Missouri Law Review

Volume 19
Issue 1 *January 1954*

Article 6

1954

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Russell W. Baker

Missouri Law Review

Volume XIX JANUARY, 1954 Number 1

# IN THE ADMINISTRATION OF INTANGIBLES: MISSOURI'S SECTION 466.010 IN PERSPECTIVE

RUSSELL W. BAKER*

## *Introductory Statement*

Among many measures considered in the Missouri legislative sessions of 1951 was the now moderately famous Senate Bill 63, dealing with the administration of estates of non-residents. By the time the bill was reached in committee, its provisions—much to the amazement of its principal sponsor, the Board of Governors of the Missouri Bar—had produced inter-state repercussions. Governors Stevenson of Illinois and Arn of Kansas expressed themselves in opposition to enactment. The Attorney General of Kansas, accompanied by officials of the Kansas Tax Department and members of the Kansas Legislature, journeyed to Jefferson City and on March 31, 1951, personally appeared before the Senate Judiciary Committee where they opposed passage of the bill on several grounds. It was said that the bill would deprive the State of Kansas of inheritance tax revenues, and yet perhaps cause double taxation of many estates; that it would entail double administration of many estates, one in Missouri and one in Kansas, much to the expense and discomfiture of the beneficiaries; that the bill perhaps was unconstitutional.

Notwithstanding these and similar pressures from other sources, the bill speedily passed the Legislature, unanimously in the Senate and by a vote of 116 to 2 in the House. Upon presentation of the measure to Governor Smith for his action, the Governor set a special hearing, at which he received all interested groups, heard their views and accepted written briefs respecting the propriety of the legislation. On August 20th

*Member Kansas City Bar. B.S. University of Kansas, 1942; J.D. University of Michigan, 1948.

he gave his approval and the bill became law effective October 9, 1951.[1]

So ended a period of almost thirty years in which Missouri by sheer self-denial had refused to allow any effective administration upon the estates of non-residents.[2] Since 1923 the desires of beneficiaries, executors and trustees to use the convenient administration machinery of Missouri courts had been thwarted by an unusual series of legislative enactments. Now Senate Bill 63, if certain conditions are met, leaves it to the judgment of the parties interested in the estate whether they will ask for Missouri administration.

Two years have elapsed and experience with the application of the new law now permits an appraisal of its provisions with clearer perspective. It is the purpose of this article to consider the legislative history and background of Section 466.010 (Part I), and the general scope and effect of administrations of intangibles (Part II). Special attention is given to problems of situs of corporate stock in Part III, and in Part IV, to constitutional limitations, of due process and full faith and credit, as they relate to probate decrees and jurisdiction. In Part V there will be considered the effect of a new Kansas statute having an apparent intention of interfering with, and attempting to nullify, Missouri administrations of the estates of Kansas decedents,[3] and the probable reception of the Kansas statute in the courts.

## I. History of Section 466.010

The original legislative action regarding administration of intangibles in Missouri came in 1923 when the legislature had before it decisions such as those in *Crohn v. Clay County State Bank*[4] and *Troll v. Third National Bank of St. Louis*,[5] which definitely called for correction. In the *Crohn* case the Kansas City Court of Appeals held that payment of a deposit by the defendant bank to an Iowa domiciliary executor did not properly acquit the bank of its liability and the public administrator of Jackson County, who received letters after such payment, could recover the deposit a second time. The court felt that it was bound to reach this

1. Mo. Laws 1951, p. 882, approved August 20, 1951, effective October 9, 1951, repealing and re-enacting Mo. Rev. Stat. § 466.010 (1949).

2. Although the refusal to administer had extended only to personal property of intangible form—stocks, bonds, credits and other choses in action—that form happened to be the one in which an overwhelming proportion of an individual's wealth is customarily kept.

3. Senate Bill 190, passed in the closing days of the recent Kansas session, approved by the Governor March 30, 1953.

4. 137 Mo. App. 712, 118 S.W. 498 (1909).

5. 278 Mo. 74, 211 S.W. 545 (1919).

conclusion because of earlier decisions of the Missouri Supreme Court[6] and refused to accept the distinction that in those cases the payment to the foreign representative occurred after local letters had issued. In the *Troll* case, the supreme court required administration of shares of stock of a St. Louis bank, although the certificates had been administered at the Illinois domicile, and there were no debts or other assets in Missouri.

Decisions such as these no doubt caused unnecessary administrations in Missouri with delay and expense far out of proportion to the amounts involved. As a result, the legislature enacted a new section, 271-a,[7] of the *Revised Statutes*. The section permitted avoidance of administration of intangibles not exceeding $1000.00 in value if the foreign personal representative filed certified copies of his appointment in the proper Missouri probate court, together with his affidavit that there were no debts or tangible property in Missouri. If, at the end of six months after such filing, no claims were presented or remained unpaid and the court was satisfied that there was no tangible property in Missouri, a certificate issued vesting the foreign personal representative with rights to the Missouri intangibles.

This statutory solution, confined to small estates, was not entirely inappropriate in its original form, but it became so in 1925, when the lawmakers saw fit to extend the prohibition to large estates as well as small, by striking out the $1000.00 limitation on the application of Section 271-a. Administration of purely intangible estates in Missouri thus became impossible regardless of their value, where decedents were nonresidents, if no Missouri debts appeared.[8]

The statute continued in that form for nearly twenty years,[9] until 1943, when the legislators decided that the "benefits" of the section should not be restricted to wholly intangible estates, but should be applied to mixed estates, and amended Section 272 accordingly. As a collateral matter, procedure was simplified; applications and affidavits in the probate court were eliminated and the statute became self-executing. The resulting Section 272, inasmuch as it is the immediate predecessor of

6. *E.g.* Bartlett v. Hyde, 3 Mo. 490 (1834). See generally Fizzell, *Payment of Debt of Foreign Representatives or Heirs*, 18 Mo. LAW BULL. 3 (1920).
7. Mo. Laws 1923, p. 107. Approved April 2, 1923, effective June 25, 1923.
8. Mo. Laws 1925, p. 101. Approved April 29, 1925, effective July 9, 1925.
9. Mo. REV. STAT. § 273 (1929); Mo. REV. STAT. § 272 (1939).

Senate Bill 63, is set forth in the margin.[10] As will be noted in a careful reading the 1943 version was worded so that ancillary administration of land and tangibles was maintained as before, but administration of intangibles could be had only if Missouri land and tangibles were insufficient to discharge debts. Observe the incredible result: A merchant doing all his business in Missouri, whose home was across the state line in Kansas, would upon death have his business property administered in two states. His merchandise inventory, business fixtures and equipment—tangibles—were administered under the jurisdiction of the Missouri probate court. His cash in a Missouri bank and his accounts receivable from Missouri customers—intangibles—could not be administered there, but were frozen for a period of six months, after which they were transmitted to his domiciliary executor at the place of his residence, and administered upon in another probate court. If our Missouri merchant had debts and administration expenses, as he no doubt would, note that they were to be satisfied from the sale of merchandise and business equipment; only if insufficient amounts were realized at the forced sale of these items could resort be had to his cash in bank and his highly liquid accounts receivable. Lawyers will have to forgive the layman who feels that this arrangement was somewhat inefficient, where not catastrophic.

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10. Mo. Laws 1943, p. 129, Approved July 26, 1943, effective Nov. 22, 1943, reads as follows:

"Section 272. *Administration of estates of non-resident decedents—how and when made.* No letters of administration shall be granted upon the estate of any decedent non-resident as to any shares of stock, bonds, credits or choses in action except upon the application of a creditor within this State or upon the showing to the Court by an ancillary administrator within this State that the lands and other personal property of such decedent within this State will not be sufficient to discharge the debts of such estate. Such application or showing shall be made in the probate court of that county in Missouri in which letters of administration might otherwise be granted, within a period of six months after the granting or refusal of letters upon the estate of such decedent at his domicile, or in the event no order refusing letters is made nor administration had upon the estate of such decedent at his domicile, then within six months after the date of death of such decedent. Unless before the expiration of such period of time an ancillary administrator within this State, pursuant to application or showing as herein provided, has made a demand for transfer, payment or delivery upon such shares of stocks, bonds, credits, or choses in action, such shares of stock, bonds, credits or choses in action may be transferred, paid or delivered to or in the name of the domiciliary executor or administrator or upon his order, or to any heir, legatee, distributee or other person entitled thereto; and the person, firm or corporation or agents thereof making such transfer, payment or delivery shall not be liable for the debts of or claims against any such decedent or his estate by reason of having made such transfer, payment or delivery. Any letters granted upon the application of a creditor under the terms of this section shall be revoked immediately upon showing to the court the satisfaction in any manner of the debt upon which such application was granted, together with all other claims, and debts filed on or before the date of such satisfaction and the payment of all court costs and fees of such proceedings."

The result of the 1943 amendment to Section 272 was not felt in the central regions of Missouri, but along the eastern and western borders of the state the impracticability of the law was recognized when experience with it became widespread. Particularly acute was the situation in Kansas City where the metropolitan business community is to a great extent concentrated in Missouri, but large and growing residential areas are situated immediately across the state boundary in Johnson County, Kansas. The persons resident there are frequently those whose estates are large, but whose business interests are inextricably mingled in the Missouri community. The bulk of their estates, save for jointly-owned residences and automobiles, is usually in Missouri. Consequently, the discriminatory 1943 Missouri amendment was of real concern to them and their legal advisers. In addition, Kansas law had discriminatory features. Kansas had enacted, in 1939, a new probate code which prohibited foreign corporations, including both national and state banks of other states, from acting as testamentary trustees of wills of Kansas residents, and the subsequent decisions of the Kansas Supreme Court interpreting the prohibition have given it exceedingly strong operation.[11] The net result of the Missouri and Kansas statutes, after 1943, was that a Johnson County testator having his principal, intangible assets in Missouri could not appoint his Missouri bank, with which he had done business all his life and whose trust officers inspired his confidence, as his testamentary trustee. Missouri's statute placed a freeze on his assets for a period of six months after his death, then compelled that property to be transmitted to the Kansas Executor. The Kansas statute prohibited its return to Missouri for trust administration. Thus Missouri forced assets down a one-way street to Kansas and Kansas law securely trapped them. It normally came as a surprise to a Kansan planning his will to find that his intangible property kept in a safe deposit box in a Missouri bank and his bank accounts could not at his death be moved upstairs to the trust department of the bank for administration as a part of his testamentary plan.

General dissatisfaction with these consequences constrained the legislature, through Senate Bill 63 as we have seen, to retreat somewhat from the flat prohibition adopted in 1943, and permit Missouri administration of intangibles under certain conditions. Section 466.010,

11. KAN. GEN. STAT. § 59-1701 (1949). *In re* Lowe's Estate, 155 Kan. 679, 127 P. 2d 512 (1942), construed this statute to prohibit transmittal of Kansas-administered property to Missouri banks as trustees.

which is set forth in the margin[12] permits administration of "stocks, bonds, credits or choses in action . . . upon a showing to the court by any legatee under, or executor named in, the will of such decedent that by such will a legacy is left, outright or in trust, to a natural person residing in Missouri, or to a corporation, including a national or state bank or trust company having its chief office, . . . in this state." Upon a showing that a legacy is left to a Missourian administration may be had; there is no other condition. The testator need not request Missouri administration in his will or name an executor to act in Mis-

12. § 466.010, as repealed and re-enacted by Mo. Laws 1951, p. 882, reads as follows:

"Section 466.010. *Administration of estates of non-resident decedent—when granted.* No letters testamentary or of administration shall be granted upon the estate of any decedent non-resident as to any shares of stock, bonds, credits or choses in action except upon the application of a creditor within this state or upon the showing to the court by an ancillary administrator within this state that the lands and other personal property of such decedent within this state will not be sufficient to discharge the debts of such estate or upon a showing to the court by any legatee under, or executor named in, the will of such decedent that by such will a legacy is left, outright or in trust, to a natural person residing in Missouri, or to a corporation, including a national or state bank or trust company having its chief office and principal place of business in this state. Such application or showing shall be made to the Probate Court of the county in Missouri in which letters testamentary or of administration might otherwise be granted, within a period of six (6) months after the date of death of such decedent, or in the event an order granting or refusing letters is made upon the estate of such decedent at his domicile, then such applications may be made any time within six (6) months after the date of that order. Unless before the expiration of such period of time an executor, administrator or ancillary administrator appointed within this state, pursuant to application or showing as herein provided, has made a demand for transfer, payment or delivery upon the issuer, obligor or debtor, or person in possession, of such shares of stocks, bonds, credits or choses in action, may be transferred, paid or delivered to or in the name of his order, or to the heirs if such deceased died intestate, or to the legatee, distributee or other person entitled thereto; and the person, firm or corporation or agents thereof making such transfer, payment or delivery shall not be liable for the debts of or claims against any such decedent or his estate by reason of having made such transfer, payment or delivery. Any letters granted upon the application of a creditor under the terms of this section shall be revoked immediately upon showing to the court the satisfaction in any manner of the debt upon which such application was granted, together with all other claims, and debts filed on or before the date of such satisfaction and the payment of all costs and fees of such proceeding. Any such administration proceeding commenced in this state upon the application and showing of any legatee under, or executor named in, the will of such decedent, shall proceed to conclusion as in other administration proceedings in this state, and after the payment of all costs of such administration proceeding, and of all claims duly allowed therein against such estate, and of all legacies given by such will, outright, or in trust, to natural persons residing in this state and to corporations, including national or state banks and trust companies, having their chief offices and principal places of business in this state, if such assets be sufficient therefor, and if not, then so far as such assets will extend, any balance remaining shall be paid and delivered over either to the foreign domiciliary executor or administrator, if any, or to the legatees under decedent's will, or if decedent left no will, to the heirs or other persons entitled thereto under the law of decedent's domicile, as such probate court of this state may order."

souri. The opportunity to administer in Missouri is, however, confined to testate estates in which a Missourian is interested and intestate estates cannot have the benefits of the law. In this respect the law is too limited. If the hypothetical Missouri merchant previously referred to as having his home across the state line fails to leave a legacy to a Missourian, or executes no will at all, the arbitrary mode of administering his Missouri assets described above continues in effect. This obvious deficiency could be remedied either by a simple amendment to the current law or by adoption of legislation similar to that in Kansas or Illinois, both of which permit ancillary administration in testate and intestate cases.[13]

Such then is the present condition of the Missouri statute relating to administration of intangibles of a non-resident. Exactly what property is within the jurisdiction of Missouri so as to be administerable under the statute, and the full faith and credit to be given such administrations, will be considered in succeeding portions of this article.

## II. What May Be Administered In Missouri: Situs of Intangibles

Where a will qualifies an estate for Missouri administration under Section 466.010, the administration will be had upon real estate and tangible personal property as a matter of course. It will also include all intangible personal property of the decedent within Missouri's jurisdiction. That is, we need not stop to inquire whether the statutory itemization of "stock, bonds, credits or choses in action" includes every possible intangible. If there be any item of intangible property not covered, it is still subject to administration in Missouri, because the scheme of Section 466.010 is to cut down the jurisdiction of probate courts by excluding administration only upon the quoted items unless the qualifying conditions are met. Any items not designated are unaffected by the section, leaving general jurisdiction over them intact.

The problem, therefore, becomes one of determining what intangible property of a non-resident decedent will be deemed within the jurisdiction of Missouri, or more generally, when is such property deemed within the jurisdiction of any state for administration purposes.

### A. *Situs Generally*

Some exploratory observations regarding the nature of the problem

13. Kan. Gen. Stat. § 59-802 (1949); Ill. Ann. Stat. Ch. 3, § 241 (Smith-Hurd, 1953). And see Part V *infra*.

of jurisdiction over intangible property are in order. It is usually said that a personal representative has power to collect and administer upon assets extending throughout but not beyond the state which appoints him.[14] True, he may in addition be granted certain extra-territorial powers and rights by the statutes of other states, but any such grant is clearly by sufferance of the foreign state.[15]

Now it is deceptively simple to say that the power of an administrator extends to property "within" his state. An intangible frequently has points of legal contact in several states. A promissory note may be kept in State A, while the promissee or endorsee lives in State B and the maker in State C. Similarly a certificate of corporate stock may be kept in State A, while the owner lives in State B and the corporation is organized and does business in State C. In multi-state situations of this type careful analysis of jurisdiction of the respective governments involved is required. "Jurisdiction" is used here in the sense of the whole exercisable power of a state lodged in the legislature and in the courts. Distinctions between legislative and judicial jurisdiction are not immediately pertinent.

Special attention should be given to the role of the situs concept in the process of determining jurisdiction. Courts have traditionally deduced jurisdiction over an item from the situs of the item. In the case of a tangible that approach is natural, for the authority of the court where the tangible is located can hardly be disputed.[16] It is a judicial fact of life, springing from the obvious power of that court to control and dispose of it through the physical effects of its writs. When judges come to the consideration of intangible items they continue to use the concept of situs, even while observing that an intangible has no real location. A fictional situs is attached to a given intangible; for the

14. *E.g.* Vaughan v. Northup, 15 Pet. 1 (U.S. 1841); Emmons v. Gordon, 140 Mo. 490, 41 S.W. 998 (1897); In the matter of Ames Estate, 52 Mo. 290 (1873); Mo. REV. STAT. §§ 462.010, 462.020 (1949). There can be no doubt of the right of a state to administer upon real property within its borders nor, as will be seen *infra*, is there any doubt about its right to administer upon local tangible personal property.

15. *Cf.* those given foreign representatives by Mo. REV. STAT. § 466.010 (1949).

16. United States v. Guaranty Trust Company, 293 U.S. 340, 345-346 (1934); Green v. Van Buskirk, 5 Wall. 307 (U.S. 1866); Exceptions in cases of property *in transitu* or brought fraudulently within the jurisdiction need not be considered here. An exception of interest, however, is that of warehoused goods for which a negotiable warehouse receipt has been issued. By virtue of its statutes permitting the goods to be represented by the paper, the state of situs has, in such a case, relinquished its jurisdiction to deal with them, and the goods are, or should be, no longer subject to attachment, garnishment or administration except through seizure or possession of the paper.

particular purpose[17] now under discussion—administration of the decedent's property (or more generally, jurisdiction *in rem)*—situs is of neccessity assigned to the jurisdiction which can control the intangible. Thus it is said that personal property ". . . . whether tangible or intangible is considered located for the purpose of administration in the territory of that state whose law must furnish the remedies or its reduction to possession."[18] The Supreme Court has recently observed:

> "Jurisdiction over an intangible can indeed only arise from control or power over the persons whose relationships are the source of the rights and obligations."[19]

It will be discovered that general statements such as those quoted are subject to further refinement. Negotiable instruments and stock certificates are often permitted to be administered where they are found—not where the debtor, or the corporation, may be domiciled. In such cases the state having the basic jurisdiction (by virtue of its control over the person involved) has, by allowing the issuance of such freely circulating business media, released its control over the intangible and agreed to recognize the owner of the paper, as determined by the law where the paper is, as the owner of the intangible.

*Situs,* giving rise to jurisdicition, must be read as a shorthand symbol for effective control. (This statement holds equally for tangibles and intangibles.) A legal relationship such as a debt truly has no location in space, but nevertheless only certain courts have power to control and enforce that relationship.[20] There can be no objection if the opinions choose to call that power situs. [21]

Ideally, limits of jurisdiction of a state over property should be

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17. For other purposes, *e.g.* assessment of personal property taxes, situs of an intangible may be said to be at the residence of the owner.

18. 2 WOERNER, AMER. LAW OF ADM. § 205 (3rd ed. 1923).

19. Estin v. Estin, 334 U.S. 541, 548 (1948) (a divorce case).

20. In the case of a debt, only the state which can serve the debtor with effective personal process can reduce it to judgment. That state has jurisdiction to administer upon it, or, in the case of a *quasi in rem* action commenced by attachment, to discharge it. Depending upon the fortuitous movements of the debtor, any state might have an opportunity to serve him personally; his domicile, however, can through substituted service constitutionally obtain a valid judgment regardless of his movements. This explains a common rule that the situs of a debt is at the debtor's domicile. The domicile may, of course, voluntarily cede its jurisdiction to other states by permitting the issuance of negotiable instruments, bonds, debentures or deposit certificates, thereby agreeing that the instrument shall embody the debt to such an extent that the law which governs the instrument necessarily governs the debt. *Cf.* Part III-D *infra.*

21. See Note, 39 HARV. L. REV. 485-489 (1926); Carpenter, *Jurisdiction over Debts for the Purpose of Administration, Garnishment and Taxation,* 31 HARV. L. REV. 905 (1918).

drawn so that with respect to any given item of property, one state and only one will have the basic right either to administer it or permit its administration elsewhere. If the ideal is not always possible of realization, and two states are deemed to have concurrent jurisdiction over an item, a rule to confer exclusive power upon one court, perhaps the one first assuming jurisdiction, should be adopted. Some such *modus operandi* appears essential to avoid head-on conflicts in the disposition of the decedent's property. Illustrative of such conflicts would be the case where the court of one state directs the sale of a bond to pay administration expenses, and the court of another state decrees distribution of the same bond, in kind, to heirs or legatees, or where different courts make conflicting determinations of the persons entitled to receive distribution.[22]

These considerations show plainly that it is not for a state to establish the furthermost reach of its own power over property. Self-determination of jurisdiction would be incompatible with the existence of other sovereigns. An authority on wills has formulated the following expression of the thought:

> "A state may assert power to decide the title to a thing and what disposition is to be made of it. . . . Such assertion of power is generally said to be a claim of jurisdiction. If other states and nations generally regard [its] judgments, orders, and decrees as final and conclusive we say that the first state has jurisdiction. . . . The existence and extent of jurisdiction thus depend rather on what the other states concede than on what the state in question claims."[23]

Normally, conflicting claims of jurisdiction to administer property do not offer practical difficulties. In the first place, lawyers often fail to press the points involved. Secondly, courts and legislatures rarely attempt to overstep their traditional bounds in these matters, out of a proper respect for the interests of their sister states. If, however, a satisfactory adjustment of jurisdictional claims is not possible at the state level, the ultimate arbiter is the United States Supreme Court.[24]

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22. Conflicting determinations of certain facts, such as domicile in divorce and probate cases are frequently left unresolved by the Supreme Court. See *e.g.* Williams v. North Carolina, 325 U.S. 226 (1945); Worcester County Trust Company v. Riley, 302 U.S. 292 (1937). However, conflicting determinations of jurisdiction over an item of property are not analogous, and the Supreme Court does resolve them, normally through the medium of the full faith and credit clause. See Part IV *infra.*

23. 2 PAGE ON WILLS, § 559 (1926).

24. Iowa v. Slimmer, 248 U.S. 155 (1918); Baker v. Baker, Eccles and Co., 242 U.S. 394 (1917); RESTATEMENT, CONFLICT OF LAWS, § 43, *Comment a* (1934).

The opinions of that Court are therefore of primary authority, and should be emphasized accordingly.

*Views of the United States Supreme Court*

The Supreme Court has had opportunity to express views upon the proper place for administration of many types of intangibles. In the case of a deposit in a New York bank belonging to a decedent domiciled in Illinois the Supreme Court has said:

> ". . . it is plain that the transfer [by will] 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 fact of its power over the person of the debtor . . .
>
> "Power over the person of the debtor confers jurisdiction, we repeat. And this being so, we perceive no better reason for denying the right of New York to impose the succession tax on debts owed by its citizens than upon tangible chattels found within the state at the time of the death. The maxim *mobilia sequuntur personam* has no more truth in the one case than in the other."[25]

Although the court was deciding that New York could impose an inheritance tax on the bank account, it did so by finding first that New York had general jurisdiction over it. The rationale of the decision therefore has pertinence to the present discussion.[26]

Of an ordinary debt, the Supreme Court has held that the domicile of the debtor and not of the decedent has jurisdiction to administer it.[27] But in the case of negotiable instruments and United States bonds, jurisdiction looks to the actual situs of the instrument. It was so held in *Iowa v. Slimmer*,[28] where the slant of the facts might well have drawn the court to decide that notes and bonds were administerable at the decedent's domicile only. The State of Iowa had asked leave to file a bill in the Supreme Court against the State of Minnesota and others. Its grounds were that an Iowa resident during the period before his death had conspired with some of the defendants to defraud the State of

25. Blackstone v. Miller, 188 U.S. 189, 205 and 206 (1902), a case which has been reinvigorated by State Tax Commission v. Aldrich, 316 U.S. 174 (1942).

26. See also Pennington v. Fourth National Bank, 243 U.S. 269, 271 (1917), where, speaking of a bank account, the court said:

"The Fourteenth Amendment did not in guaranteeing due process of law, abridge the jurisdiction which a state possessed over property within its borders, regardless of the residence or presence of the owner. That jurisdiction extends alike to tangible and intangible property."

27. Wyman v. Halstead, 109 U.S. 654 (1884).

28. 248 U.S. 115 (1918).

Iowa of inhertance taxes by arranging with them to keep his promissory notes and United States bonds in Minnesota. The decedent's will was probated in Minnesota and administration was there had upon the notes and bonds. Iowa asked a determination that it, as the conceded domicile of the decedent, had jurisdiction to administer upon his property, and Minnesota did not. The Supreme Court denied leave to file the bill, saying, per Brandeis, J.:

> "Regardless of the domicil of the decedent, these notes and bonds are subject to probate proceedings in that state [Minnesota] . . . its court had power either to distribute property located there according to the terms of the will applicable thereto, or to direct that it be transmitted to the personal representative of the decedent at the place of his domicil to be disposed of by him."[29]

This holding directly disposed of the proceeding, the Court saying:

> ". . . It presents a conclusive reason why leave to file the bill of complaint should be denied."[30]

Neither should there be overlooked the important case of *Baker v. Baker, Eccles & Co.*[31] wherein Kentucky and Tennessee each judicially determined it was the domicile of the decedent and made conflicting distributions of stock in a Kentucky corporation. The Tennessee distributee sued in Kentucky for the shares, asking that full faith and credit be given the Tennessee proceeding; Kentucky refused relief.[32] On appeal to the United States Supreme Court, the Tennessee distributee's fundamental contention was that the personal estate of a decedent is a legal unit, having its *situs* at the owner's domicile, and the title to the whole of it wherever situate was vested in the duly qualified domiciliary administrator. This contention was absolutely rejected. The court noted that the property in controversy was shares in a Kentucky corporation

29. *Id.* at 120-121.
30. *Id.* at 120. See also New England Mutual Life Insurance Company v. Woodward, 111 U.S. 138 (1884) (insurance proceeds administerable where the policy itself is, not at domicile.)
31. 242 U.S. 394 (1917).
32. 162 Ky. 683, 173 S.W. 109 (1915).

"having no situs outside of its own state so far as appears,"[33] and held that the Tennessee judgments had no effect upon them.[34]

*Baker* and *Slimmer* left little reason to think that intangibles are to be treated differently than tangibles or real estate for the purpose of granting administration. In these and other cases discussed *supra,* the Supreme Court has upheld the power of the situs state to administer upon intangibles.

The Court's views are not to be considered as novel or unusual. They are drawn directly from the common law, as is most conveniently shown, perhaps by the Court's earliest statements of the matter, in 1831, when Mr. Justice Johnson, in a comprehensive dictum, outlined the course of the common law in subjecting intangible property to letters of administration. By ample citation of authorities, he demonstrated that contract debts in England had situs with the debtor, bonds and specialties had situs where the instruments were and judgments had situs where rendered—all independent of the domicile of the owner—and would be administerable where so located. This branch of the Court's opinion concludes:

> "In point of fact, it cannot be questioned, that goods thus found within the limits of a sovereign's jurisdiction, are subject to his laws; it would be an absurdity, in terms, to affirm the contrary. . . ."[35]

### B. *Domicile as a Test of Jurisdiction: Mobilia Sequuntur Personam*

Attention should be addressed to the meaning of the maxim *mobilia sequuntur personam* as it bears on the present question. This maxim, of remote origin, may have been used at one time to identify all personal property with the person of its owner. The Supreme Court has said:

> "The old rule, expressed in the maxim *mobilia sequuntur personam* by which personal property was regarded as subject

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33. Baker v. Baker, Eccles & Co., 242 U.S. 394 at 400 (1917).

34. The headnote of the case contains language even broader than that in the opinion, thus: (*Id.* at 394)

"Each State has the power to control and administer the personal assets of an intestate found within her borders, such as debts due from a local corporation or the shares of its stock, to satisfy the rights of her own citizens in the distribution of such assets.

"No State, therefore, has the power, by probate or other proceedings *in rem,* to fix the status as to administration, and determine the course of devolution, of personal property of an intestate situate beyond her borders and within the domain of another state."

35. Smith v. Union Bank, 5 Pet. 518, 526 (U.S. 1831).

> to the law of the owner's domicil, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs,* the law of the place where the property is kept and used."[36]

The ecclesiastical and common law of England was that administration of a decedent's property was correctly had only at its location, regardless of the decedent's domicile. The court of situs, however, by comity applied to movables the law of succession of the domicile so that the entire personal estate wherever located was distributed as an entirety to the persons and in the proportions designated by the law of the domicile.[37] Application of the domiciliary succession law is still almost universal. Missouri has adopted it by statute[38] as have many other states. It is instructive to note, however, that a few jurisdictions do not look to the domiciliary law. Illinois, prior to 1940,[39] and Mississippi yet today[40] have not followed the usual rule. Their statutes have required that personal property in the state be distributed to heirs determined under local laws and not by the law of the domicile. Thus it has been held by the Mississippi court that stock in a Mississippi corporation owned by a resident of Minnesota devolves according to the intestate law of Mississippi.[41]

Despite local departure from the rule, the idea of a universal succession according to the law of the domicile is a fairly fixed concept in our

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36. Pullman's Palace Car Company v. Pennsylvania, 141 U.S. 18, 22 (1891).
37. For a summation of this rule and of ancillary administration as it developed in the ecclesiastical courts of England see Buchanan and Myers, *The Administration of Intangibles in View of First National Bank v. Maine,* 48 HARV. L. REV. 911-915 (1935).
38. MO. REV. STAT. § 466.080 (1949).
39. ILL. ANN. STAT. Chap. 39, § 1 (1934), repealed effective Jan. 1, 1940. *Compare* Headen v. Cohn, 292 Ill. 210, 126 N.E. 550 (1920) (affirming distribution under Illinois law) *with* Schultz v. Chicago City Bank & Trust Co., 284 Ill. 148, 51 N.E. 2nd 140 (1943) (affirming distribution under the usual conflicts rule, after repeal of statute).
40. MISS. CODE Title 5, Ch. 1, § 467 (1942).
41. Ewing v. Warren, 144 Miss. 233, 109 So. 601 (1926).

jurisprudence; it is in this sense that *mobilia sequuntur personam* states the accepted rule.[42]

Not always have courts clearly distinguished between the propriety of administering at the situs, and the propriety of applying in that administration the succession law of the domicile. In an 1869 opinion, *Wilkins v. Ellett*,[43] the Supreme Court used language illustrative of the possible confusion. The question was whether payment of a debt in Tennessee to an Alabama administrator was good as against a subsequently appointed administrator in Tennessee. Mr. Justice Nelson said:

> "It has long been settled, and is a principle of universal jurisprudence, in all civilized nations, that the personal estate of the deceased is to be regarded, for the purposes of succession and distribution, wherever situated, as having no other locality than that of his domicile; and, if he dies intestate, the succession is governed by the law of the place where he was domiciled at the time of his decease, and not by the conflicting laws of the various places where the property happened at the time to be situated. . . . The original administrator, therefore, with letters taken out at the place of the domicil, *is invested with the title to all the personal property of the deceased. . . .*"[44] (Emphasis supplied.)

He viewed the need for ancillary administration as arising out of the domiciliary representative's incapacity to sue in another state, and not from his lack of title. Since the Alabama administrator was appointed at the domicile (as the court assumed), his title was unimpeachable and payment to him was held good acquittance. The actual holding was sustainable on other grounds, but the generous dictum enfolding it was opposed by logic, tradition, and the Court's own prior holdings.[45]

Fortunately, the ligitants in *Wilkins v. Ellett* were unabashed by the opinion, and after a new trial the identical case came back some fourteen years later for a second decision.[46] The jury finding on the second trial revealed an erroneous assumption in the previous opinion, in this:

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42. ". . . It is this . . . that gives whatever meaning it has to the saying *mobilia sequuntur personam.*" Holmes, J., in Blackstone v. Miller, 188 U.S. 189, 204 (1902). But *cf.* the anomalous view taken by the Kansas Supreme Court *In Re* Rogers Estate, 164 Kan. 492, 190 P. 2d 857 (1948). There the court, assuming arguendo that an indemnity insurance policy was property, felt that there was no power in the Kansas Probate Court to administer upon it because the decedent was a non-resident.

43. 9 Wall. 740 (U.S. 1869).

44. *Id.* at 741.

45. Vaughan v. Northup, 15 Pet. 1 (U.S. 1841); Smith v. Union Bank, 5 Pet. 518 (U.S. 1831).

46. Wilkins v. Ellett, 108 U.S. 256 (1883).

Although the payment was made in Tennessee to an Alabama administrator, Tennessee was the domicile. It now appeared that the Supreme Court in the first case had decided in favor of an ancillary administrator as against the claim of one appointed at the domicile. Nevertheless, the second opinion held that the payment to the ancillary Alabama administrator was still a good acquittance, a result which undermines Mr. Justice Nelson's doctrine of world-wide title in the domiciliary representative. Despite *Wilkins* II, *Wilkins* I is at times carelessly cited as establishing the domicile as a preferred place for administration. There is no countenance for such a position. The subsequent Supreme Court cases discussed above have firmly established the jurisdiction of the court of situs. *Tilt v. Kelsey*[47] and *Riley v. New York Trust Company*[48] are also confirmatory. In the latter case, where the situs of the decedent's corporate stock was stipulated to be in Delaware and the only question was whether domicile was in New York or Georgia, the Court said:

> "Her [Delaware] sovereignty determines personal and property rights within her territory. Subject to constitutional limitations, it was her prerogative to distribute the property located in Delaware or to direct its transmission to the domiciliary representative of the deceased."[49]

The *Restatement*[50] concurs generally. It provides for administration of a chattel at its location,[51] permits payment of a debt to any of several administrators in addition to the domiciliary administrator,[52] and provides for the administration of a corporate share by the administrator in possession of the certificate.[53]

In view of the authorities, it must be concluded that the maxim *mobilia sequuntur personam* has no modern application except to describe the general rule by which domiciliary law is applied in the forum to determine heirship. It has never been the law in the United States that the domicile has some peculiar paramount right whereby it may administer upon all of a decedent's personal property wherever located. The Supreme Court has rejected every attempt to give the domicile a superior status in this regard. It has adhered to practical limitations on power

47. 207 U.S. 43 (1907).
48. 315 U.S. 343 (1942).
49. *Id.* at 349.
50. RESTATEMENT, CONFLICT OF LAWS (1934).
51. *Id.* § 471.
52. *Id.* § 480.
53. *Id.* § 477.

handed down from the common law. Jurisdiction over property, tangible or intangible, and whether for purposes of administration or otherwise, has been found to reside in the court or courts which can successfully and effectively control the property, or the persons whose relationships are the subject matter of the property.

In our federal system, the Supreme Court exercises an authority to allocate power between the several states, which naturally has no counterpart in the interplay of laws of independent sovereigns. It is fortunate that that power was not used to upset the common law rules of situs-jurisdiction over intangibles. The difficulty of a domiciliary test of jurisdiction has become apparent in the constantly increasing volume of divorce-jurisdicition clashes, epitomized by the *Williams* litigation.[54] Mr. Justice Rutledge has well presented the painful consequences of adhering to a domicile test of jurisdiction even in "status" cases, such as divorce, where such a test has been traditional:

> "Domicil, as a substantive concept, steadily reflects neither a policy of permanence nor one of transiency. It rather reflects both inconstantly. The very name gives forth the idea of home with all its ancient associations of permanence. But 'home' in the modern world is often a trailer or a tourist camp. Automobiles, nation-wide business and multiple family dwelling units have deprived the institution, though not the idea, of its former general fixation to soil and locality. But, beyond this, 'home' in the domiciliary sense can be changed in the twinkling of an eye, the time it takes a man to make up his mind to remain where he is when he is away from home. He need do no more than decide, by a flash of thought, to stay 'either permanently or for an indefinite or unlimited length of the time.' No other connection of permanence is required. All of his belongings, his business, his family, his established interests and intimate relations may remain where they have always been. Yet if he is but physically present elsewhere, without even bag or baggage, and undergoes the mental flash, in a moment he has created a new domicil though hardly a new home.
>
> ". . . Apart from the necessity for travel, hardly evidentiary of stabilized relationship in a transient age, the criterion comes down to a purely subjective mental state, related to remaining for a length of time never yet defined with clarity.
>
> "With the crux of power fixed in such a variable, small wonder that the states vacillate in applying it and this Court

54. Williams v. North Carolina, 317 U.S. 287 (1942); Williams v. North Carolina, 325 U.S. 226 (1945). See also Sutton v. Lieb, 342 U.S. 402 (1952).

ceaselessly seeks without finding a solution for its quandry. But not all the vice lies in the substantive conception. Only lawyers know, unless now it is taxpayers and persons divorced, how rambling is the scope of facts from which proof is ever drawn to show and negate the ultimate conclusion of subjective 'fact.' They know, as do the courts and other tribunals which wrestle with the problem, how easily facts procreative of conflicting inferences may be marshalled and how conjectural is the outcome. There is no greater legal gamble. Rare is the situation, where much is at stake, in which conflicting circumstances cannot be shown and where accordingly conflicting ultimate inferences cannot be drawn.

"The essentially variable nature of the test lies therefore as much in the proof and the mode of making the conclusion as in the substantive conception itself. When what must be proved is a variable, the proof and the conclusion which follows upon it inevitably take on that character. The 'unitary domicle-jurisdictional fact-permissible inference' variable not only is an inconstant, vacillating pivot for allocating power. It is inherently a surrender of the power to make the allocation."[55]

These considerations, written with regard to the domicile of living persons, must be given more weight where the search is to find the domicile of a deceased person who cannot be examined. If, by some precedent-shattering decision, the Supreme Court were to provide for unitary administration of an estate at the domicile, it would hardly be possible to foresee all of its consequences. Certainly there would be conflicting determinations of domicile by the states, more numerous and more important than ever before, and the resolution of those conflicts, each one presenting unique facts, would fall upon the federal courts, if indeed they would hear the issues.[56]

Much more practical is the actual operation of our present system. Situs determination of either tangibles or intangibles does not involve elusive and subjective fact findings. The facts will be concrete—where was the certificate held, or, where can the debtor be served—not matters of intent and "mental flash." The legal principles to be applied to those concrete facts either can be, or are now, settled without interminable litigation.

In brief, while it is perfectly appropriate for each state to make its

55. 325 U.S. at 257-259 (1945).

56. *Cf.* Worcester County Trust Co. v. Riley, 302 U.S. 292, 299 (1937); but see Texas v. Florida, 306 U.S. 398 (1939) (domicile determined by Supreme Court under special circumstances).

own determination of the domicile of a decedent as a stepping-stone to deciding what it will do with the decedent's property which it controls[57] —it would be inappropriate and a legal nightmare to permit each state, by determining itself to be the decedent's domicile, to draw unto itself the control of his property wherever situate in the United States.

### C. *Situs for Inheritance Tax Purposes*

There is no necessary connection between a state's jurisdiction to administer upon intangibles, and its jurisdiction to levy inheritance taxes upon them. Nevertheless, it is thought desirable to discuss briefly the scope of a state's inheritance tax jurisdiction, because it is a topic often associated with, and compared with, jurisdiction to administer.

The inheritance tax jurisdiction of a state has been the subject of a long series of Supreme Court decisions. With tangibles the Court has unwaveringly confined inheritance taxation to the state of situs.[58] Intangibles never have received similar treatment. In *Blackstone v. Miller*[59] the Court held that both the domicile and the situs could tax them, but a quick succession of cases between 1930 and 1932 overruled that holding, drawing from the "void of due process"[60] a concept that double taxation of intangibles was prohibited by the Constitution,[61] and selecting the domicile as to the single state having inheritance tax jurisdiction. However, upon a third look at the problem, the Supreme Court has definitely re-adopted its first view, and *Blackstone v. Miller supra,* again states the law. Two preliminary cases decided in 1939[62] forecast the return to *Blackstone v. Miller,* and in *State Tax Commission of Utah v. Aldrich*[63] the full circle was completed. Due process, it is now clear, is not denied by the situs in imposing inheritance taxes upon intangibles.

While the Supreme Court in its 1930-32 opinions[64] temporarily adopted *mobilia sequuntur personam* as expressing its policy views in the assessment of inheritance taxes, there is no inkling even in those

57. *E.g.* Baker v. Baker, Eccles Co. 242 U.S. 394 (1917).
58. Treichler v. Wisconsin, 338 U.S. 251 (1949); Frick v. Pennsylvania, 268 U.S. 473 (1925).
59. 188 U.S. 189 (1903).
60. Holmes, J., dissenting in Baldwin v. Missouri, 281 U.S. 586, 596 (1930).
61. Farmers Loan & Trust Co. v Minnesota, 280 U.S. 204 (1930); Baldwin v. Missouri, 281 U.S. 586 (1930); Biedler v. South Carolina Tax Commission, 282 U.S. 1 (1930); First National Bank v. Maine, 284 U.S. 312 (1932).
62. Curry v. McCandless, 307 U.S. 357 (1939); Graves v. Elliott, 307 U.S. 383 (1939).
63. 316 U.S. 174 (1942).
64. Note 61 *supra.*

cases that the domiciliary state was being given a right to administer upon the intangible.[65]

Indeed, situs of intangibles for tax purposes could only be relevant to situs for other purposes if the power to tax was founded solely upon jurisdiction in rem. It was not so founded even in the overruled 1930-32 decisions.

Now that the *Aldrich* case re-establishes the taxing power of any state having an appropriate connection with the intangible, most state legislatures have acted to avoid the possibility of double taxation, by passing reciprocal inheritance tax exemption statutes. These statutes provide that intangibles of a non-resident shall not be taxed if the domiciliary state has enacted similar reciprocal legislation,[66] or as in the case of Missouri, exempts them regardless of the existence of reciprocal legislation at the domicile.[67]

D. *Missouri and Kansas Decisions*

In general, Missouri has followed normal rules in determining its jurisdiction to administer upon tangible and intangible property. Thus bank deposits and debts due from local debtors are administerable in Missouri.[68] With respect to administration of corporate stock, decisions of Missouri courts have had a wide influence in development of mercantile situs rules. That subject will be developed at length in the next portion of this article.

One Missouri decision should be specifically noted at this point. A promissory note executed by two makers resident in Jackson County, Missouri, and apparently negotiable, was kept by the payee at his domicile in Kansas. After his death the Kansas probate court issued its decree determining heirship and vesting title to the note in plaintiff's assignors. Plaintiff sued on the note in Missouri claiming that it was personal property and under the maxin *mobilia sequuntur personam* had administerable situs in Kansas. The Kansas City Court of Appeals held, on authority of the *Crohn* case, *supra,* among others, that the situs of the note was at the residence of the debtors. The Kansas decree "could not convey . . . title to any property situated in Missouri."[69]

The decision is not reconcilable with the mercantile point of view,

65. See Buchanan and Myers, *The Administration of Intangibles in View of First National Bank v. Maine,* 48 HARV. L. REV. 911 (1935).
66. *E.g.* KAN. GEN. STAT. § 79-1501e (1949).
67. MO. REV. STAT. § 145.020, Subsec. 3 (1) (1949).
68. *E.g.* Crohn v. Clay County State Bank, 137 Mo. App. 712, 118 S.W. 498 (1909).
69. Pinet v. Pinet, 230 Mo. App. 500, 191 S.W. 2d 362, 364 (1945).

as expressed in the Negotiable Instruments Law, that a negotiable note is property in itself, nor is the decision reconcilable with *Iowa v. Slimmer, supra,* in which the Supreme Court of the United States held that a promissory note is administerable where the note is.[70] An examination of the record and briefs in the case shows that *Iowa v. Slimmer* was probably not called to the attention of the court. Plaintiff did not even invoke Section 272,[71] the forerunner of the current Section 466.010, which apparently would have given him an absolute right to recovery. In fact the court commented upon the omission in ruling for the defendant.[72]

The Kansas decisions are unlike those of Missouri or any other jurisdiction. At one time a mercantile approach was suggested by the Kansas Supreme Court. In *Ames v. Citizens National Bank*[73] the right to administer upon a certificate of deposit issued by a Kansas bank was in issue. While the decision was for the New Mexico domiciliary executor, the case contains a broad intimation that if the Kansas ancillary administrator had had possession of the certificate, he would have been entitled to administer upon it.

Kansas law relating to situs of stocks for purposes of administration is unsettled. *In re Miller's Estate*[74] arose when a decedent held certificates of stock in a Kansas corporation at his residence in Missouri. The court found Kansas administration improper because, it said, the shares were located at the residence of the decendent. It is uncertain whether the holding of this case is affected by a provision in the 1939 Corporation Code, that situs of shares in a Kansas corporation shall be deemed situate in Kansas "for all purposes of title, action, attachment, garnishment and jurisdiction of all courts in this state."[75] Also uncertain is the effect, in turn, of the Uniform Stock Transfer Act,[76] adopted in 1947, upon the situs provision of the Corporation Code.

A Kansas case involving treatment of notes, *Moore v. Jordan,*[77] is of

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70. And see 3 BEALE, THE CONFLICT OF LAWS § 471.8 (1935), where it is said:
"It has been almost uniformly held that a foreign administrator who succeeds to possession of the note may assign it so as to enable the assignee to sue on it in the state where the maker is domiciled."
71. Mo. REV. STAT. (1939).
72. 191 S.W. 2d at 364 (1945). See Becker v. Buder, 185 F. 2d 311 (8th Cir. 1950), *affirming* 88 F. Supp. 609 (E.D. Mo. 1949) and holding that Mo. REV. STAT. § 272 (1939) gave a right to the foreign administrator or distributee to sue for intangibles in Missouri.
73. 105 Kan. 83, 181 Pac. 564 (1919).
74. 90 Kan. 819, 136 Pac. 255 (1913).
75. KAN. GEN. STAT. § 17-3218 (1949).
76. *Id.* §§ 17-4801 *et seq.*
77. 36 Kan. 271, 13 Pac. 337 (1887).

interest because of the analysis of the court. There a Kansas debtor had executed notes to the decedent. At death the notes were in Colorado. The issue of the decedent's domicile as between Colorado and Illinois was hotly contested in the Kansas court, and the jury found the domicile to be in Illinois. On this set of facts the nimbleness of the Kansas court was remarkable. It used *Wyman v. Halstead*[78] (a debt is administerable at the debtor's domicile) to show that the Colorado administrator was not entitled. It then used the language of the first *Wilkins v. Ellett*[79] (the domicile has a "superior" right) to show that between Illinois and Kansas, the Illinois administrator was entitled.

These views were reiterated in 1930,[80] but in 1948 the Kansas court delivered itself of a dictum much more sweeping, saying:

> "This court has long recognized the irreconcilable conflict which exists on the subject of personal property for the purpose of administration [citing cases]. This court early made its choice of doctrine on that subject and has consistently adhered to it. As applied to administration of estates we are committed to the doctrine that the situs of personal property is transitory prior to the death of its owner and follows the owner wherever he may be, but that after his death the situs becomes fixed and local at the place of his domicile."[81]

The case arose when a resident of North Carolina died with a public liability insurance policy on which there were claims resulting from a Kansas collision. Whether or not the policy was an asset of the decedent's estate was not decided, the court preferring to rest its decision on whether the alleged asset was in Kansas or at the domicile of the decedent. As shown by the quoted language, the decision was that the policy, if an asset, had its situs in North Carolina. Whether the decision is really based upon an insistent pursuit of *mobilia sequuntur personam,* or upon policy matters not fully explicated, is not crystal clear. For example, the court later in the opinion says:

> "A conclusion that this indemnity policy constitutes 'estate' left by the nonresident decedent to be administered in Marshall county would mean this policy constitutes 'estate' which may be administered in any county in Kansas and in any county of every other state of the union, with a similar statute, in which

78. Note 27 *supra.*
79. Note 43 *supra.*
80. Toner v. Conqueror Trust Company, 131 Kan. 651, 293 Pac. 745 (1930).
81. *In re* Rogers Estate, 164 Kan. 492, 190 P. 2d 857, 860-861 (1948).

the insurer is authorized to transact business. We do not think the statute was intended to produce such a result."[82]

We cannot further inquire why the Kansas court felt it necessary to reach its conclusion in the *Rogers* case by adopting an impractical and meaningless rule of law—*mobilia sequuntur personam*—"a rule not true either as a matter of fact or legal doctrine."[83] Prior decisions did not seem to require it, and in fact the Kansas Court itself, eight years previously in a tax case, had recognized the necessity of departing "from the ancient rule of *mobilia sequuntur personam*,"[84] saying:

> "Such a departure was made almost inevitable by the great economic changes that came in the modern world. In ancient days the average individual possessed few chattels and these were of comparatively simple character. When he moved on to other climes he customarily took his 'movables' with him. Accordingly, a presumption, hardening into a conclusion of law, arose that in all cases he had actually done so. Hence, when the sovereign had jurisdiction of the individual he had jurisdiction of the 'mobilia' wherever located. But time marched on, and simplicity of life gave way to complexity. *Mobilia* became of infinite variety and character. Frequently they have become so localized that it would be fantastic for the law to treat them as having wholly followed the owner to another state where he resides."[85]

Broadly speaking, what the Kansas court has currently done is this: It has refused to exercise its jurisdiction to administer upon many items of property. It has preferred instead to forward them to the domiciliary state for administration and as a legal crutch has used the *mobilia* doctrine. It is entirely within the power of Kansas to do this. The rule probably will convenience domiciliary administrators, but no doubt will inconvenience those Kansas creditors and legatees who, as a result, will have to file their claims in foreign courts.

Observe that Kansas has never, in any case, attempted to apply the *mobilia* doctrine in reverse, *i. e.*, to deny authority of other states to conduct ancillary administration on the personal estates of Kansas domiciliaries. Kansas could not so apply its law, if it wished, where the

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82. *Id.* at 862.

83. GOODRICH, CONFLICT OF LAWS 473 (2d ed. 1938). "The most such a statement does is to put the legal conclusion . . . a we're here because we're here sort of exegesis." (Id. p. 480).

84. Russell v. Cogswell, 151 Kan. 14, 98 P. 2d 179, 183 (1940).

85. *Id.* at 183-184.

United States Supreme Court has pronounced ancillary administration proper.[86]

It is of interest to compare the Kansas and Missouri approaches with that of Illinois, which has avoided judicial speculation by enacting broad statutes covering the subject. In Illinois ancillary letters will issue upon an estate of a non-resident unless the probate court is satisfied that no inheritance taxes will be due and all claims are paid, *and* the parties in interest desire to settle the estate without administration in Illinois.[87] As for what may be administered in an Illinois ancillary administration, the statute specifies the criteria for determining situs, and whole-heartedly embraces the mercantile theory of situs:

> "For the purpose of granting administration of both testate and intestate estates of non-resident decedents, the situs of tangible personal estate is where it is located and the situs of intangible personal estate is where the instrument evidencing a debt, obligation, stock or chose in action happens to be, or where the debtor resides, if there is no instrument evidencing the debt, obligation or chose in action in this state."[88]

## III. Situs of Corporate Shares: Development of The Mercantile Theory

### A. *Development in the Absence of Statutes*

Determination of situs of corporate stock for administration purposes may become an intricate problem. Situs might be claimed by any of several jurisdictions—the state of incorporation, the decedent's domicile, the place where the certificate is kept, or, though no authority supports it, the state where the corporate assets are.[89]

It was early held that the state of incorporation had a pre-eminent claim to jurisdiction over the shares.[90] The United States Supreme Court adopted that general view in a 1900 decision, *Jellenik v. Huron Copper Mining Company*,[91] holding that an action to remove a cloud on title to shares, *quasi in rem*, was properly brought where incorporation took place, where the shares were transferable only on the books of the corporation. The decision was influential in cases of decedent's

86. See Part IV *infra*.
87. Ill. Ann. Stat. Ch. 3, § 241 (Smith-Hurd, 1941).
88. *Id.* § 207.
89. See Rhode Island Trust Co. v. Doughton, 270 U.S. 69 (1926) (presence of assets does not mean presence of shares, in a tax case).
90. For a collection of administration cases with that dominant holding see 72 A.L.R. 179 (1931).
91. 177 U.S. 1 (1900).

estates. The Missouri Supreme Court in partial reliance upon *Jellenik* once held that the only place where shares in Missouri corporation could be administered was in Missouri.[92]

This viewpoint was bolstered in the *Baker* case[93] where the situs of the shares in controversy was assumed to be in the state of incorporation "so far as appears."[94] However, a sharp change of theory was indicated by the Supreme Court in 1925, in *Direction der Disconto-Gesellschaft v. United States Steel,*[95] a case which because it involved a transfer outside the United States did not even have the helpful underpinning of the full faith and credit clause. Stock certificates of a New Jersey corporation were expropriated in England during the first World War as enemy assets, and held and transferred by the British alien-property trustee. The German owners sued the corporation and the trustee after conclusion of hostilities, but the Supreme Court refused the argument that the shares were not subject to British power. Mr. Justice Holmes, speaking for the Court, analyzed the jurisdiction of the British authorities as follows:

> "Therefore New Jersey having authorized that corporation like others to issue certificates that so far represent the stock that ordinarily at least no one can get the benefits of ownership except through and by means of the paper, it recognizes as owner anyone to whom the person declared by the paper to be owner has transferred it by the endorsement provided for wherever it takes place. It allows an indorsement in blank, and by its law as well as by the law of England an indorsement in blank authorizes anyone who is the lawful owner of the paper to write in a name, and thereby entitle the person so named to demand registration as owner in his turn upon the corporation's books. But the question who is the owner of the paper depends upon the law of the place where the paper is."[96]

There is little doubt but that the Supreme Court would have reached the same conclusion in the case of a foreign executor in possession of the certificates, whose position in every essential respect is like that of the British trustee.[97]

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92. Troll v. Third National Bank of St. Louis, 278 Mo. 74, 211 S.W. 545 (1919). See the fuller discussion in Section III C, *infra.*
93. Baker v. Baker, Eccles & Co., 242 U.S. 394 (1917).
94. *Id.* at 400.
95. 267 U.S. 22 (1925).
96. *Id.* at 28.
97. The Missouri Supreme Court felt no doubt. See Lohman v. Kansas City Southern Railway, 326 Mo. 819, 33 S.W. 2d 112 (1930) discussed *infra.*

A number of state courts of last resort must, on the basis of past decisions, be classified as holding that the state of incorporation is *the* proper one for administration.[98] However, those holdings were prior to general adoption of the Uniform Stock Transfer Act—a statute which gives promise of consolidating the mercantile viewpoint of stock transfers everywhere, and which will be discussed at length in a later section.[99]

Also, important corporate jurisdictions such as New York and Delaware have reached the mercantile viewpoint without the aid of statutes, and have sanctioned administration upon the certificate, regardless of domicile or state of incorporation.

Despite contrary language in earlier cases, notably *New York Trust Company v. Riley,*[100] Delaware has recognized the propriety of administering upon stock of its corporations solely through possession of the certificate. In *Bowles v. R. G. Dun-Bradstreet Corporation,*[101] a Rhode Island resident died owning shares of stock in the defendant Delaware coroporation. His New York ancillary executors held the certificates. The court noted that the generality of statement indulged in the *New York Trust Company* case, *supra,* and in the first *Wilkins* case, [102] to the effect that the domicile has some kind of superior title and position in the administration of a decedent's estate, ". . . will not bear a careful analysis in all of its aspects. . . . In fact, the strict legal rights and powers of the executor or administrator of a deceased person are confined to the territorial limits of the state appointing him, and this is true whether he be a domiciliary or an ancillary representative."[103] It was held that the corporation should transfer the shares at the instance of the New York ancillary executors in possession of the certificates.

In New York, it has been settled since 1913 that the place of the certificate may have jurisdiction to administer the shares. The New York Court of Appeals so ruled in *Lockwood v. United States Steel,*[104] a leading case. The Bermuda decedent owned certificates of stock in a

98. Note 90 *supra.*

99. See III B *infra.*

100. 24 Del. Ch. 354, 16 A. 2d. 773 (1940), *affirmed sub. nom.* Riley v. New York Trust Company, 315 U.S. 343 (1942). The question of situs was not before the Supreme Court on appeal. The opinion states, "The parties are agreed, and it is therefore assumed, that Delaware is the situs of the stock." 315 U.S. 343 at 346 (1942). Under that stipulation the Supreme Court went on to hold that Delaware had complete power and discretion in disposing of the stock.

101. 25 Del. Ch. 92, 12 A. 2d 392 (1940).

102. 9 Wall. 740 (U.S. 1869). See Part II.

103. 12 A. 2d at 395-396.

104. 209 N. Y. 375, 103 N.E. 697 (1913).

New Jersey corporation, which were being held for safekeeping in New York. The corporation had refused to transfer the stock on the New York executor's assignment, and the executor sued for damages. The crucial question of situs of the stock for administration purposes was decided adversely to the executor in the Appellate Division. It rendered an opinion[105] which said that the situs might be either at the domicile or in the state of incorporation, but not in New York. The Court of Appeal reversed, held that the presence of the certificates in New York established situs there, and permitted recovery of damages.

Writers in the field of conflict of laws are of one mind in taking the mercantile viewpoint,[106] independently of the Uniform Stock Transfer Act. The *Restatement's* position that the administrator in possession of the certificate is entitled to the shares is shown in Section 477, and it is said there, in *Comment c:*

> "The administrator in possession of the certificate can administer it in the same way as any other chattel which is part of the estate. . . . Should the corporation, upon presentation of the certificate and of sufficient evidence of the appointment of the administrator, refuse to transfer the shares to the administrator or his transferee, such administrator or his transferee respectively can proceed against the corporation by suit in his own name even though there is a local administrator in the forum."[107]

### B. *Effect of the Uniform Stock Transfer Act*

There need be no special quarrel with the situs theory embodied in the *Jellenik* case[108] (or state court decisions to the same effect) as of the year the decision was rendered, 1900. Since then, however, a vital change in the nature of the American corporate share has taken place. The bundle of legal rights in the corporate share is not now made up in the same way as in 1900. Then it was a written chose in action of a complex variety and a true intangible; the 1954 share has become, in important ways, actual tangible property which is embodied in the certificate. This revolution in concept has been accomplished partly through judicial recognition of the expanded law merchant which underlies the trading of daily millions on the exchanges. Of more general importance has

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105. 153 App. Div. 655, 138 N.Y. Supp. 725 (1st Dept. 1912).

106. See *e.g.* 3 BEALE, THE CONFLICT OF LAWS § 477 (1935); GOODRICH, CONFLICT OF LAWS § 180 (2d ed. 1938).

107. RESTATEMENT, CONFLICT OF LAWS (1934).

108. Jellenik v. Huron Copper Mining Company, *supra* note 91.

been the enactment of the Uniform Stock Transfer Act, and we are informed by the Commissioners on Uniform State Laws[109] that the Act, with some variations, has been enacted in all 48 states, Hawaii, Alaska and the District of Columbia.[110] As one of only two Uniform Laws (the other being the Negotiable Instruments Law) to make a clean sweep and win approval from every legislature, it should command maximum respect from the courts in its adoption of the mercantile theory, both as law and as an expression of the needs of the business community.

Section 1 of the Act provides that title to a certificate and to the shares represented thereby can be transferred only by delivery of the certificate duly endorsed or with written assignment attached.[111] The actual title to shares as against the rest of the world is governed by possession of the certificate. This is made clear by Sections 5 and 6.[112] To lose a certificate is to lose the right to the shares unless bond is posted.[113]

Under the original Act garnishment or attachment of the stock of a shareholder could be had only through seizure of the certificate.[114] This provision is of special importance, because it gives to the court having jurisdiction of the certificate power to determine interests in the shares.[115]

The Uniform Act does not contain any provision specifying situs of stock for administration purposes. Indeed to have such a provision might seem almost superfluous, and this notwithstanding Section 2, which provides that nothing in the Act shall be construed to enlarge the

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109. 6 U.L.A., 1953 Supplement.

110. See Mo. Rev. Stat. §§ 403.050 *et seq.* (1949); Kan. Gen. Stat. §§ 17-4801 *et seq.* (1949).

111. Mo. Rev. Stat. § 403.050 (1949). Missouri and Kansas both have enlarged this section to permit specifically endorsement by a trustee in bankruptcy, executor, administrator or other fiduciary. See Kan. Gen. Stat. § 17-4801 (1949).

112. Mo. Rev. Stat. § 403.090, 403.100 (1949).

113. U.S.T.A. § 17, Mo. Rev. Stat. § 403.210 (1949).

114. Missouri and Kansas have amended this provision to permit attachment on the books of the corporation as an alternative to seizure of the certificate. In Missouri precedence is given to the certificate attachment, however, but Kansas makes the matter one of first in time, first in right. Compare Mo. Rev. Stat. § 403.170 (1949) with Kan. Gen. Stat. § 17-4313 (1949). See also State *ex rel.* North American Co. v. Koerner, 357 Mo. 908, 211 S.W. 2d 698 (1948) (upholding the provision for attachment on the books, as not impossibly repugnant to the remainder of the Act). The effect of this case is discussed at length in *The Uniform Stock Transfer Act in Missouri,* 1951 Wash. U. L. Q. 384.

115. See the general annotation in 122 A.L.R. 333 (1939).

power of trustees, executors, administrators or other fiduciaries to make valid endorsements or assignments.[116]

It is believed evident that the reference to executors and administrators in Section 2 does not restrict the right of the executor having the certificate to administer upon the shares. The framers of the Act were merely being careful not to expand the ordinary powers of an executor or trustee to sell or dispose of property. An executor or trustee must still show his authority to make a transfer, through exhibition of a court order or a power in the will or trust instrument, as he did before the Act. In other words, possible breaches of fiduciary duty must still be inquired into by transferees and transfer agents.

Thus, Section 2, in making clear that the Act does not validate an otherwise improper fiduciary endorsement, has no effect on the jurisdiction of courts to declare ownership. If the Act truly embodies the shares in the certificates (and that *is* its central principle), then jurisdiction in rem, including probate jurisdiction, exists where the certificate is. So runs the thought of Professor Beale when he says in his authoritative treatise,[117] in speaking of the Uniform Act:

> "This statute, though it does not specifically deal with the question of administration, in all other respects, seems to accept the mercantile theory. . . . It is submitted that the Uniform Stock Transfer Act should be construed as adopting the mercantile view wholeheartedly, including the treatment of the certificates as controlling the shares for purposes of administration."[118]

The Uniform Stock Transfer Act is therefore solid ground upon which to base the expectation that state courts and the Supreme Court will, in the future, recognize administration upon the certificate as administration upon the stock.

### C. *Situs of Corporate Shares: The Missouri View*

Of special interest in the application of the newly enacted Section 466.010 is the previous course of Missouri decisions on the situs of stock and the proper place for its administration. At one time, owing to the diligence and the litigiousness of some of its public administrators, Mis-

116. Mo. Rev. Stat. § 403.060 (1940). See also § 18 of the Act, Mo. Rev. Stat. § 403.220 (1949) (application of ordinary rules, including law merchant, to cases not touched by the Act.)
117. Beale, The Conflict of Laws (1935).
118. *Id.* Vol. 3, § 477.2.

souri was at the forefront in determinations of this question; its *Lohman*[119] decisions, *infra,* have received wide attention.

The starting point in discussion of the Missouri law will be taken as *Armour Brothers Banking Company v. Smith,* [120] an 1892 attachment case. It held that a stock certificate was mere indicia of the actual share interest of the stockholder, and that the attachment of the certificate was not effective to confer jurisdiction over the shares, the particular company having been incorporated in Texas.

*Richardson v. Busch*[121] presented squarely the question of the proper place for administration of stock. The defendant, in possession of stock certificates in the New York corporation belonging to a New York decedent, had delivered them to a New York domiciliary administrator. The Public Administrator of St. Louis then sued the defendant for conversion. Judge Valliant wrote an opinion which said that if the stock "was in New York at the time of his death, it cannot be made the basis of administration in this state, even if our statute essayed to make it so."[122] He relied principally on two cases, *Armour Brothers, supra* (in which case he was the trial judge), and *Jellenik v. Huron Copper Mining Company,*[123] saying that the court in the *Armour Brothers* case declared the fundamental doctrine that the res was not within Missouri's borders.

*Richardson v. Busch* set the stage for the litigation yet to come. It was easily inferable from its language that the court would henceforth recognize only Missouri administrations on shares of Missouri corporations. Fine prospects were in this manner opened to the diligent public administrator, who could and would discover stockholdings of non-residents in Missouri corporations and demand their transfer to him. These prospects were confirmed in 1919 by a series of cases bearing the name of the St. Louis Public Administrator, Harry Troll. In *Troll v. Third National Bank of St. Louis,*[124] an Illinois domiciliary executrix had a

119. Ira H. Lohman, one-time Public Administrator of Cole County, possibly contributed most to the law of this question with seven reported cases bearing his name, although Harry Troll, Public Administrator of St. Louis, is not to be denied his share of credit, his name appearing on four reported cases.

120. 113 Mo. 12, 20 S.W. 690 (1892).

121. 198 Mo. 175, 95 S.W. 894 (1906). See also the companion case, De La Vergne v. Richardson, 198 Mo. 189, 95 S.W. 898 (1906), wherein the administrator's letters were revoked for lack of any administerable property in Missouri.

122. *Id.* at 897.

123. 177 U.S. 1 (1900) discussed *supra.*

124. 278 Mo. 74, 211 S.W. 545 (1919). See also the companion cases (not officially reported) of Troll v. Third National Bank of St. Louis, 216 S.W. 922 (1919); Troll v. United Railway Company, 216 S.W. 923 (1919); Troll v. National Bank of Commerce, 216 S.W. 923 (1919).

certificate for 33 shares of the defendant's stock. The St. Louis Public Administrator sued for the transfer of that stock to him. The Supreme Court, relying entirely on *Richardson v. Busch,* held that the situs of the stock was the state of incorporation, Missouri, and that the Public Administrator had power to act under a statute permitting him to administer when property was left exposed to loss, saying, "Any estate with no administrator to look after it is exposed to loss", even though in the instant case the estate was entirely bank stock.

The *Troll* case thus refused to recognize any but a Missouri administration on shares of stock in a Missouri corporation. This was a holding well calculated to discourage investments by non-residents in Missouri corporations but fortunately the commitment of the court to that position was only temporary, as will now be seen.

Ira H. Lohman's series of battles with the Kansas City Southern Railway (a Missouri corporation) through the New York and Missouri courts provided the most recent judicial development of Missouri law. The *Lohman* decisions, the last of which was handed down in 1930, were all rendered under the law prior to the 1923 legislation which solved the problem by simply prohibiting administration of stock of non-residents.

The first decedent to receive Lohman's attention was one Beach, who died in New York in 1922 holding certificates of Kansas City Southern stock in that state. Beach's executors brought suit against Kansas City Southern in the New York Federal Court. The district court's decision for the plaintiffs[125] was appealed to the Second Circuit Court of Appeals, which affirmed and said:

> ". . . for, though shares of stock have a "situs" in the state of incorporation, they likewise have one for the purposes of Section 57 [of the Judicial Code] in the state where the corporation is engaged in business and where the stock certificates were held by the deceased and are held by his executors. . . ."[126]

Two subsequent cases[127] added little, but then came three cases involving different decedents, each entitled *Lohman v. Kansas City South-*

125. Norrie v. Kansas City Southern Railway Company, 7 F. 2d 158 (S.D. N.Y. 1925).

126. Norrie v. Lohman, 16 F. 2d 355 (2d Cir. 1926).

127, Peet Bros. Mfg. Co. v. Lohman, 211 Mo. App. 984, 295 S.W. 504 (1927), where Lohman stipulated himself out of court, and Fairchild v. Lohman, 13 F. 2d 252 (W.D. Mo. 1926), wherein Judge Reeves took occasion to say that "personal property . . . follows the person of the owner" subject only to exceptions in favor of creditors and distributees, and refused to follow the Troll case, although he said he was distinguishing it.

*ern Railway Company,* all of which were decided by the Supreme Court of Missouri *en banc* in 1930. In the first case, Docket No. 27317,[128] the court rendered a full and exhaustive opinion on the following facts: Upmann, a New York decedent, had Kansas City Southern certificates located in New York. The corporation transferred the shares to his New York executors on demand. Since the railroad was a Missouri corporation Lohman sued for the same shares on the ground that the *Troll* case established the situs of the stock in Missouri. It was apparent that *Lohman* would win if the *Troll* case were permitted to stand. Lohman lost. The court said:

> "We have much doubt concerning the correctness of the ruling in the Troll case, if that case be regarded as laying down the absolute and unvarying rule that, for all purposes and regardless of the absence of claims against the estate of deceased by this state or by its citizens for debts or as distributees, the situs of shares of stock in Missouri corporations is in this state and nowhere else."[129]

The court placed particular emphasis upon the decision of the United States Supreme Court in the *Disconto-Gesellschaft* case,[130] saying:

> "The Disconto-Gesellschaft case seems conclusively to establish the rule that shares of stock in a corporation, represented by appropriate certificates of stock, constitute property in themselves, and not merely evidence of ownership, and have a situs for some purposes elsewhere than in the state where the corporation is domiciled. That case announces the latest and the controlling rule of the United States Supreme Court. . . .
>
> "The certificates of stock held by Upmann must therefore be regarded as having the character of personal property in themselves and a situs for some purposes in the state of New York."

The second and third cases, Dockets 27318[131] and 27319,[132] dealt with similar sets of facts, except that Lohman's demand upon the railroad for the shares was made before it had transferred the stock to the New York executors, and as a result, the New York executors had been compelled to recover the shares by prior suits in New York. Lohman was a party to the second suit by substituted personal service, but in the

128. 326 Mo. 819, 33 S.W. 2d 112 (1930.)
129. *Id.* at 115.
130. Direction der Disconto-Gesellschaft v. United States Steel Corporation, 267 U.S. 22 (1925).
131. 326 Mo. 842, 33 S.W. 2d 118 (1930).
132. 326 Mo. 868, 33 S.W. 2d 117 (1930).

third, no effort was made to join him as a party. The railroad had complied with both New York judgments. Lohman, now suing the railroad in Missouri, lost again. In No. 27319 the court ruled:

> "Defendant [the railroad] maintained an office in New York and was there personally served with process. The Supreme Court of that state, therefore, had before it both defendant and the stock, to the extent that it was called upon to deal with said stock, and had full power and jurisdiction to decide the right of the New York executors to have the shares of stock transferred to them. Under the full faith and credit clause of the Federal Constitution, it is our duty to recognize the validity and finality of the judgment rendered by that court."[133]

The court applied the same reasoning to No. 27318 and found it unnecessary to decide whether the substituted personal service was effective as to Lohman.

Since *Lohman,* little remains of the *Troll* cases. The *Lohman* opinions markedly recognize that situs of a share accompanies the certificate, for purposes of administration. It is to be observed also that the decedent's domicile was not even a factor in the reasoning of the court.

In assessing Missouri law today there should not be any special concern with the emphatic language used by Judge Valliant in the *Richardson* case almost fifty years ago, when he said that jurisdiction over a share is not conferred by the presence of the certificate, and the "certificate could not be made the basis of administration in this state, even if our statute essayed to make it so."[134] That statement does not reach the fundamental point that the legislatures and courts of *other* states may give jurisdiction to Missouri by generally recognizing the mercantile characteristics of stock shares—where Missouri by its own statute could not.

As a result of *Lohman* and the Uniform Stock Transfer Act, Missouri seems now committed to a certificate-situs principle of jurisdiction. Administration upon a certificate should henceforth be deemed equivalent to administration upon the shares it represents.

### D. *Rationale*

As an original question the situs of shares might have been deemed to be where the corporate assets are. The state having control of the assets might well have been the ultimate jurisdiction before which the

133. *Ibid.*
134. Richardson v. Busch, 198 Mo. 175, 95 S.W. 894 (1906).

primary stock rights—the right to receive dividends and share assets upon liquidation—would have to seek recognition. As a matter of naked power between independent sovereigns such a view of situs may be correct,[135] but in the United States where a typical corporation may have assets in a score of states, it would be highly impractical. It was early decided that the internal affairs of the corporation, including rights in its stock, were to be governed and determined by the state under whose law it was organized. The state of incorporation was looked to as a technical headquarters to obviate conflicting judicial management of the internal affairs of the corporation.

However, administration in the state of incorporation is also a highly impractical requirement; in the case of a diversified investment program, it would mean administration of the investor's estate in many places. That does not happen, as lawyers well know. Seemingly it is avoided by a general business custom of accepting the endorsement of any duly appointed executor who produces a certificate—which is nothing more or less than a widespread, day-to-day reliance on the mercantile theory of dealing with stock.[136] It is in no wise a recognition of a "superior right" in the domiciliary executor, even though in by far the greatest number of cases certificates are held at the domicile of the decedent and the executor producing them is appointed there. This statement may be tested by supposing that a domiciliary representative requests a transfer of stock without producing the certificates, they being in the hands, let us say, of an ancillary administrator. The reaction of the transfer agent to such a request is readily predictable. It will be refused because of the Uniform Stock Transfer Act. Since the certificates are neither lost nor destroyed, the issuance of new certificates without surrender of the old would subject the corporation to a double liability on the shares.[137]

It should be repeated here that the mercantile idea of stock dealing is not a mere practice of business men without logical, legal foundations. True, courts originally settled upon the state of incorporation as the situs of stock, since that state had a basic jurisdiction over the person of the corporation. However, we have previously seen that the idea of jurisdiction as resting upon control of the persons whose legal relations are

135. *Cf.* Cities Service Company v. McGrath, 343 U.S. 330 (1952), where the Supreme Court refused to apply regular situs rules (in the case of a negotiable debenture) if to do so would defeat recovery of American securities looted by enemy forces.

136. Occasionally the reliance is on special statutes.

137. U. S.T.A. § 17.

the intangible is but a general truth which is subject to further refinement.[138] Nothing prevents a state having an ultimate jurisdiction of that kind from allowing the issuance of freely circulating documents such as checks, notes, bonds and stock certificates, which to paraphrase Justice Holmes,[139] so far represent the intangible legal relation that only through and by means of the paper can the benefits of ownership be enforced, in ordinary cases. Properly viewed, the very recognition of the person who owns the paper as owner of the intangible, constitutes a release of jurisdiction by the state of ultimate control, in favor of the laws and courts of the place where the paper is. This is the rationale of the mercantile theory.

Let us advance a step further. Suppose an administrator produces a stock certificate and the transfer agent refuses transfer on the ground that in the state of incorporation a local administrator is acting and claiming to administer upon the shares. Should administration upon the certificate take precedence? The answer of Goodrich and the *Restatement* is yes. Goodrich says:

> "Granting that the ultimate control of the transfer of shares of stock is in the state of incorporation, the adoption by that state of a statute such as the Uniform Act would indicate that a transfer of the shareholder's interest would be ineffective, even though ordered by a court of the corporate domicile, unless the court had control over the certificate, and that a transfer ordered by a court having jurisdiction over the certificate would be recognized as valid at the corporate domicile. The stock should therefore be regarded as an asset and administered at the place where the certificate is located, rather than in the state of incorporation."[140]

He does not pursue the point, but it is permissible to ask whether the state of incorporation is *compelled,* under the full faith and credit clause, to recognize the administration upon the certificate—or may it, having permitted the issuance of the certificate and its circulation outside its borders as fully representative of the stock, now deny that it did so, and for purposes of administration conclude that the situs of the stock is within its jurisdiction. It is easy enough to say that since the state of incorporation has a fundamental right to declare the incidents of its

138. Part II-A, *supra.*
139. Direction der Disconto-Gesellschaft v. U.S. Steel, 267 U.S. 22, 28 (1925).
140. GOODRICH, CONFLICT OF LAWS § 180 (2d ed. 1938). *Accord:* RESTATEMENT, CONFLICT OF LAWS § 477, *Comment* c. (1934).

shares and certificates, its decision in situating the shares cannot be questioned elsewhere. Nevertheless, constitutional questions can be seen —not only of full faith and credit, but of due process and perhaps of abridgement of a contract obligation, assuming that the stock in question is a contract between corporation and stockholder of which the state statutes, including the Uniform Stock Transfer Act, are impliedly a part.

Brief note should be made of the practice of holding shares of stock of an individual decedent in a street name or in the hands of a broker, endorsed in blank. In such a case the decedent's rights are not to be identified with those of ordinary stockholders, for he owns but a simple right to receive specified shares from the broker on demand. This right is a mere claim, though specifically enforceable, and would probably be administerable where the broker is, like a debt.

We may sum up the state of the law relating to probate jurisdiction over corporate shares in the following fashion. The tendency of courts to accept commercial habits and to permit dealing with the certificate to be conclusive, was noticeable long before general enactment of the Uniform Stock Transfer Act. The *Restatement* and the text writers have endorsed that tendency fully. Strong practical recognition of the mercantile theory has always been found in the requirement of lawyers and tranfer agents that the certificate must be produced to effect a transfer. Today the universal presence of the Stock Transfer Act permits the opinion to be hazarded that the mercantile theory will supplant all others, in the courts as well as on the exchanges.

The practical advantages of the mercantile theory in estate administration cannot be disputed. Needs of beneficiaries, executors and transfer agents will be best served, and transfers expedited, by permitting the transfer of stock at the instance of the executor who produces the certificates. In short, the administration and transfer of stock should be comparable to the administration and transfer of negotiable instruments; comparable benefits will flow from that treatment.

## IV. Constitutional Limitations In The Administration of Intangibles

Justice Jackson, writing of the full faith and credit clause in the *Columbia Law Review,* has said:

"We have so far as I can ascertain the most localized and

> conflicting system [of administering justice] of any country which presents the external appearance of nationhood."[141]

Yet there are unifying factors in our system, and among them the due process and full faith and credit clauses stand out. To the extent inter-state conflicts in the administration of intangibles are to be resolved, these clauses will be the principal instruments of the courts. Several indirect references have already been made to their effect upon probate decrees, but it is believed desirable to make a more comprehensive, though not exhaustive, statement of the subject.

Article IV, Section 1, of the Constitution requires each state to give full faith and credit to "the public Acts, Records and Judicial Proceedings of every other State." Congress, by the same section, is authorized to prescribe "the effect" of such acts, records and proceedings, and it almost immediately exercised this power.[142] The current statute is found in Sections 1738 and 1739 of Ttile 28, United States Code, and provides that acts, records and judicial proceedings shall in every state have the same full faith and credit as they have by law or usage in the court of the state from which they are taken.[143]

The adoption of the Fourteenth Amendment to the Constitution in 1868 has proved, in the operation of its due process clause, a rigorous restraint on the freedom with which a state can act upon its internal affairs. Due process goes to the validity of action in and of the state itself; full faith and credit concerns the external respect to be given to a state's action. That they are closely connected was reiterated by the Supreme Court in 1946: "A judgment obtained in violation of procedural due process is not entitled to full faith and credit when sued upon in another jurisdiction."[144] Probably this statement by the Supreme Court is good in its reverse sense under certain circumstances: Any purported judgment against property to which other states are not compelled to give full faith and credit because of lack of jurisdiction in rem, is probably violative of due process and void in the state of first instance.[145] The *Restatement* provides:

> "If a State attempts to exercise power by creating interests

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141. Jackson, *Full Faith and Credit—The Lawyers' Clause of the Constitution*, 45 COL. LAW REV. 1, 18 (1945).
142. Act of May 26, 1790 c. 11, 1 STAT. 122.
143. 62 STAT. 947 (1948), 28 U.S.C.A. §§ 1738 and 1739.
144. Griffin v. Griffin, 327 U.S. 220, 228 (1946).
145. See Pennoyer v. Neff, 95 U.S. 714 (1877); Baker v. Baker, Eccles & Co., 242 U.S. 394 (1917).

> with respect to persons or things which it has no jurisdiction to create, its action is in violation of the Fourteenth Amendment to the Constitution and is void in the State itself. The Supreme Court of the United States may review all cases whether from a lower Federal court or from a State court of last resort which involve a question of the exercise of power on the part of a State when it has no jurisdiction."[146]

An administration proceeding is entitled to full faith and credit as a "judicial proceeding."[147] While certain steps in the proceeding may give rise to personal rights and duties,[148] nevertheless it is a proceeding *in rem*.[149]

> "It is elementary that [a] probate proceeding by which jurisdiction of a probate court is asserted over the estate of a decedent for the purpose of administering the same is in the nature of a proceeding in rem, and is therefore one as to which all of the world is charged with notice."[150]

The decrees of a probate court in which we are interested are those partially or finally distributing an estate, or directing the sale of property, because under them interests in property are created without regard to what persons, if any, are officially before the court. Since *Pennoyer v. Neff*[151] and *Thompson v. Whitman*,[152] especially, it has been accepted as settled that *in rem* proceedings are entitled to full faith and credit everywhere in the United States, subject to the right of other states to inquire into whether the court of first instance had actual jurisdiction over the res. If, for example, a probate court decrees distribution of personal property not having situs in the state where the court sits, other courts are privileged to refuse credit to that decree.[153]

*Thompson v. Whitman* arose out of a controversy over the sloop *Anna S. Whitman*, a tangible object whose disputed location at a given time was a factual matter. Likewise, the location of intangibles might conceivably be disputed on the factual level, but the far more important

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146. RESTATEMENT, CONFLICT OF LAWS § 43, *Comment a* (1934).

147 So treated in Riley v. New York Trust Co., 315 U.S. 343 (1942); Michigan Trust Company v. Ferry, 228 U.S. 346 (1913); Tilt v. Kelsey, 207 U.S. 43 (1907).

148. *E.g.* litigation of claims, discovery of assets.

149. For a thorough analysis of this concept see Simes, *The Administration of a Decedent's Estate as a Proceeding in Rem*, 43 MICH. L. REV. 675 (1945).

150. Goodrich v. Ferris, 214 U.S. 71, 80-81 (1909).

151. Note 145 *supra*.

152. 18 Wall. 457 (U.S. 1873).

153. Baker v. Baker, Eccles & Co., 242 U.S. 394 (1917) (distribution of corporate stock).

question arises where the facts are conceded. Is every state free to apply its own notions of legal situs to conceded facts, and reach a hostile jurisdictional conclusion? In other words, can a state compel full faith and credit to be given to its decrees, or deny credit to foreign decrees, by adopting an unusual concept of situs?

The answer to this question seems rather clear. In other fields a state has not been able to evade constitutional obligations by re-defining the concepts involved. Thus, in a tax case the Wisconsin court has said:

> "It seems evident to us that a state may not, by definition, construction, or other process, domesticate a person or corporation in fact domiciled elsewhere, in order to avoid the application of constitutional principles established by the Supreme Court of the United States relative to jurisdiction for purposes of taxation. To say that it may do so is to contend that the limits of the state's jurisdiction to tax are wholly self-imposed."[154]

Neither can a domiciliary state acquire jurisdiction over an out-of-state intangible by calling itself the situs. The Supreme Court has found such a domiciliary decree to be violative of due process and not entitled to full faith and credit.[155] The cases and authorities cited in Part II *supra* are confirmation of the jurisdiction of the court of situs, as customarily defined. Jurisdiction being established in that court, its decrees comport with due process and are entitled to credit everywhere.[156] The restraint upon the domiciliary court has been phrased in other language, but to the same effort is *Overby v. Gordon*[157] where a Georgia decedent had a large bank account in Washington, D. C. The Supreme Court there said:

> "Now it is undeniable that the sovereignty of the state of Georgia and the jurisdiction of its courts . . . did not extend to or embrace the assets of the decedent situated within the territorial jurisdiction of the District of Columbia."

Judge Learned Hand, while on the district court bench, put the matter in the following language:

> "No doubt the state of New York, as respects goods situated

154. Newport Co. v. Wisconsin Tax Commission, 219 Wis. 293, 261 N.W. 884, 890 (1935). And see Hanna v. Stedman, 230 N.Y. 326, 130 N.E. 566 (1921) (on conceded facts, jurisdiction-in-rem conclusion may be re-examined by second state).

155. Baker v. Baker, Eccles Co., note 153 *supra,* and see Iowa v. Slimmer, 248 U.S. 115 (1918).

156. See Hopkins, *The Extraterritorial Effect of Probate Decrees,* 53 YALE L. J. 221, 234 (1944).

157. 177 U.S. 214 (1900).

> within its own jurisdiction, might provide that an executor appointed elsewhere should be its own representative, and that process served upon him within its own borders should be effective to determine the disposition of all such goods. [Citing cases] Yet if it attempted to go further than this, to take any steps towards the disposition of a decedent's goods situated elsewhere and under the existing administration of another state, it would violate the common understanding respecting such matters and expose itself to the disregard of its judgments by the state which had appointed the executor and assumed the direction of his official conduct. Moreover, since the fourteenth amendment, the assumption of such a jurisdiction which conflicted with the exclusive authority of another state over a matter within its jurisdiction would itself be disregarded at the outset, at least in a federal court: nor would the executor be left to the assertion of the invalidity of such proceedings, when it was presented for execution or as evidence. Pennoyer v Neff, 95 U.S. 714."[158]

Where the normal rules for ascertaining situs of intangibles are not clear, it is possible that two states may enter conflicting claims of probate jurisdiction over the same items, each with justification. Thus, when Missouri's rule was that the situs of stock of Missouri's corporation was in Missouri and nowhere else,[159] federal courts in New York thought otherwise, and decided that a New York executor with a stock certificate in a Missouri corporation could administer the stock.[160] Confronted with the New York decision, the Missouri Supreme Court, in *Lohman v. Kansas City Southern Ry.*, ruled that the New York decree and administration was entitled to full faith and credit.[161]

Instances will arise where a given intangible will concededly be subject to the jurisdiction of two or more states for administration purposes, with each state willing to concede the basic jurisdiction of others.[162] Thus debtors of decedents, especially corporate debtors, may well be subject to process in several states, and any of several administrators may be entitled to sue and collect the debt. Payment to any of them should operate as a full acquittance,[163] but absent payment, any of them may sue for recovery. In such a case it is suggested that the courts will,

158. Thorburn v. Gates, 225 Fed. 613, 616 (S.D. N.Y. 1915).
159. Troll v. Third National Bank, 278 Mo. 74, 211 S.W. 545 (1919).
160. Norrie v. Lohman, 16 F. 2d 355 (2d Cir. 1926).
161. 326 Mo. 868, 33 S.W. 2d 117 (1930).
162. An intimation of that situation is found in Standard Oil Company v. New Jersey, 341 U.S. 428 (1951), where New Jersey successfully escheated corporate stock and dividends of its domestic corporations.
163. RESTATEMENT, CONFLICT OF LAWS § 480 (1934).

as a practical matter, if not as a constitutional requirement, defer to that court first assuming jurisdiction.[164]

That it may be a constitutional reqiurement is indicated by the fact that service of process upon a debtor is deemed to operate as a seizure of the debt, to the extent it is susceptible of seizure. At least it has been so held many times in the garnishment cases, where debts owing to a non-resident are subjected, *quasi in rem,* to the payment of local creditors of the non-resident.[165] Garnishment cases are important to this discussion because they proceed upon a jurisdictional foundation comparable to that of an administration. In either case, the objective of state power is to declare or create rights in the debt, and in fact, it is common for court opinions, where jurisdictional points are in issue, to cite the two types of proceeding as equivalent.

A garnishment case having important bearing on the problem is *Chicago, Rock Island & Pacific Ry. v. Sturm,*[166] where the Kansas Supreme Court attempted to disregard the seizure of a debt by a foreign court on the ground that by its definition, *mobilia sequuntur personam,* the situs of the debt was in Kansas. The railroad in question had been garnished by an Iowa writ for a Kansas workman's wages, and the workman immediately sued for the same wages in a Kansas court. In the eyes of the Kansas court, Iowa was without jurisdiction. The United States Supreme Court thought otherwise. Situs of the debt was wherever the debtor might be served. Iowa had by its process seized the debt and it had jurisdiction. The Kansas judgment was therefore reversed outright for failure to give full faith and credit to the Iowa proceedings. The implication of the case is two-fold: First, the Kansas attempt to use the *mobilia* doctrine as a jurisdictional test was prohibited by the Constitution. Second, the court first seizing the debt would seem to have drawn jurisdiction to itself, excluding other courts.[167]

Many questions of the application of the Constitution to administration of intangibles remain unsettled today. In dealing with them a lawyer

164. But *cf.* §§ 504 and 505, RESTATEMENT, OF CONFLICT LAWS (1934), which indicate that a number of suits might be prosecuted concurrently, and the one first reduced to judgment would supersede the others.

165. Baltimore & Ohio R.R. v. Hostetter, 240 U.S. 620 (1916); Harris v. Balk, 198 U.S. 215 (1905).

166. 174 U.S. 710 (1899), *reversing* 58 Kan. 818, 51 Pac. 1100 (1897).

167. *Cf.* Lion Bonding Co. v. Karatz, 262 U.S. 77 (1923) and Harkin v. Brundage, 276 U.S. 36 (1928) (where two courts have concurrent jurisdiction, in receivership cases, the first asserting it takes exclusive jurisdiction).

can only predict on the basis of the present reports what the likely action of a court will be. He should, however, bear in mind that the court whose decision he is predicting is not a state court of last resort, but the Federal Supreme Court. The right of a state to administer upon an intangible is limited by the due process clause, questions under which are clearly federal in nature, and by the full faith and credit clause. The Supreme Court itself is "the final arbiter when the question is raised as to what is a permissible limitation on the full faith and credit clause."[168]

## V. A New Nullification Doctrine: Kansas Senate Bill 190

On March 30, 1953, the Governor of Kansas approved a bill, Senate Bill 190, relating to administration of out-of-state property of Kansas decedents.[169] It has been said to be a retalitory measure for Missouri's Senate Bill 63. However, the concept of retaliation seems a strange one under the circumstances. All that Missouri had done was to retreat from an unworkable legislative innovation and reinstate the law of ancillary administration as it had previously existed in Missouri,[170] and as it now exists in most other states,[171] including Kansas. Indeed, Sections 59-801 and 59-802 of the *Kansas General Statutes* permit ancillary administra-

168. Both in Williams v. North Carolina, 317 U.S. 287, 302 (1942) and in Johnson v. Muelberger, 340 U.S. 581, 585 (1951).

169. Bill passed the Senate March 4, 1953, was amended by the House and passed on March 25. The Senate concurred March 26. The new Kansas law reads as follows, with the portion added by the House italicized:

"Section 1. The courts of Kansas shall have exclusive jurisdiction to determine the devolution of property by will or by descent of all persons who are residents of Kansas at the time of death as to real property located in Kansas and tangible or intangible personal property wherever located. Any determination with regard to the devolution of such property by other courts except federal courts having jurisdiction by reason of removal and appeals from Kansas courts, shall be void and of no effect, *and in all such cases, the director of revenue and taxation of the state of Kansas shall refuse to issue any inheritance tax order, waiver or clearance.* In any case where a resident of Kansas shall die owning real estate in Kansas, or tangible or intangible personal property wherever located, exceeding the statutory inheritance tax exemption for his heirs at law, and the heirs at law or others entitled to commence administration proceedings in Kansas shall fail to do so, or shall commence administration proceedings in any other state, the director of revenue of the state of Kansas provided no order has been made for the payment of inheritance taxes shall be authorized to commence administration proceedings in the county where such person was a resident at the time of death, and upon notice provided by law, the probate court shall appoint an executor or administrator upon such petition for administration as in other cases. Such executor or administrator shall take possession of all tangible and intangible personal property owned by the decedent, wherever located, and of all real estate owned by the decedent located in the state of Kansas, and shall make full inventory thereof for the director of revenue as provided by law."

170. See Part I *infra*.

171. The statutes of Illinois, Iowa, California and New York have been examined as a random sample, and in each of them ancillary administration of tangibles and intangibles of a non-resident is required or permitted.

tion whenever the probate court deems it "necessary." Had Missouri legislators copied these Kansas statutes instead of passing Senate Bill 63, they would have arrived at a much broader, and more satisfactory, basis for ancillary administration.

Kansas Senate Bill 190 purports to do two things: It declares a rule of law and it establishes a procedure. The rule of law is that Kansas shall have jurisdiction over property of Kansas decedents which is outside its borders. Exclusive jurisdiction to determine devolution of "tangible or intangible personal property wherever located" is vested in the Kansas courts, and determinations by courts of other states are said to be void. Observe that the statute does not, in its opening language, say that foreign administration proceedings shall be entirely void; it proscribes only their decrees of distribution. If the foreign probate court should transmit the residue in its hands to the Kansas administrator for final distribution, would the Kansas law be satisfied? Such an interpretation is contradicted by the closing language of the statute when it directs that the Kansas administrator, appointed on application of the Director of Revenue, shall take into his possession all personal property wherever located.[172] No legal means of carrying out this direction comes to mind.[173] Nevertheless, it indicates that even possession of property by a foreign administrator is obnoxious to the expressed Kansas policy.

It will not be denied that the Kansas statute is a novel piece of legislation in its unconcealed purpose of giving extra-territorial effect to Kansas law. It is an attempt to apply the *mobilia sequuntur personam* doctrine as a jurisdictional test. We have seen that the Kansas courts have sometimes refused to administer upon goods of non-residents, citing the *mobilia* doctrine, which they may constitutionally do.[174] Now the legislature, and not the Kansas courts, has tried to impose the *mobilia* doctrine in such a way that it will withdraw jurisdiction from other states and invade their sovereignty.

Administration proceedings in one state purporting to affect property interests not within the jurisdiction of that state violate the common understanding and will be denied full faith and credit elsewhere.[175] Such proceedings are not due process of law within the meaning of the Four-

172. It is impossible to tell whether this direction applies to all Kansas executors and administrators, or only those appointed on application of the Director.

173. For practical results, conscientious Kansas administrators might resort to dead-of-night excursions into other jurisdictions.

174. Part II-D, *supra*.

175. See Part IV, *supra*.

teenth Amendment, and are void in the state of first instance.[176] Thus it should be expected that the Kansas courts will recognize the invalidity of the new statute as promptly as any other courts.

There will be no attempt at this point to restate what has already been said in earlier portions of this article relating to the jurisdiction of states to administer upon intangibles.[177] The moving parties behind the Kansas statute probably had not recently read the decisions of the Supreme Court upon the subject.[178] Very likely they did not realize that once before, in the *Sturm* case, Kansas had attempted to use the *mobilia* doctrine to establish the situs of an intangible within its borders, and the Supreme Court held the attempt unconstitutional.[179]

Brief attention should be given to the effect of the procedure which Senate Bill 190 provides. If administration proceedings are commenced in any other state, the Kansas Director of Revenue is authorized to initiate administration in Kansas and have an executor or administrator appointed "for administration as in other cases." This approach suggests that the object of the bill is to protect inheritance tax revenues, but the question arises whether it was really designed for, or in any way accomplishes that purpose.

With respect to tangible property of the decedent outside the State of Kansas, Kansas cannot collect inheritance taxes, as a matter of due process of law.[180] Therefore, the direction to administer upon such property can have nothing to do with inheritance taxes.

Kansas may, under current decisions of the Supreme Court, levy inheritance tax upon intangibles of its decedents wherever located.[181] The new statute seems of little help in collecting that tax. Other Kansas statutes of long standing permit the Director of Revenue, or the County Attorney, to apply for appointment of an administrator where no local administration has been commenced within four months after death.[182] The Kansas Director of Revenue has deemed his power applicable to

176. *Ibid.*

177. See generally Parts II and III, *supra.*

178. *E.g.* Iowa v. Slimmer, 248 U. S. 115 (1918).

179. Chicago, Rock Island & Pacific Ry. v. Sturm, 174 U.S. 710 (1899), *reversing* 58 Kan. 818, 51 Pac. 1100 (1897). The principal exposition of the *mobilia* doctrine, held unconstitutional in this case, will be found in an earlier Kansas opinion, Missouri Pacific Ry. v. Sharritt, 43 Kan. 375, 23 Pac. 430, 431 (1889).

180. This was the exact holding of the Supreme Court in Treichler v. Wisconsin, 338 U.S. 251 (1949). See generally Part II-C, *supra.*

181. Part II-C, *supra.*

182. KAN. GEN. STAT. § 79-1521 (1949), and see § 79-1512 for non-judicial determinations of inheritance tax.

both testate and intestate estates,[183] and accepting his own construction of the statutes, it appears that Senate Bill 190 has given the Director of Revenue no additional power and created no procedure useful in collecting inheritance tax which was not already available.[184]

It has already been observed that nearly all states, including Missouri, have exempted intangible property of non-residents from any inheritance taxes.[185] Thus when a Kansas decedent's intangible estate is administered in Missouri under Senate Bill 63, inheritance taxes will be payable to Kansas and not to Missouri. Note that this result stems from Supreme Court decisions and state statutes of long standing. Kansas Senate Bill 190 is not involved.

Even where there is no domiciliary administration of a Kansas resident's estate, and original letters are issued by the Missouri probate court, Kansas need not fear any substantial loss of revenue, for reasons unconnected with the new law. In larger estates there will be no motive to avoid Kansas taxes because of the operation of the federal 80% credit against the basic federal estate tax.[186] To obtain this credit the Missouri executor will pay inheritance taxes to Kansas. In addition, it appears that Kansas may very well assert any claim to inheritance taxes in Missouri courts, by virtue of a county rule adopted in the statutes and by court decision.[187]

## CONCLUSION

The passage of Senate Bill 63 in the 1951 Missouri legislative sessions caused Missouri law, respecting the administration of estates of non-residents, once again to conform to the laws of most other states. The enactment ended a virtual prohibition of such administrations, which for many years had frustrated the wishes of beneficiaries of non-residents.

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183. See his current affidavit form IH-22, which has been in use for over 10 years.

184. However, after declaring that any determination of devolution by other courts shall be void, the statute says, "in all such cases, the Director of Revenue and Taxation of the State of Kansas shall refuse to issue any inheritance tax order, waiver or clearance." This was the language added by the House amendment to the Senate Bill, but what purpose is to be served by it is unclear. In the first place "all such cases" refers to "any determination . . . by other courts." From that language it is gathered that the Director may issue orders and waivers prior to the time of the final decree of distribution by the foreign court. In the second place, the accepted mode of determining inheritance taxes in Kansas is by an official order of the Director. Perhaps this means that Kansas will refuse to assess any inheritance taxes in a proper case.

185. Part II-C, *supra*.

186. I.R.C. § 813.

187. State *ex rel.* Oklahoma Tax Commission v. Rogers, 238 Mo. App. 1115, 193 S.W. 2d 919 (1946) and see MO. REV. STAT. § 507.020 (1949).

Now the machinery of the Missouri probate courts is made available to them, if they find it convenient to use it. Missouri banks again can be appointed testamentary trustees of property located in Missouri, where prior law effectively denied that possibility. However, use of the amended section is conditioned upon there being a will which leaves a legacy to a Missourian, outright or in trust. If the requirement is met, administration of all property within the jurisdiction of Missouri can be had in a Missouri probate court.

There is nothing mandatory in the law. Specified parties interested in the estate must want administration in Missouri and apply for it. Should they desire but a single domiciliary administration, that desire is respected, and regardless of whether a legacy is left to a Missourian or not, property in Missouri will, at the end of six months, be transmitted to the domiciliary executor for administration. This optional feature of the Missouri law gives it great flexibility, and careful lawyers will take advantage of it. In applicable cases wills should provide for at least a nominal gift to a Missourian, so that an option will be open to the beneficiaries of the estate to have a Missouri administration or not, depending upon the circumstances at the time the will takes effect.

It has already been mentioned that Senate Bill 63 did not go far enough in permitting ancillary administrations.[188] Either the Kansas or the Illinois statute on the subject would have better served Missouri's purpose, as was suggested in Part V.[189] Both of those states, as well as many others, have laws permitting ancillary administration of testate and intestate estates.

The principal difficulty with the present Missouri law is that the condition for ancillary administration is too restrictive. The typical estate is intestate, and in such a case Missouri law requires a six months waiting period before Missouri intangibles can be made use of in estate administration. In small estates the principal items thus frozen are salaries or wages due to a decedent non-resident, or his bank account. There is no legal way for a Missouri employer or a Missouri bank to pay over these items for six months after death. Further legislation is required, in the public interest, to expand the basis for ancillary administration and provide for ancillary orders refusing letters of administration.

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188. See the example in Part I of the Missouri merchant who is unfortunate enough to live across the state line.

189. KAN. GEN. STAT. §§ 59-801 and 59-802 (1949). The Illinois statute is ILL. ANN. STAT. Ch. 3, § 241 (Smith-Hurd 1941) discussed in Part II-D.

This article has discussed at some length the question of jurisdiction to administer upon intangibles and constitutional limitations upon the exercise of a state's power in that field.[190] These problems have nothing to do with the validity of Section 466.010, but are concerned solely with the determination of the precise scope of an ancillary administration. Obviously, they are not problems created by the new Missouri law. They are inherent in a non-centralized, federal system of government, and are faced by each of the states, whenever it attempts to determine what property it is authorized to administer.

The jurisdictional and constitutional questions discussed may prove to be of diminished importance under the new Missouri law, because use of that law for ancillary administration is permissive, not mandatory. Presumably, therefore, the ancillary administration and the domiciliary administration, if any, will be conducted harmoniously.

190. Parts II, III, and IV.