevada, New Jersey, New York, Rhode Island, Tennessee, Vermont, Virginia and Washington. CCH STATE INHERITANCE, ESTATE AND GIFT TAX SERVICE ¶ 12,080.

15. 316 U.S. 174 (1942).

16. See Kelly v. Bastedo, 70 Ariz. 371, 220 P.2d 1069 (1950), where the court upheld a tax on the stock in an Arizona corporation owned by a non-resident who died in 1941, relying on the Aldrich case, supra, but called attention to the fact that the law was changed in 1943 by Ariz. Code § 40-113.

17. 9 UNIFORM LAWS ANN. 621, Pocket Supp. 287. States having the Uniform Act are: Alaska, California (where it is unnecessary since California does not tax the intangibles of non-residents in any event) Hawaii, Idaho, Illinois, Indiana, Iowa, Maryland, Michigan, New York, Pennsylvania, South Carolina, South Dakota, Washington, West Virginia and Wyoming. Other states with reciprocity provisions are Arkansas, Colorado, Kansas, Mississippi, Montana, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Texas, Utah and Wisconsin. CCH STATE INHERITANCE, ESTATE AND GIFT TAX SERVICE ¶ 12,080. Florida is among the states which adopts both approaches. Under Fla. STAT. § 198.03 there is no tax on intangibles of non-residents at death, and § 198.44 further provides for reciprocity. The reaction of Mississippi to the Aldrich case is interesting: "Notwithstanding the decision in Aldrich v. State Tax Commission of Utah, Mississippi will continue to adhere to the theory of single taxation, as announced in First National Bank of Boston v. Maine, 285 U.S. 312." Letter of State Tax Commission, Sept. 11, 1942, quoted in CCH STATE INHERITANCE, ESTATE AND GIFT TAX SERVICE, Mississippi, ¶ 1675.

18. S.D. Laws (1945) c. 198.
The preferable rule, of course, is that the absence of a tax meets the requirements of reciprocity. In re Eilermann Estate, 179 Wash. 15, 35 P.2d 763 (1934), and In re Uihlen's Estate, 247 Wis. 476, 20 N.W.2d 120 (1945). Cf. the situation in Iowa, due to language added to the Uniform Act in the Iowa statute, Iowa Code Ann. § 450.91, indicating that the property must be taxed at the domicil, discussed in CCH State Inheritance, Estate and Gift Tax Service, Iowa, ¶ 1680, and under the Wisconsin statute, Wis. Stat. § 72.01(9) where there is a complete exemption from taxation in the foreign state. Estate of J. L. Robbins, Wis. Sup. Ct., Jan. 9, 1951, and Estate of M. E. Stewart, Wis. Sup. Ct., Jan. 9, 1951. In re Robbins' Estate, 45 N.AV.2d 678 (Wis. 1951) and In re Stewart's Estate, 45 N.W.2d 637 (Wis. 1951).

The Aldrich decision also threw doubt upon the tax status of tangible personal property, which was not definitely settled until the two decisions.

19. CCH State Inheritance, Estate and Gift Tax Service ¶ 1680-1680E.

The preferable rule, of course, is that the absence of a tax meets the requirements of reciprocity. In re Eilermann Estate, 179 Wash. 15, 35 P.2d 763 (1934), and In re Uihlen's Estate, 247 Wis. 476, 20 N.W.2d 120 (1945). Cf. the situation in Iowa, due to language added to the Uniform Act in the Iowa statute, Iowa Code Ann. § 450.91, indicating that the property must be taxed at the domicil, discussed in CCH State Inheritance, Estate and Gift Tax Service, Iowa, ¶ 1680, and under the Wisconsin statute, Wis. Stat. § 72.01(9) where there is a complete exemption from taxation in the foreign state. Estate of J. L. Robbins, Wis. Sup. Ct., Jan. 9, 1951, and Estate of M. E. Stewart, Wis. Sup. Ct., Jan. 9, 1951. In re Robbins' Estate, 45 N.AV.2d 678 (Wis. 1951) and In re Stewart's Estate, 45 N.W.2d 637 (Wis. 1951).

20. "At the present time Pennsylvania has reciprocity with all other states of the United States, Panama and Hawaii." Letter, Department of Revenue, Oct. 26, 1949, quoted in CCH State Inheritance, Estate and Gift Tax Service, Pennsylvania, ¶ 1680. On the other hand, in 1947, Colorado listed Alabama, District of Columbia, Georgia, Kentucky, Massachusetts, North Carolina, Puerto Rico, Rhode Island and Wisconsin as not meeting the requirements of the Colorado reciprocity statute, with a note that Alabama, Massachusetts and Wisconsin attempt reciprocity. CCH State Inheritance, Estate and Gift Tax Service, Colorado, ¶ 1680. For a case showing the results of a mistaken belief by administrative officials of New York that that state did not have reciprocity with Pennsylvania, see Platt v. Wagner, 347 Pa. 27, 31 A.2d 499 (1943).

21. See Wisconsin cases, supra note 19.

22. Massachusetts v. Missouri, 308 U.S. 1 (1939). Missouri repealed the Uniform Reciprocal Transfer Act, Mo. Laws, 1939, p. 182, § 1, and is now a jurisdiction which does not levy a tax on the intangibles of non-residents, supra note 14.

23. Supra note 12.

in Treichler v. Wisconsin in 1949 and 1950. Logically, under the mobilia sequuntur personam rule, there is no reason why the state of domicil could not tax tangible as well as intangible property of its residents. Historically, the states had done so until the decision in Frick v. Pennsylvania. Would the court withdraw from this field, as it had in the case of death taxes on intangibles?

A definite answer was given in the Treichler case. Frick v. Pennsylvania was adhered to, and it was held that the 14th Amendment prohibits the state of domicil from levying a death tax on tangible personal property physically located in another state. Only Mr. Justice Black continued to doubt that the 14th Amendment had anything to do with the problem.

Logically, the difference in treatment for constitutional purposes seems difficult to defend, but at least we have a definite answer. There can be no double taxation of personal property at death: in the case of tangible property, because the Constitution, as interpreted by the Court, forbids it, and assigns the right to tax to the state of the situs of the property; in the case of intangible property, even though the Constitution is silent, because the states, by unanimous consent have agreed to forego the right to double taxation, and assigned the right to tax to the state of domicil.

Despite the repudiation of double taxation, a very real danger still exists because of the possibility of "double domicil." Theoretically, by definition, a man can have but one domicil at a time. Actually, the way Americans move around, it is often most difficult to determine where their domicil is, and no wonder that courts, purporting to follow the same rules,

27. Supra note 25.
30. See Bittker, The Taxation of Out-of-State Tangible Property, 56 Yale L.J. 640 (1946). As a practical matter, however, the Supreme Court's inconsistency is more defensible. The Louisiana statutes will illustrate the point. Louisiana gave up any claim to tax intangibles of non-domiciliaries without any strings of reciprocity. La. Acr 67 of 1940, § 1, Dard's Stats. (Supp. 1949) § 8556.1. Nevertheless, despite Frick v. Pennsylvania, supra, Louisiana still asserts the right to tax the tangibles of its residents, wherever located. (Dard's Stats. [1939] § 8557). See Champagne, Jurisdiction to Levy Inheritance Taxes, 10 La. L. Rev. 519 (1950). In the Aldrich case, the court is permitting the states to return to the traditional mobilia rule, if they so desire. In Frick v. Pennsylvania and Treichler it is insisting on avoiding double taxation by regarding tangibles as analogous to land, and abandoning the traditional mobilia rule. Is there more justification for judicial interference where the solution is to be the adoption of an innovation than where it is to be a return to tradition?
31. Restatement, Conflict of Laws, § 11 (1934). The notion that a man could have two domiciles was described as "monstrous" as long ago as Somerville v. Lord Somerville, 5 Ves. 750 (Ct. 1801). Difficulties in determining domicil are discussed in Tweed and Sargent, Death and Taxes are Certain—But What of Domicil?, 53 Harv. L. Rev. 68 (1939) and practical suggestions for avoiding the double domicil trap are made in Guterman, Avoidance of Double Death Taxation of Estates and Trusts, 95 U. of Pa. L. Rev. 701 (1947).
often reach contradictory results on the facts. Where taxes are involved, the taxpayers will deliberately confuse the issue.\textsuperscript{92}

The career of Col. Green, whose death tax problems gave rise to the famous case of \textit{Texas v. Florida},\textsuperscript{32} is typical. Born in Massachusetts, he maintained a home there until his death. In the earlier years of his life, he managed family business interests in Texas, and was prominent in that state’s business and political life. He also maintained an office in New York, from which most of his business affairs were conducted. Finally, in his old age, he purchased a home in Florida. Where was his domicil? About all that can be definitely said was that he intended to travel.

Because of the exceptional circumstances that the total state death tax claims against the estate, from the four states involved, amounted to more than the estate — 37 million in tax claims against a 36 million dollar estate — and that Texas was willing to invoke the original jurisdiction of the Supreme Court by a suit against Florida, the conflicting claims as to domicil were resolved by the Supreme Court (in favor of Massachusetts). But this is the only case in which the court has consented to settle conflicting claims of domicil.

In the \textit{Dorrance} case,\textsuperscript{34} both Pennsylvania and New Jersey collected full inheritance taxes, though neither state claimed any right to tax the estates of non-residents. The result was reached because the courts of both states held that Dr. Dorrance was a resident of that particular state, and the Supreme Court refused review. If any doubt remained that no federal question was involved in conflicting state decisions as to domicil it was definitely set at rest by \textit{Worcester County Trust Co. v. Riley}.\textsuperscript{35}

The situation is thus analogous to that which obtained with regard to the taxation of intangibles at death. If a solution is found, it must be through voluntary state action. In 1944 the Commissioners on Uniform State Laws proposed both a Uniform Act on Interstate Arbitration of
Death Taxes, and a Uniform Act on Interstate Compromise of Death Taxes.\textsuperscript{36} To date, both acts have been adopted by six states.\textsuperscript{37} The technical problems in avoiding "double domicil" decisions have been met, and it remains only for the same forces which secured the solution of the double taxation of intangibles problem in the legislatures to secure action here.

A final problem remains to plague the estate planner, though it is outside the scope of this paper. That is the problem of multiple taxation of trusts, as permitted in \textit{Greenough v. Tax Assessors of City of Newport}.\textsuperscript{38} In this case the court held that there was no constitutional objection, under the 14th Amendment, to the levy of a property tax on a New York trust at the co-trustee's residence in Rhode Island. The door to double taxation of trusts, opened by \textit{Curry v. McCanless},\textsuperscript{39} permitting taxation at both the decedent's and trustee's domicil, has been closed as to death taxes by the exemption and reciprocity statutes discussed above. But there is no present protection against the double levy of a property tax against the trust thereafter. The uniform acts expressly avoid touching on the problem of property taxation.\textsuperscript{40} The safe practical course is to name a corporate trustee in a state such as New York, where the state has waived the right to tax trusts established by non-residents in its own constitution or statutes.\textsuperscript{41}

From the foregoing, it may appear that the problem isn't a problem any more. However, enough of a problem still remains to perhaps justify an examination of the cases which led to the present situation. Further, it may shed some light on the wisdom of the apparent contradiction in the court's attitude, in that, even after the apparent success of its action in turning the problem of intangible taxation back to the states, it still retains constitutional barriers against double taxation of tangibles.\textsuperscript{42}

\textbf{Prior to 1905}

It is important to note that the courts have been primarily concerned with the problem of jurisdiction to tax. From this point of view, if the

\begin{itemize}
  \item \textsuperscript{36} 9 \textit{Uniform Laws Ann.} (Pocket Supp.) 252, 259.
  \item \textsuperscript{37} California, Maine, Maryland, Pennsylvania, Vermont and Virginia, supra note 36. In addition, CCH \textit{State Inheritance, Estate and Gift Tax Service} ¶ 12,035 lists the following states as having compromise and arbitration statutes not modeled after the Uniform Act: Connecticut, Delaware, District of Columbia, Indiana, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, Oklahoma and Utah. The only reported case so far under arbitration statutes is between Massachusetts and New Hampshire in 1950, CCH \textit{Inheritance, Estate Tax Service} ¶ 17,141. It may well be that generally no legislation is necessary for compromise, since that is an inherent power of the Attorney-General's office. Cooley v. South Carolina Tax Comm'n, 204 S.C. 10, 28 S.E.2d 445 (1943), but statutory authorization for arbitration would appear to be necessary. Another device is intervention by a state claiming domicil in the proceedings in another state. See \textit{Estate of Trowbridge}, 266 N.Y. 283, 194 N.E. 756 (1935), where Connecticut intervened in a New York proceeding, and secured a decision that the decedent was domiciled in Connecticut.
  \item \textsuperscript{38} 331 U.S. 486 (1947).
  \item \textsuperscript{39} 307 U.S. 357 (1939).
  \item \textsuperscript{40} \textit{Report of Special Committee on Double Taxation of Intangibles}, 9 \textit{Uniform Laws Ann.} (Pocket Supp.) 253.
  \item \textsuperscript{41} N.Y. Const. Art. XVI, § 3.
  \item \textsuperscript{42} Supra note 25.
\end{itemize}
state has jurisdiction, it is immaterial which sort of tax the state decides
to levy. Consequently, the doctrines have been developed in cases which
actually concerned both property taxes and death taxes.

Prior to the present century, the principal distinction made by the
courts with regard to property was between land and personalty. When
the planter moved, his land remained behind, but his slaves went with him.
For purposes of jurisdiction to tax, land was regarded as having a “situs”
within a particular state’s territorial limits, whereas personal property was
regarded as moving with the owner. The latter concept was summarized
by the phrase, *mobilia sequuntur personam*, and, under this doctrine, juris-
diction to tax all personalty was assigned to the state of the owner’s domicil.
Since personalty was usually actually kept near the owner’s domicil, there
was little incentive for states to compete with each other in taxing a de-
cedent’s personalty.

In the latter half of the 19th century, however, the United States
underwent a rapid economic expansion. Intangibles, such as stocks and
bonds, were rapidly becoming the principal form of wealth in the country.
They attracted the attention of state collectors as a source of revenue.
Being mobile instead of fixed, a decedent’s personalty was not confined
to the territorial limits of a particular state. Instead, it could be kept in
several states, with the result that more than one state could claim the
right to assess a tax. During this period the power of states to tax per-
sonalty located beyond the territorial limits was not questioned. The *mobilia*
rule continued in full force, and the courts made no distinction between
tangibles and intangibles for purposes of death taxation.

The early cases also sanctioned double taxation, starting with the propo-
sition that credits could be taxed both by the state of the creditor and
that of the debtor. In *Kirtland v. Hotchkiss* the court held that Connect-
icut could levy *ad valorem* property taxes on bonds owned by a Connecticut
resident and representing debts owed by residents of Illinois. The loans
had been made in Illinois and were secured by lands situated there. In *Savings & Loan Society v. Multnomah County* a similar tax imposed by
Oregon, the debtor’s state, was held valid in a case where the debt was

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43. Marshall, C. J., “All subjects over which the sovereign power of a state extends,
are objects of taxation; but those over which it does not extend, are, upon the soundest
principles, exempt from taxation.” *McCulloch v. Maryland*, 4 Wheat. 316, 429 (U.S.
1819).

44. For a broad statement of the *mobilia* rule see *Weaver’s Estate v. Iowa*, 110
Iowa 328, 330, 81 N.W. 603, 604 (1900): “That the legislature has power to impose
a tax on residents upon the personal property owned by them, no matter where the
same is situated, is conceded.” Cf. Bittker, *op. cit. supra* note 30, at 643, citing *Hoyt v.
Comm’ts*, 23 N.Y. 224 (1861), for the proposition that: “Courts did, however,
show a marked tendency to construe statutes as not intended to include extra-territorial
chattels, particularly by refusing to apply the maxim *mobilia sequuntur personam* when
the statute embraced only property ‘within the state’. . . . or by declining to permit
double taxation in the absence of irrefutable evidence that the legislature intended it.”

45. 100 U.S. 491 (1879).

46. 169 U.S. 421 (1898).
secured by a mortgage held by a resident of California. Again, in *Bristol v. Washington County,* a tax on credits by the debtor's state was upheld. Here, a citizen of New York was engaged in the business of making loans in Minnesota through an agent regularly employed there. In upholding the tax, the court pointed out that "the business of investing and reinvesting" money subjected the credits to taxation. In none of these cases was the issue of double taxation discussed by the court.

In *Blackstone v. Miller,* the issue of double taxation was squarely faced. In this case, the court held that New York, the debtor's state, could impose a death tax on a bank deposit which had been in the state for more than a year before the owner, an Illinois domiciliary, died. The court refused to be persuaded by the argument that the deposit was only transitorily present in New York, since it was held for reinvestment in stocks which were to be removed. Instead, the court held that while more than mere temporary presence of a credit was necessary to establish jurisdiction the deposit was delayed within the taxing power of New York long enough to justify a finding that it was not there temporarily. With respect to possible taxation by Illinois, the creditor's state, Mr. Justice Holmes said: "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."

The early cases dealing with tangible personality were concerned chiefly with moving chattels. *Coe v. Errol* involved floating logs through New Hampshire. They were delayed at the town of Errol because of low water. The New Hampshire tax assessed against the logs was sustained, on the ground that they were detained sufficiently long in Errol to break the interstate journey and acquire a taxable location there. In holding that the non-resident owner was liable for the New Hampshire tax, Mr. Justice Bradley said, "if the owner of personal property within a state resides in another state which taxes him for that property as part of his general estate attached to his person, this action of the latter state does not in the least affect the right of the state in which the property is situated to tax it also. It is hardly necessary to cite authorities on a point so elementary."

The court followed this decision with two railroad cases, both upholding the right of the state of actual location to levy taxes on railroad cars. In

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47. 177 U.S. 133 (1900).
48. 188 U.S. 189 (1903).
49. The court's conclusion here was somewhat analogous to the "permanent location" requirement established for chattels. See *Union Refrigerator Transit Co. v. Kentucky,* 199 U.S. 194 (1905) discussed infra.
50. It is to be noted that the principal constitutional objection raised in the "moving chattel" cases has been the due process clause of the 14th Amendment rather than the interstate commerce clause. *Cf. Northwest Airlines, Inc. v. Minnesota,* 322 U.S. 292 (1944).
51. 116 U.S. 517 (1886).
Pullman's Palace Car Co. v. Pennsylvania\(^2\) an apportioned\(^{20}\) tax was upheld, while in American Refrigerator Transit Co. v. Hall \(^{21}\) a tax on cars actually in the state on tax day was upheld.

1905—1937

The due process limitation on the jurisdiction of states to tax personality was first expressly imposed in Union Refrigerator Transit Co. v. Kentucky.\(^{55}\)

There Kentucky, the state of corporate domicil, sought to tax the transit company on a fleet of railroad cars which were used almost entirely outside the state. Drawing analogy to the case of foreign land, the court said: "The argument against the taxability of land within the jurisdiction of another state applies with equal cogency to tangible personal property beyond the jurisdiction. It is not only beyond the sovereignty of the taxing state, but does not and cannot receive protection under its laws."

It was in this case that Mr. Justice Holmes first expressed his doubts as to the application of the 14th Amendment. As we have seen, these doubts were destined to prevail, where intangible property was involved, although not as applied to the precise situation concerning tangible property with relation to which they were originally expressed.

After the Union Refrigerator Transit case, efforts were made to limit the multi-state taxation of intangibles which had previously been approved. In Hawley v. City of Malden,\(^{56}\) Massachusetts assessed a property tax against a domiciliary of that state on stock of a foreign corporation which owned no property and did no business in Massachusetts. In opposing the tax the taxpayer pointed out that under the earlier case of Corry v. Baltimore\(^{17}\) the state of corporate domicil might also tax the stock as property located in the state of incorporation—thus raising the issue of multi-state taxation. The taxpayer argued that the stock had a "situs" in the state of incorporation, and, under the Union Refrigerator Transit case, was not taxable in Massachusetts. The court, however, reaffirmed Kirtland v. Hotchkiss\(^{58}\) and held that the rule of the Union Refrigerator Transit case did not apply to intangibles which could have no physical situs. The court here

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52. 141 U.S. 18 (1891).
54. 174 U.S. 70 (1899).
55. 199 U.S. 194 (1905). Cf. Louisville & Jeffersonville Ferry Co. v. Kentucky, 188 U.S. 385 (1903). There the action was to recover certain taxes assessed against a ferry company operating a service between Kentucky and Indiana. Kentucky, the domiciliary state, had attempted to tax the Indiana franchise granted by the latter state, where the company was licensed to do business. In permitting a recovery the court held that Kentucky's attempt to tax the Indiana Franchise amounted to a deprivation of property in violation of the 14th Amendment.
56. 232 U.S. 1 (1914).
57. 196 U.S. 466 (1905).
58. 100 U.S. 491 (1879).
pointed out that the state of corporate domicil had not actually taxed the stock involved.

Two years later, in *Bullen v. Wisconsin* the court again followed the *Kirtland* case, and held that Wisconsin, the settlor's state, could tax a trust in Illinois which the Wisconsin domiciliary had created, retaining a power of revocation and a right to the income. Four years later, in *Cream of Wheat Co. v. Grand Forks County* the court refused to apply the due process limitation in a case where the subject intangibles were expressly alleged to have already been taxed once by the state where the company's plant and business were located. Here, North Dakota had assessed what purported to be a property tax on the intangible property of a domestic corporation which had no property and did no business in the state. The court, per Mr. Justice Brandeis, summarily treated the taxpayer's contention that it was being subjected to double taxation by saying: "... It is sufficient to say that the 14th Amendment does not prohibit double taxation." Unless viewed as intended to overrule the *Union Refrigerator Transit* case, this statement must be regarded as limited to intangible property, which was the subject matter of the suit.

With regard to tangible property, two moving-chattel cases of this period should be noted. The first is *New York Central & H. R.R. v. Miller*. There, New York, the state of corporate domicil, assessed a franchise tax against the railroad, measured by the full value of its freight cars which were moving continuously in and out of the state. The court sustained the tax, on the theory that no particular cars were shown to be so continuously outside the state as to be protected by and subject to taxation in another state. The second case is *Southern Pacific Co. v. Kentucky*. Here, Kentucky, the state of corporate domicil, levied a tax on a fleet of steamships owned by the taxpayer but permanently operating on the high seas. It was physically impossible for the property to ever enter Kentucky. Nevertheless, the court sustained the tax—apparently for the reason that, having no taxable situs within any other state, the ships would otherwise go tax free.

These limitations, coming from property tax cases, were first applied to the state's jurisdiction to tax tangibles at death in the leading case of *Frick v. Pennsylvania*, which, as we have seen, is still adhered to. The real significance of the court's holding lay in the fact that the distinction between tangibles and intangibles was permitted to outweigh the generally accepted tax view that, while a property tax may be considered levied "on" property, a death tax is levied on the privilege of transfer.

60. 253 U.S. 325 (1920).
61. 212 U.S. 584 (1906).
62. 222 U.S. 63 (1911).
63. 268 U.S. 473 (1925).
64. Supra note 25.
or succession.65 In the *Frick* case, the decedent, Henry C. Frick, died leaving, among other assets, a $13,000,000 art collection. The collection was permanently kept in New York City. Pennsylvania, the state of decedent's domicil, attempted to tax the transfer as personality passing at death. The Supreme Court held that by reason of the character and situs of the tangibles, the due process clause deprived Pennsylvania of jurisdiction to tax. By so holding, the court established for both property taxes and death taxes the same rule respecting state jurisdiction to tax tangibles permanently located beyond the territorial limits.66

Nine years after the *Frick* case, the Supreme Court decided the converse proposition in *City Bank Farmers Trust Co. v. Schnader*.67 Here, a New York domiciliary loaned paintings to a Philadelphia museum for exhibition under an oral agreement, terminable at will, whereby the paintings could be sold for presentation to the museum. No definite time was set for returning the paintings, and they were still in Pennsylvania when the owner died nearly three years later. The court held that the paintings were "permanently located" in Pennsylvania, within the *Frick* rule, and had acquired sufficient taxable situs for Pennsylvania to tax their transfer at death.

Swinging back again to the transfer of intangibles, we come to two North Carolina cases decided by the Supreme Court in 1926—each episodic, and neither to be relied on today. The first, *Rhode Island Trust Co. v. Doughton*68 concerned the right of a state where a corporation does business to impose a death tax upon corporate shares owned by a non-resident to the proportionate extent of the business done in the state. The court held that North Carolina was without jurisdiction to impose the tax, distinguishing between the separate identities of the corporation and its shareholders and holding that the former could not, by determining the business situs of the corporation, create a basis for jurisdiction to impose a tax on the latter. It is certainly doubtful that the court would reach this same conclusion today.69

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66. The court held further that Pennsylvania could not justify the levy by arguing that in taxing the transfer of Pennsylvania property the domiciliary state might include as part of the basis of computation the value of extra-state tangibles. This too, the court held, would violate the due process clause. The court distinguished Maxwell v. Bugbee, 250 U.S. 525 (1919) which had sustained a state statute graduating tax rates according to the value of the total estate, wherever located, but applying the rates so fixed only to the part of the value within the taxing state. See Lowndes, *Rate and Measure in Jurisdiction to Tax—Aftermath of Maxwell v. Bugbee*, 49 Harv. L. Rev. 756 (1936); *Yale L.J.* 930 (1936).
67. 293 U.S. 112 (1934).
68. 270 U.S. 69 (1926).

Mr. Guterman points out that under the *Aldrich* decision North Carolina could reach the stockholders of foreign corporations doing business within its borders, by re-
The second case, *Wachovia Bank & Trust Co. v. Doughton* involved the attempt of the domiciliary state of a donee of a power of appointment over property held in trust to tax its exercise. Here, a Massachusetts decedent left property by will to a Massachusetts trustee, the income payable to his daughter for life with a general power of appointment by will. The daughter moved to North Carolina where she died, leaving a will exercising the power. The daughter's will was probated in North Carolina and the state levied a death tax on the value of the appointed property. The Supreme Court denied the power of North Carolina to tax. The court referred to the rule in Massachusetts that the appointee takes from the donor and not from the donee, and that the exercise of the power was determinable only by the law of the donor's domicil. In so holding, the court pointed out that the trust assets had no situs in North Carolina. With respect to the exercise of the power in North Carolina, the court said that the right was given to the donee by the donor's will, rather than conferred by the law of the donee's domicil.

The *Safe Deposit & Trust Co. v. Virginia* case, decided in 1929, foreshadowed the limitations on taxation of intangibles which were clearly enunciated in the *Farmers Loan & Trust Co.* case the following year. The *Safe Deposit & Trust Co. v. Virginia* case involved an attempt by Virginia to tax Virginia trust beneficiaries on the value of the corpus of a Maryland trust rather than on the value of their beneficial interests. The court denied the right of the beneficiaries' domiciliary state to tax. In a concurring opinion, Mr. Justice Stone agreed with the result, but expressed the opinion that Virginia could have taxed the beneficial interests as such upon a properly determined value.

In Wisconsin v. J. C. Penney Co., the court permitted Wisconsin, where the foreign corporation carried on business, to levy a tax on non-resident stockholders based on dividends received out of income earned in Wisconsin. The Wisconsin law required the corporation to deduct the tax from the dividends even though declared outside that state in favor of non-resident shareholders. The court reasoned that the tax was merely an extension of the state's income tax which was levied on earnings within the state; the tax here being levied on non-resident shareholders measured by income earned, not by them, but by the corporation. To this degree, the corporate entity was disregarded. The benefits and privileges of earning income in Wisconsin by means of a foreign corporation were deemed sufficient to support the tax.

70. 272 U.S. 567 (1926).
71. For the proposition that non-exercise of a power of appointment may constitutionally be taxed in the same manner as exercise of the power, see *Saltonstall v. Saltonstall*, 276 U.S. 260 (1928).
73. 280 U.S. 88 (1929).
74. *Farmers Loan & Trust Co. v. Minnesota*, 280 U.S. 204 (1930) discussed infra.
75. In reliance on *Curry v. McCanless*, 307 U.S. 357 (1939) and *Graves v. Elliott*, 307 U.S. 383 (1939), both discussed infra, the court in *Commonwealth v. Stewart*, 312 U.S. 649 (1941) upheld a Pennsylvania property tax assessed on the equitable interest of a Pennsylvania resident in a trust in intangibles located in New York. In effect, the
At the time the Frick case was decided, in 1925, and prior to the Farmers Loan & Trust Co. decision in 1930, the rule of Blackstone v. Miller was in force permitting the multi-state taxation of intangibles. Accordingly, one of the essential issues to be decided by the court before due process limitations could be applied was whether the property taxed was tangible or intangible. That is again the situation today, in view of the Aldrich and Treichler cases. The court dealt with this question at considerable length in the case of Blodgett v. Silberman. Here, the court reversed a holding of the Supreme Court of Errors of Connecticut that United States bonds belonging to a Connecticut decedent but located in New York were tangibles and taxable only in New York. Instead, the court followed Kirtland v. Hotchkiss and held that Connecticut, where the decedent was domiciled, could impose a death tax on intangibles which included (1) a partnership interest in a New York firm, (2) certificates of stock in foreign corporations and the United States bonds kept in New York, and (3) a life insurance policy kept in New York. The court did not indicate whether the intangibles might not also have been taxed in New York, and merely referred to the "business situs" cases as having "little or no bearing on the power of the state of a decedent's domicil to tax the transfer of his bonds which we are now considering."

Significant in the court's decision was the holding that "anything having as its essence an indebtedness or a chose in action" could not be regarded as a tangible for purposes of the Frick case. With respect to the Curry and Graves v. Elliott cases overruled the Safe Deposit & Trust Co. case. See also the discussion in the Greenough case, supra note 58.

76. 268 U.S. 473 (1925).
77. 280 U.S. 204 (1930).
78. 188 U.S. 189 (1903).
79. RESTATEMENT, CONFLICT OF LAWS § 7, comment b (1934).
80. 316 U.S. 174 (1942).
82. 227 U.S. 1 (1916). This case is regarded as authority for the proposition that the Supreme Court will review the state court's characterization of personalty as "tangible" or "intangible." But see Mr. Justice Stone's concurring opinion in Pearson v. McGraw, 308 U.S. 313 (1939): "As I am of opinion that there is nothing in the Constitution to compel a state to treat federal reserve notes for tax purposes as chattels were treated in Frick v. Pennsylvania . . . and as no reason has been advanced, even in Blodgett v. Silberman . . . for a different view . . . the judgment should, I think, be reversed on that ground." This statement is regarded in some quarters to be a recognition of a state's right to make its own characterization of personalty, as tangible or intangible, without review by the Supreme Court. For a case in which a state court assumed it had that right, see In re Perry's Estate, 192 P.2d 532 (Mont. 1948) where the court held, contrary to Blodgett v. Silberman, that a partnership interest was a tangible, so that such an interest, owned by a California resident, was subjected to the Montana death tax.
83. 100 U.S. 491 (1879).
84. Case of the State Tax on Foreign-Held Bonds, 15 Wall. 300 (U.S. 1873); New Orleans v. Stempel, 175 U.S. 509 (1899).
85. Even earlier, in Bullen v. Wisconsin, 240 U.S. 625 (1916), discussed supra, it had been held that Wisconsin, the decedent's domicil, could impose a death tax on the transfer by revocable trust of securities held by a trustee in Illinois. The state of Illinois also taxed the transfer and the court saw no objection to this, citing Blackstone v. Miller. The Bullen case was never overruled, and the court relied on it in Curry v. McCausland, 307 U.S. 357 (1939) discussed infra.
the court's power of review of jurisdictional issues there was in the opinion a strong inference that a determination that an item of personality is tangible for purposes of state law will not be permitted to form the final basis for a determination of the applicability of the Frick case.

The Holmes theory that there is no constitutional prohibition of double taxation of personality was completely, though only temporarily, repudiated with respect to intangibles in 1930 and the years immediately following; the initial blow fell in the Farmers Loan & Trust Co. case which specifically overruled Blackstone v. Miller. There, the court held that Minnesota could not impose a death tax on the transfer of bonds of the cities of Minneapolis and St. Paul which belonged to the estate of a non-resident decedent who died a domiciliary of New York. The majority applied the due process limitation of the 14th Amendment to strike down the Minnesota tax on the ground that the Union Refrigerator Transit case and the cases following it were controlling. The court said: "The bonds and certificates of the decedent had acquired permanent situs for taxation in New York; their testamentary transfer was properly taxable there but not in Minnesota."

In a concurring opinion, Mr. Justice Stone said: "It is enough . . . that the transfer was effected in New York by one domiciled there and is controlled by its law . . . Granting that the continued existence of the contract rested in part on the law of Minnesota, the relation of that law to the transfer in New York, both in point of theory and in every practical aspect, appears to me to be too attenuated to constitute any reasonable basis for deeming the transfer to be within the taxing jurisdiction of Minnesota."

Although Mr. Justice Stone did not concur in the majority's invocation of the 14th Amendment to apply a rule of single taxation to intangibles, the effect of the decision was to place the transfer at death of both tangibles and intangibles on an equal footing. Whether this new rule applied also to "business situs" situations, to shares of stock and to property taxes still remained open.

With regard to "business situs," the court decided the Beidler case the same year. There, the taxing state contended that a "business situs" for the intangibles in question had been established in South Carolina, thus permitting their taxation there. The court examined the basis for the non-domiciliary state's contention and denied the right to assert the tax.

86. 280 U.S. 204 (1930).
87. 188 U.S. 189 (1903).
88. 199 U.S. 194 (1905).
89. In Frick v. Pennsylvania, 268 U.S. 473 (1925) the court held that the state permanently located outside the taxing state. At that time Blackstone v. Miller was distinguished on the ground that intangible personality was "on a different footing from tangible property."
Decided also in the same year was Baldwin v. Missouri. Here, the factual situation was similar to that in the Farmer's Loan & Trust Co. case except that the paper evidence of the debts were kept in Missouri, the taxing state, and some of the debts were secured by liens on Missouri lands. The court threw considerable doubt on the former holding in Saving & Loan Society v. Multnomah County by holding the tax against the estate of a New York decedent invalid.

The First National Bank of Boston v. Maine case, decided in 1932, applied the single tax rule to shares of stock. There, the court refused to permit a non-domiciliary state to impose a death tax on shares in a domestic corporation owned by the estate of a non-resident decedent.

Still undecided was the question whether the due process limitation was to be applied in the case of property taxes assessed on shares in a domestic corporation owned by a non-resident. Before the court faced this problem, however, it decided Senior v. Braden involving the question of whether land trust certificates were "land or interests in land" or intangibles. Ohio levied a personal property tax on land trust certificates representing a domiciliary taxpayer's beneficial interest in foreign land, the legal title to which was held by an out-of-state trustee. The trustee was to hold and manage the realty for the benefit of the certificate holders and to distribute the income or sale proceeds to them in accordance with their interests. The state conceded that if the tax were assessed against "land or interests in land" it would be unconstitutional. The court held that the certificates were interests in land, and the Ohio tax was stricken down as violating both the state and federal constitutions.

In 1937 the court began to make inroads on the rule of the Farmers Loan & Trust Co. and First National Bank of Boston cases, when an effort was made to extend the doctrine to property taxes levied against

91. 281 U.S. 586 (1930).
92. 280 U.S. 204 (1930).
93. 177 U.S. 133 (1900).
94. 284 U.S. 312 (1932).
95. At the time the First National Bank of Boston case was argued, 37 states had enacted reciprocity statutes exempting the local intangible property of decedents domiciled in states which granted a similar immunity from death taxes. The constitutionality of such legislation had been upheld in New York, in an opinion by Chief Judge Cardozo, City Bank Farmers Trust Co. v. New York Central R.R., 253 N.Y. 49, 170 N.E. 489 (1930).
97. 296 U.S. 422 (1935). For discussion of this case see Rodell, Woe Unto You Lawyers 103-134 (1934); Bittker, op. cit. supra note 30, at 653-655: "An interest in land, whether it is the interest of a mortgagee, unpaid vendor, equitable owner, beneficiary of a trust, or whatever, has all the characteristics which, according to the court in the Union Refrigerator Transit case, subject intangible property to taxation by the state of the owner's domicile, while it shares none of the characteristics which were thought to confer a parallel immunity on tangible property."
98. 280 U.S. 204 (1930).
99. 284 U.S. 312 (1932).
intangibles both by the state of "business situs" and by the state of corporate domicil.

In *First Bank Stock Corp. v. Minnesota*, the state of "business situs" levied a property tax on shares of a foreign corporation held by Minnesota residents. Against the argument that the shares were taxable only by the state of incorporation, the court held that the 14th Amendment did not forbid the imposition of the tax by the state of "business situs." The court recognized the right of the state of corporate domicil to tax intangibles, "at least in the absence of activities identifying them with some other place as their 'business situs'."

The reverse situation was presented in *Schuykill Trust Co. v. Pennsylvania*. Here the court sustained the power of Pennsylvania, the state of corporate domicil, to tax local trust company shares which were the property of non-resident stockholders.

The effect of these two decisions was to reaffirm multi-state property taxation of intangibles. However, the *Farmers Loan & Trust Co.* and *First National Bank of Boston* cases remained unquestioned with respect to death taxes.

In the spring of 1939, the problem of multi-state taxation was again presented to the court in three cases, all of which were decided the same day.

In the first, *Newark Fire Insurance Co. v. State Board of Tax Appeals*, a curiously divided court asserted the power to determine the fact of "business situs." At the same time some transitory doubt was cast upon the multi-state property taxation of intangibles which had been so recently re-established. Here, New Jersey had assessed a property tax on intangibles of a domestic corporation. The tax was opposed on the grounds that the intangibles were associated with the New York operations of the company where a "business situs" was allegedly established. For this reason, the taxpayer contended that the intangibles were only taxable in New York. Mr. Justice Reed, writing for Chief Justice Hughes and Justices Butler and Roberts, avoided the question of permissible double taxation, and held, upon a review of the facts, that the taxpayer did not have a "business situs" in New York, and hence was taxable in New Jersey. The other four Justices who participated pointed out the similarity to the situation in *Cream of Wheat Co. v. Grand Forks Co.* and said that the New Jersey tax was valid regardless of whether or not the intangibles had a "business situs" in New York.

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100. 301 U.S. 234 (1937).
101. Reaffirming Hawley v. City of Malden, supra note 56.
102. 303 U.S. 506 (1938).
103. 280 U.S. 204 (1930).
104. 284 U.S. 312 (1932).
105. 307 U.S. 313 (1939).
106. 253 U.S. 325 (1920).
107. For the proposition that an *ad valorem* property tax can be assessed by the state of "business situs," or "commercial domicil," against intangibles belonging to a
The second and third cases, Curry v. McCanless\(^{108}\) and Graves v. Elliot\(^{109}\) involved the imposition of death taxes on trust property by the states of decedent's domicil. In Curry v. McCanless the decedent, a resident of Tennessee, had transferred securities in trust to an Alabama trust company, reserving a life estate in the income and the power to dispose of the trust corpus by will. The settlor died leaving a will disposing of the securities in trust to the same trustee but upon different terms from those contained in the inter vivos trust. In Graves v. Elliot the decedent, while residing in Colorado, created a revocable trust of intangibles to be administered in that state. Later the settlor moved to New York, where she died domiciled without having revoked the trust.

In both cases the taxes immediately considered by the court were those assessed by the decedent's domiciles. In sustaining the Tennessee and New York taxes the majority of the court, per Mr. Justice Stone, held that the states in which the trusts were administered, Alabama and Colorado, might also impose death taxes on the intangibles held in trust. On this latter point there was no disagreement among the members of the court. All of the Justices conceded that the assets were so "localized" as to be taxable at the "trust situs."\(^{110}\) Disagreement arose over whether or not the principle of *mobilia sequuntur personam* should be applied to hold the securities subject to taxes at the decedent's domicil. Since taxation at the "trust situs" was conceded, validation of the taxes here in issue would be tantamount to a removal of the due process limitation on multi-state taxation of intangibles at death.\(^{111}\) With respect to this issue the court was confronted with two conflicting lines of cases. On the one hand, the older cases, involving principally property taxes, took the view that the due process clause did not proscribe multi-state taxation. On the other hand, the Farmers Loan & Trust Co. and First National Bank of Boston cases stood for the opposite proposition. Over the dissents of Justices Butler, McReynolds and Roberts, joined by Chief Justice Hughes, the majority adopted the position taken by the earlier decisions, distinguishing the second line of cases as being exceptional and of very limited application.

The die thus cast by the majority in 1939 set the stage for the *State Tax Commission of Utah v. Aldrich*\(^{112}\) decision in 1942, discussed at the

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\(^{109}\) Alabama followed its victory in this case with the adoption of a reciprocity statute, which specifically exempts trusts from taxation, *ALA. CODE, §§ 1118, 1119*, adopted in 1940, obviously to protect trust business.

\(^{110}\) 307 U.S. 383 (1939).

\(^{111}\) See Farmers Loan & Trust Co. v. Minnesota, supra note 103, and First National Bank of Boston v. Maine, supra note 104.

\(^{112}\) 316 U.S. 174 (1942).
beginning of this paper. By the time this decision was handed down, Chief Justice Hughes and Justices Butler and McReynolds, all of whom had dissented in the McCanless and Elliott cases, were no longer on the court. They had been replaced by Justices Murphy, Byrnes and Jackson.

Earlier in the same year in which the Aldrich decision was handed down, the court had occasion to return to the problem of taxation powers of appointment by the state of the donee's domicil. Previously, in 1926, it had held that where the donor had died domiciled in another state, the domiciliary state of the donee, who exercised the power by will, could not assess a tax. In 1942, the problem was reconsidered in Graves v. Schmidlapp. Here, a Massachusetts decedent left property in trust to Massachusetts trustees with directions to pay the income to his son for life with a general power in the life beneficiary to appoint by will. The son died domiciled in New York, where he exercised the power by a will duly admitted to probate in that state. New York assessed a tax against the donee's estate, including in the gross estate the property appointed under the exercise of the power. The New York court denied the state's constitutional power to assert the tax on the grounds that the jurisdictional limitations of the Wachovia Bank & Trust Co. case were controlling.

The Supreme Court reversed the New York decision and expressly overruled the Wachovia case. The court based its decision on two grounds: first, that the right to appoint the intangible was property in the donee's hands where he was domiciled and such disposition furnished a proper occasion for assessment of a death tax no less than on the transfer of property which he fully owned; second, that regardless of how the power might have been exercised, it was in fact executed by a will probated in New York, thus entitling the transfer to the protection and benefit of New York law.

This trend reached its climax in the Aldrich case, discussed at the beginning of this paper. The principle of single taxation of intangibles, established in the Farmers Loan & Trust Co. and First National Bank of Boston cases, and grounded upon the due process limitation of the 14th Amendment, clashed head on with the Holmes view that the 14th Amendment had nothing to do with the problem, enunciated in Blackstone v. Miller 39 years before, and repeated in Baldwin v. Missouri, in a dissent written during the last term in which he sat on the court. The court divided seven to two in favor of removing the constitutional prohibition against taxation of intangibles by more than one state.

114. 315 U.S. 657 (1942).
115. Supra note 113.
116. The decision is criticized in Guterman, Revitalization of Multiple State Death Taxation, 42 Col. L. Rev. 1249, 1269-1273 (1942).
117. Supra note 103.
118. Supra note 104.
119. 188 U.S. 189 (1903).
120. 281 U.S. 586 (1930).
Finally, as we have seen, the court removed the constitutional restraints on the levy of multiple property taxes against trusts in the Greenough case\textsuperscript{121} but in the Treichler case\textsuperscript{122} adhered to the view that there was a constitutional prohibition against the taxation of tangibles by the state of the decedent’s domicil, if they were located outside the state.

The actual results, in the adoption of state reciprocal legislation, or in the omission of intangible personal property from the scope of the state death taxes, appear to have justified the faith of those, who, like Mr. Justice Holmes, felt that it was not the duty of the Supreme Court to remedy all economic evils. With little friction, the states have proven themselves able to meet the problem, after the Supreme Court left it in their hands. Mr. Justice Jackson’s fears of irresponsible state action, fortunately, have not been borne out by events.

\textsuperscript{121} 331 U.S. 486 (1947).
\textsuperscript{122} 338 U.S. 251 (1949).