

# JURISDICTION OF THE STATES TO TAX —RECENT DEVELOPMENTS

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The recent case of *Farmers Loan and Trust Company v. Minnesota*<sup>1</sup> again raises the interesting and all-important question of how far a state may go under the Fourteenth Amendment in taxing property to which it has in one way or other some connection. The Supreme Court here held that the State of Minnesota could not impose an inheritance tax upon the testamentary transfer of bonds and obligations of Minnesota municipal corporations kept by the owner in New York, where he had been domiciled and where his will was probated, none of such bonds and obligations having any connection with any business conducted by or on behalf of decedent in Minnesota.

The decision, it is seen, overturns a number of cases in the State courts holding that an inheritance tax on intangibles might be collected at the domicile of the debtor,<sup>2</sup> although there were decisions in several states to the contrary.<sup>3</sup> Justices Holmes and Brandeis dissent on the theory that the domicile of the debtor furnishes the law that make the obligations continuing and that it is this domiciliary law in the last analysis that compels payment. "The right to tax exists in this case because the party needs the help of Minnesota to acquire a right and that state can demand a quid pro quo in return."<sup>4</sup> This is consistent with the position taken by the Supreme Court in analogous cases in the past<sup>5</sup> as to the rational basis for jurisdic-

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\* See p. 517 for biographical note.

<sup>1</sup> 50 Sp. Ct. Rep. 98 (Jan. 6, 1930).

<sup>2</sup> *Re Adams Estate*, 167 Iowa 382, 149 N. W. 531; *Graves v. Shaw*, 173 Mass. 205, 53 N. E. 372; *Borden v. Burrall*, 221 Mass. 212, 109 N. E. 153; *State v. Probate Court*, 128 Minn. 371, 150 N. W. 1094; *Re Rogers' Estate*, 149 Mich. 305, 112 N. W. 931; *Blackstone v. Miller*, 188 U. S. 189, 47 L. Ed. 439.

<sup>3</sup> *Chambers v. Mumford*, 187 Col. 223, 201 Pac. 588; *People v. Blair*, 276 Ill. 623, 115 N. E. 218; *Gilbertson v. Oliver*, 129 Iowa 568, 105 N. W. 1002.

<sup>4</sup> 50 Sp. Ct. Rep. 98, 101-102.

<sup>5</sup> "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

tion to tax, and sounds very much like the language used by Justice Holmes in *Blackstone v. Miller*.<sup>6</sup>

Two objections have been made to the argument. In the first place the law of any other state where jurisdiction might be obtained over the debtor would likewise compel him to pay. Again, the law of the domicile could not do otherwise than compel the debtor to pay.<sup>7</sup> That domicile could not impair the obligation of contracts nor could it take the creditor's property without due process of law. Thus even back of the domiciliary law is the Federal Constitution which prohibits the State of Minnesota from "abolishing the debt by its fiat."

It is submitted that the objections are not tenable and so far as the Holmes dissent enunciates a conflict of laws theory, it is clearly sound. It is no answer, as the opinion points out, that the creditor might recover in any state wherein he obtains personal service of the defendant, for such recovery would be not at all by virtue of the contract law of the forum but solely by virtue of its conflict of laws rule which looks to Minnesota law to determine the creditors substantive rights. Again, although the Constitution guarantees the creditor the inviolability of his contract rights, it does so by making Minnesota impotent to change its law. Any attempt to do so is null and void so that as the venerable Justice points out, it is the Minnesota law (albeit under compulsion) that makes the contracts binding.<sup>8</sup>

The answer to Holmes' argument, in this case, is to be found in the opinion of Justice Stone. The secret lies in a simple analysis of the character of the tax in question.

Mr. Justice Stone agrees with the result reached by the majority but writes a concurring opinion. He rests his decision

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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 those services, or otherwise to benefit the person or property taxed . . . the taxation of such property . . . partakes rather of the nature of an extortion than a tax . . ." *Union Transit Co. v. Kentucky*, 199 U. S. 194, 202.

<sup>6</sup> 188 U. S. 189, 47 L. Ed. 439: "What gives a debt validity? Nothing but the fact that the law of the place where the debtor is will make him pay. It does not matter that the law would not need to be invoked in the particular place."

<sup>7</sup> See Goodrich, *Conflict of Laws* (1926) p. 85.

<sup>8</sup> See Carpenter on taxing debts at the domicile of the debtor, 31 Harv. L. Rev. 924 ff.

upon what, it is submitted, is the sound ground from a logical viewpoint, namely that what is here taxed is nothing more than the testamentary transfer of the bonds and that transfer must be by virtue of the law of New York. The tax is an excise or privilege tax, and no state can impose such a tax except the state where the act is performed or where the privilege is enjoyed.<sup>9</sup> "It is enough to uphold the present decision that the transfer was effective in New York by one domiciled there and is controlled by its law."<sup>9a</sup>

The majority not only held that the tax in question could not be imposed at the debtor's domicile, expressly overruling *Blackstone v. Miller*,<sup>10</sup> but they purported to indicate that the tendency of the Supreme Court to curb the greed of the states on matters of taxation is and will continue to be a definite policy of the Court. Some portions of the opinion are obviously designed to hint that other situations which result in "double taxation" may come under the cloud of the Fourteenth Amendment. It has been thought that double taxation alone was not inconsistent with due process of law and many decisions and dicta testify to the validity of multiple taxation upon the same

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<sup>9</sup> See *Provident Savings Association v. Kentucky*, 239 U. S. 103, 60 L. Ed. 167, L. R. A. 1916 C, 572. See Carpenter, *supra*, note 8, at p. 922.

<sup>9a</sup> Does this argument prove too much? Suppose the decedent had been domiciled in Connecticut, his bonds being permanently located in New York. Connecticut could impose an inheritance tax. *Silberman v. Blodgett*, 277 U. S. 1. But this is because both Connecticut law and New York law is necessary to effect the transfer. See Goodrich, *Conflict of Laws*, p. 377-378. In no event does Minnesota law contribute to making effective the transfer.

<sup>10</sup> "*Blackstone v. Miller* no longer can be regarded as a correct exposition of existing law and to prevent misunderstanding it is definitely overruled." In *Blackstone v. Miller*, it had been held that New York might lawfully impose an inheritance tax upon simple choses in action of a non-resident decedent because the debtor was domiciled in New York and the debt had existed for some months.

It is to be noted that Dean Carpenter in his article, *supra*, note 8, at p. 930 predicted the repudiation of *State Tax on Foreign Held Bonds*, 15 Wall. 300, 21 L. Ed. 179, in which the Supreme Court held invalid a Pennsylvania statute taxing foreign held bonds of Pennsylvania corporations. *Blackstone v. Miller*, *supra*, pointed in that direction. The conflict of Laws theory of Mr. Justice Holmes seemed to demand it. Instead, the Court now expressly overrules *Blackstone v. Miller*, and, as Mr. Justice Holmes apparently thinks, repudiates his doctrine of conflict of laws. It is urged, however, that this latter result is a non-sequuntur, for reasons assigned in the text.

property.<sup>11</sup> There are growing limitations, however, upon this practice by the states where it is thought the results are unfair. To appraise the significance of the current case it is necessary to note briefly the extent of the checks imposed to date upon double taxation.

The starting point of course in all cases raising the question of state power to tax under the Fourteenth Amendment is the proposition that no state may tax property that is not within its jurisdiction.<sup>12</sup> The problem is to determine and measure the jurisdiction of the state over property for purposes of taxation. It is to be observed that there is no objection to "double taxation" if the state has jurisdiction. If the two or more taxes are imposed by the state with conceded jurisdiction there can be no objection under the Federal Constitution providing, of course, the tax measures are uniform, for public purposes and are not discriminatory. There is no more objection to a state with jurisdiction taxing the same property twice than there is to doubling the tax upon the same property. The questions arise under the due process clause where two or more states attempt to tax the same property and thus the problem is one of jurisdiction.

As to property taxes, jurisdiction to tax land is, of course, perfectly well settled. No state but the state of the situs of the land can tax it,<sup>13</sup> nor can a state measure a personal tax on its citizen by the value of his foreign realty.<sup>14</sup> It is not due process of law. In respect to a tax on personalty a distinction is taken between tangibles and intangibles. It is settled law now that tangibles may be taxed in the state where they are permanently located<sup>15</sup> and if they are so permanently located in a foreign state they are not taxable at the domicile of the

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<sup>11</sup> See *Cream of Wheat v. County of Grand Forks*, 253 U. S. 325, 64 L. Ed. 931; *Fidelity & Columbia Trust Co. v. Louisville*, 245 U. S. 54, 62 L. Ed. 145; *Blodgett v. Silberman*, 277 U. S. 1, 72 L. Ed. 749; *Bristol v. Washington Co.*, 177 U. S. 133, 44 L. Ed. 701. See opinion of Mr. Justice Stone in *Farmers Loan & Trust Co. v. Minnesota*, 50 Sp. Ct. Rep. 98, 101; "Hitherto the fact that taxation is 'double' has not been deemed to affect its constitutionality . . ."

<sup>12</sup> *State Tax on Foreign Held Bonds*, 15 Wall. 300, 21 L. Ed. 179; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 50 L. Ed. 150. See also Goodrich, *Conflict of Laws* (1926), p. 65.

<sup>13</sup> See Goodrich, op. cit., pp. 72-74 and cases cited.

<sup>14</sup> *Louisville & J. Ferry Co. v. Kentucky*, 188 U. S. 385, 47 L. Ed. 513.

<sup>15</sup> *Coe v. Errol*, 116 U. S. 517, 29 L. Ed. 715.

owner.<sup>16</sup> But if they are transient and only temporarily within the foreign state they are not taxable there,<sup>17</sup> except where there is always a number of such or similar chattels within the state in which case they may be taxed upon the "average" basis,<sup>18</sup> or where there is a temporary stoppage for the performance of some act with respect to the property for the benefit of the owner.<sup>19</sup> Tangible property that is transient and has not acquired such a situs for taxation is still taxable at the domicile of the owner on the theory of *mobilia sequunter personam*.<sup>20</sup>

With respect to an inheritance tax upon tangibles the same limitation has been extended. Although formerly an inheritance tax could be constitutionally imposed at the domicile upon the transfer of all tangible property wherever located,<sup>21</sup> it is now settled that the domiciliary tax cannot include tangibles that are permanently located in another state.<sup>22</sup> It is not due process of law.

Thus while the maxim *mobilia sequunter* has here lost much of its force until taxation by more than one state on the same tangibles is eliminated, the dogma has not been emasculated to an equal extent with respect to intangibles. Accordingly there is much "double taxation" of this type of property since it is recognized that intangibles may acquire a situs for tax purposes other than the domicile of the owner so that certain kinds of intangibles such as bonds,<sup>23</sup> negotiable notes<sup>24</sup> and bank deposits<sup>25</sup> may be taxed where they are permanently kept or

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<sup>16</sup> *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 50 L. Ed. 150.

<sup>17</sup> *Kelly v. Rhoades*, 188 U. S. 1, 47 L. Ed. 359. See Powell, *Taxation of Things in Transit*, 7 Va. L. Rev. 167, 245, 429, 497.

<sup>18</sup> *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. Ed. 613.

<sup>19</sup> *Bacon v. Illinois*, 277 U. S. 504, 57 L. Ed. 615; *McCutchen v. Board of Equalization*, 87 N. J. Law 370, 94 Atl. 310. These cases, however, arise under the Commerce Clause and not under the Fourteenth Amendment.

<sup>20</sup> *Southern Pacific Co. v. Kentucky*, 222 U. S. 63, 56 L. Ed. 96.

<sup>21</sup> See Goodrich, *Conflict of Law*, p. 106.

<sup>22</sup> *Frick v. Pennsylvania*, 268 U. S. 473.

<sup>23</sup> *Scottish Union etc. v. Bowland*, 196 U. S. 611, 49 L. Ed. 619; *Buck v. Miller*, 147 Ind. 586, 45 N. E. 647.

<sup>24</sup> *New Orleans v. Stemple*, 175 U. S. 309, 44 L. Ed. 174.

<sup>25</sup> *Fidelity & Columbia Trust Co. v. Louisville*, 245 U. S. 54, 62 L. Ed. 145; *Schmidt v. Fatley*, 148 Ind. 150, 47 N. E. 326.

where they have acquired a business situs.<sup>26</sup> It has been held that jurisdiction to tax choses in action exists at the domicile of the debtor<sup>27</sup> and at the domicile of the creditor<sup>28</sup> on the theory that either domicile has jurisdiction for tax purposes. The former view is probably not good law now,<sup>29</sup> and is certainly not so far as the inheritance tax on bonds is concerned, as the principal case decides.

Not two years ago, the Court by a unanimous decision, upheld an inheritance tax by the State of Connecticut imposed upon bonds held by a citizen domiciled in that state, although such bonds had never been in the state, were kept in New York, used for business purposes there and were subject to taxation there.<sup>30</sup> It was, of course, urged upon the Court that here was a splendid opportunity to abolish the distinction between tangible and intangible wealth, and to extend the rule of the Frick case to prevent taxation at the domicile of the owner upon property which had acquired a taxable situs and was subject to the death duties of another state. This the Court refused to do and the power of Connecticut was upheld upon the strength of the doctrine of *mobilia sequuntur personam*, which, the Court thought was too deeply imbedded in the law to be disturbed.

Thus it is seen that the theory of *mobilia sequuntur* together with the inconsistent doctrine that intangibles may acquire a taxable situs elsewhere has led to the possibility, and in many cases the actual taxation of the same property or the same succession by two or more jurisdictions. Last fall, the Court in a case<sup>31</sup> which raised the simple question whether the domicile of the beneficiary of a trust could impose a tax on the intangible wealth held in trust, such wealth being actually located in and the trustee being domiciled in another state, took occasion to drag into its opinion the wholly irrelevant doctrine of *mobilia sequuntur personam* and to disclose the injustice and evils of

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<sup>26</sup> *Bristol v. Washington*, 177 U. S. 133, 44 L. Ed. 701; *Buck v. Miller*, 147 Ind. 586, 45 N. E. 647.

<sup>27</sup> *Wilcox v. Ellis*, 14 Kan. 588 and see language of Mr. Justice Holmes in *Blackstone v. Miller*, 188 U. S. 189, 47 L. Ed. 439, which, however, was an inheritance tax case. See note 2, supra.

<sup>28</sup> *Kirtland v. Hotchkiss*, 100 U. S. 491; 25 L. Ed. 558.

<sup>29</sup> See *State Tax on Foreign Held Bonds*, 15 Wall. 300; 21 L. Ed. 179; see also *Foresman v. Byrns*, 68 Ind. 247.

<sup>30</sup> *Blodgett v. Silberman*, 277 U. S. 1.

<sup>31</sup> *Safe Deposit & Trust Co. of Baltimore v. Virginia*, 50 Sp. Ct. 59.

the practice of the states.<sup>32</sup> The entire matter was a dictum and probably meaningless. Again in the present case, the majority speaking again through Mr. Justice McReynolds engage in much talk about the alteration and change of conditions and unfairness and injustice of double taxation not so much by reason of the doctrine of *mobilia sequuntur personam* which the Court appeared this time to approve, but upon the practice of foreign states taxing the same property which it seemed conceded the domicile had jurisdiction to tax.<sup>33</sup> Again the discussion is uncalled for and the baldist of dicta. The case is a simple one and the question narrow. *Mobilia sequuntur personam* was not involved and had no application. Nor did the practice of taxing intangibles where their documentary evidence is permanently located. The Court had no occasion to examine the policy which the states have followed, with the assent of the Supreme Court, for three quarters of a century. It is submitted, that in view of the position maintained by an undivided Court of less than two years ago,<sup>34</sup> intangibles may still be taxed at the domicile of the owner and that domicile may continue to impose death duties, regardless of the fact that such property may have acquired a taxable situs and is in fact taxed elsewhere.

It is further submitted that it is the sheerest of folly to expect a change in the law that the Court has carefully developed for years allowing the states to tax the succession of intangibles when the documentary evidence is permanently located therein.

Although it is now settled, of course, that the domicile of the debtor may not tax the succession of bonds where such is

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<sup>32</sup> See Note, 78 Penn. L. Rev. 532-538 (1930).

<sup>33</sup> "While debts have no actual territorial situs, we have ruled that a state may properly apply the rule *mobilia sequuntur personam* and treat them as localized at the creditor's domicile for taxation purposes. Tangibles with permanent situs therein, and their testamentary transfer, may be taxed only by the state where they are found. *And we think the general reasons declared sufficient to inhibit taxation of them by two states apply under present circumstances with no less force to intangibles with taxable situs imposed by due applications of the legal fiction. . . .* And certainly existing conditions no less imperatively demand protection of choses in action against multiplied taxation whether following misapplication of some legal fiction or conflicting theories concerning the sovereign's right to exact contributions. For many years the trend of decisions here has been in that direction." (Italics mine.)

<sup>34</sup> *Blodget v. Silberman*, 277 U. S. 1.

the only claim to jurisdiction to tax, there is still much "double taxation." It is still possible for states to tax owners of intangibles at their domicile, though such intangibles are taxed elsewhere on the theory that they have a "situs" there.<sup>35</sup> It is still possible to tax the testamentary disposition of intangibles at the domicile of the testator,<sup>36</sup> although such intangibles are taxable elsewhere.<sup>37</sup> To make an estate subject to the jurisdiction of but one state to impose death duties, it would be necessary either to overrule the Silberman case, and prohibit the domicile from taxing when a tax was permissible elsewhere, or prohibit such taxing at any state where the documentary evidence of such intangible might be permanently located or have a business situs. The Supreme Court in the majority opinion cited the Silberman case with approval and mentioned, with apparent approval, some of the long and impressive line of decisions approving direct property taxes and inheritance taxes where the documents are permanently located or have been "localized." It can hardly be supposed that this decision is intended, without mentioning them, to overrule directly *Wheeler v. Sohmer*,<sup>38</sup> and the large number of state decisions allowing such a succession tax,<sup>39</sup> and to overrule indirectly *Scottish Union and National Insurance Co. v. Bowland*,<sup>40</sup> *New Orleans v. Stemple*,<sup>41</sup> *Parish of New Orleans v. Comptoir Nationale D'Escompte*,<sup>42</sup> *Bristol v. Washington Co.*,<sup>43</sup> *Liverpool and London and Globe Insurance Co. v. Board of Assessors*,<sup>44</sup> and the mass of state decisions which have allowed direct property taxes under similar circumstances.<sup>45</sup>

Apparently, then, the majority of the Court had no intention of throwing discredit upon either of these well established

<sup>35</sup> *Fidelity & Columbia Trust Co. v. Louisville*, supra, note 25.

<sup>36</sup> *Blodget v. Silberman*, supra, note 34.

<sup>37</sup> *Callahan v. Woodbridge*, 171 Mass. 595, 51 N. E. 176; *Matter of Morgan*, 150 N. Y. 35, 44 N. E. 1126; *Wheeler v. Sohmer*, 233 U. S. 434, 58 L. Ed. 1030; *In re Estate of Adams*, 167 Iowa 382, 149 N. E. 531.

<sup>38</sup> 233 U. S. 434, 58 L. Ed. 1030.

<sup>39</sup> See Cases collected in Goodrich, *Conflict of Laws*, p. 109, notes 55, 56, 57.

<sup>40</sup> 196 U. S. 611, 48 L. Ed. 619.

<sup>41</sup> 175 U. S. 309, 44 L. Ed. 174.

<sup>42</sup> 191 U. S. 388, 48 L. Ed. 701.

<sup>43</sup> 177 U. S. 133, 44 L. Ed. 701.

<sup>44</sup> 221 U. S. 346, 55 L. Ed. 762.

<sup>45</sup> See cases collected in Goodrich, *Conflict of Laws*, pp. 87-92 and notes



doctrines. Just how they propose to right the "injustice" and "oppressive" results is just a little bit difficult to guess. About the only safe conclusion is that the Court took occasion to employ some very fine but broad language in a case of only moderate significance. The law, however, seems perfectly clear and the case is significant for exactly what it decides, and no more. While this reduces the possibility of multiple taxation of inheritances, it in no sense restricts such taxation to one state, nor does it give reasonable promise for any further restriction in the future. As to promising any modification in the general application of *mobilia sequuntur personam*, the obiter in this case tends more than anything else to neutralize the uncalled for excesses of the opinion in the *Safe Deposit etc. v. Virginia*. About the only net result of the two cases is that the lawyer had best take the decisions for what they actually decide and put no faith in dicta.

Nor is such a result undesirable. In spite of the continued and persistent pressure brought to bear upon the Court and in spite of the criticism from high sources and competent scholars,<sup>46</sup> it is submitted that the practice of the states should not be disturbed. In spite of the fact that, as Mr. Justice McReynolds insists, "primitive conditions have passed" it is very doubtful if man's primitive impulse to avoid paying taxes has passed. Until the owners of intangible wealth demonstrate some more inclination to pay one tax fairly imposed than they have in the past, the occasional injustice in a particular case must yield to the expediency of laws which are designed to prevent the entire escape of property which is all too easy to conceal from the assessor.

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<sup>46</sup> See e. g. Goodrich, *Conflict of Laws*, p. 89.

# INDIANA LAW JOURNAL

Published Monthly, October to June, inclusive, by The Indiana State Bar Association

EXECUTIVE OFFICE, 319 N. PENNSYLVANIA, INDIANAPOLIS, INDIANA  
EDITORIAL OFFICE, BLOOMINGTON, INDIANA

SUBSCRIPTION PRICE, \$3.00 A YEAR SINGLE COPIES, 50 CENTS  
Canadian Subscription Price is \$3.50; Foreign, \$4.00

Subscription price to individuals, not members of the Indiana State Bar Association, \$3.00 a year; to those who are members of the association the price is \$1.50, and is included in their annual dues, \$5.00.

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