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JURISDICTION FOR THE PURPOSE OF IMPOSING INHERITANCE TAXES

By DAVID R. MASON*

FOR nearly half a century so-called inheritance tax laws of the states of the United States have been predicated upon two distinct theories of jurisdiction, many states embodying both theories into their statutes. Recent decisions rendered by the Supreme Court of the United States, however, challenge the constitutionality of such a scheme and indicate the expediency of a review of the extent of state jurisdiction for the purpose of imposing such taxes.

The legislature of New York set an example for other states of the United States when it passed a law[1] providing that: "all property which shall pass by will or by the intestate laws of this state, from any person who may die seized or possessed of the same while a resident of this state, or if such decedent was not a resident of this state at the time of death, which property, or any part thereof, shall be within this state * * * shall be, and is subject to a tax * * *."

That statute has been changed many times, and in 1896 the subject of the tax was stated to be the transfer of property by will or intestate law.[2] However, regardless of whether the literal terms of the law might seem to impose a direct tax on property or whether the subject of the tax is stated to be the transfer of property, the courts have generally agreed[3] that the tax imposed by statutes of

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[1]Laws of 1887, ch. 713, sec. 1, amending laws of 1885, ch. 483, which was held in In re Enston's Will (1889) 113 N. Y. 174, 21 N.E. 87, not to include property of nonresident decedents.

[2]Art. X, ch. 908, Laws of 1896.

[3]In re Embury, 19 App. Div. 214, 45 N. Y. S. 881 (1897), affirmed in 154 N. Y. 746, 49 N.E. 1096, ascribed a double character to the tax. The court said that as to residents the tax is on the succession or transfer, but as to nonresidents it is a tax on the property itself. The adoption of such a statement would give rise to constitutional difficulties, and such sporadic declarations probably result from the use of the test of situs of the property to determine liability to the tax in the case of nonresident decedents. As will appear, the test of situs is entirely consistent with the theory of the tax as upon the exercise of the privilege of receiving or transmitting property.

this nature is not one on property but rather that it is an excise tax upon the exercise of a privilege incident to the shifting of the legal interest in property upon the death of the owner. It has been referred to by some courts as an excise upon the right to transmit and by many others as an excise upon the right to receive. Thus, the supreme court of Wisconsin, in *Beals v. State*,[4] said:

"The inheritance tax * * * is not a tax upon property or upon property rights in any sense, but purely an excise levied upon the 'transfer' or transaction and merely measured in amount by the amount of the property taxed."

Again, the supreme court of Michigan concluded,[5] after considering the contention that the tax is upon the privilege of succession and so to be distinguished from a tax on the property itself:

"Many other cases might be cited in support of the proposition that it is a tax upon the privilege, rather than upon the property. * * * We are of the opinion that the overwhelming weight of autority supports it."

This character of the tax as a premium upon the exercise of the privilege of transmitting or receiving property is important, for the legislative power to impose taxes is restricted by the doctrine enunciated by the Supreme Court of the United States[6] that a tax by a state in no position to render an equivalent in service or benefit is a taking of property without due process of law in contravention of the Fourteenth Amendment to the federal Constitution. If the tax is a bonus exacted by the state for the privilege of transmitting or succeeding to property on the death of its owner, the state levying such a tax must give some privilege of transmitting or succeeding. The transfer or shifting of the legal interest must depend in some way upon the law of the state seeking to impose the tax—must take place according to or by virtue of its laws.

The Supreme Court of the United States apparently at one time adopted the view that this is the only limitation of state jurisdiction to impose inheritance taxes to be found in the federal Con-

[4]139 Wis. 544, 121 N.W. 347 (1909).

[5]Union Trust Co. v. Durfee, 125 Mich. 487, 84 N.W. 1101 (1901).

[6]Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 25 Sup. Ct. 36, 4 Ann. Cas. 493 (1905).

stitution. In *Magoun v. Illinois Trust and Savings Bank*[7] Mr. Justice McKenna, delivering the opinion of the court, said of cases dealing with legacy or inheritance taxes:

"They are based on two principles: 1. An inheritance tax is not one on property, but one of the succession. 2. The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it."

Again in *Bullen v. Wisconsin*,[8] Mr. Justice Holmes said:

"As the states where the property is situated, if governed by the common law, generally recognized the law of the domicile as determining the succession, it may be said that, in a practical sense at least, the law of the domicile is needed to establish the inheritance. Therefore, the inheritance may be taxed at the place of domicile, whatever the limitations of power over the specific chattels may be. as is especially plain in the case of contracts and stocks."

If, then, a state is in a position to render an equivalent to the taxpayer by furnishing a law governing the transfer or succession, there would seem to be no constitutional limitation upon that state imposing an inheritance tax. The inquiry would seem to be narrowed to a question of what law governs or controls the distribution of the estate.

That is the theory upon which state inheritance tax laws have been based, and prior to 1925 at least the authorities merely invoked the rules of private international law to test jurisdiction to impose the tax. The courts agreed that real property is transferred according to and by virtue of the laws of the jurisdiction in which it is situated, and that, therefore, that jurisdiction alone possesses the power to impose an inheritance tax upon the transfer of or succession to it.[9] On the other hand the courts recognized that the transfer of or succession to personal property takes place according to

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[7]170 U. S. 283, 18 Sup. Ct. 594, 42 L. ed. 1037 (1898).

[8]240 U. S. 625, 36 Sup. Ct. 472, 60 L. ed. 839 (1916).

[9]People v. Kellogg, 268 Ill. 489, 109 N.E. 304 (1915); Connell v. Crosby, 210 Ill. 380, 71 N.E. 350 (1904); Westfeldt's Succession, 122 La. 836, 48 So. 281 (1909); McCurdy v. McCurdy, 197 Mass. 248, 83 N.E. 881 (1908); Matter of Burden, 47 Mis. (N. Y.) 329, 18 L. R. A. 709 (1905); In re Handley, 181 Pa. St. 339, 37 Atl. 587 (1897); Commonwealth v. Coleman, 52 Pa. 468 (1866).

the law of the owner's domicile but by the consent or acquiescence of the jurisdiction where the property is situated. It was, therefore, generally assumed and frequently held that both the state of domicile and the state having jurisdiction of the property might exact an inheritance tax in respect to personal property.

Most of the cases involving the power of the state of the owner's domicile to impose the tax were confined in their actual holdings, it is true, to the exaction of the tax in respect to intangible personal property.[10] However, the power to exact the tax in respect to all personal property was generally stated broadly, and in those cases where tangible personal property was involved[11] the courts had no difficulty in sustaining the power of the state of domicile.

Likewise jurisdiction independent of the owner's domicile, as a basis for the exaction of an inheritance tax, was asserted over both tangible and intangible personalty.[12] The physical presence of tangible personalty within a state, if not for a mere temporary or transient purpose, gave jurisdiction to that state to exact the tax on the transfer thereof or succession thereto.[13] Various theories were invoked to give jurisdiction over intangible personalty. The devolution of debts owed to nonresidents was subjected to an inheritance tax by the state of the debtor's domicile,[14] and, if secured

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[10]Bullen v. Wisconsin, 240 U. S. 625, 36 Sup. Ct. 473, 60 L. ed. 830 (1916); Kennedy v. New York, 222 U. S. 525, 32 Sup. Ct. 105, 56 L. ed. 299 (1912); Hopkins' Appeal, 77 Conn. 644, 60 Atl. 657 (1905); Callup's Appeal, 76 Conn. 617, 57 Atl. 699 (1904); People v. Kellogg, 268 Ill. 489, 109 N.E. 304 (1915); Frothinghan v. Shaw, 175 Mass. 59, 55 N.E. 623 (1899); Mann v. Carter, 74 N. H. 345, 68 Atl. 130 (1907); Hartman's case, 70 N. J. Eq. 664, 62 Atl. 560 (1905); In re Dingman, 66 App. Div. 228, 72 N. Y. S. 694 (1901); In re Merriam, 141 N. Y. 479, 36 N.E. 505 (1894); In re Short's Estate, 16 Pa. 63 (1851).

[11]In re Gumbinner's Estate, 92 Mis. 104, 155 N. Y. S. 188 (1915); In re Swift, 136 N. Y. 77, 32 N.E. 1096, 18 L. R. A. 709 (1893); In re Sherwood's Estate, 122 Wash. 648, 211 Pac. 734 (1922).

[12]Burclay v. Commonwealth, 156 Ky. 455, 161 S.W. 510, 51 L. R. A. (N. S.) 232 (1913); State v. Dalrymple, 70 Md. 294, 17 Atl. 82, 3 L. R. A. 372 (1889); Alvany v. Powell, 55 N. C. (2 Jones Eq.) 50 (1854); Commonwealth v. Smith, 5 Pa. St. 142 (1847).

[13]In re Gould's Estate, 123 Mis. 14, 205 N. Y. S. 158 (1924); In re Brooks, 119 Mis. 738, 197 N. Y. S. 637 (1922).

[14]Blackstone v. Miller, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. ed. 439 (1903); Hoyt v. Kegan, 183 Iowa 592, 167 N.W. 521 (1918); In re Stanton,

by a mortgage on land, by the state where the land was situated.[15] Authorities recognized that the permanent physical presence of the evidence of property, e.g., notes, bonds, stocks, etc. was a sufficient basis of jurisdiction for inheritance tax purposes.[16] Again, it was held that the state where the owner caused property to become integral parts of a local business, e.g., where credits were left in control of a resident agent for the purpose of investment and re-investment, might levy an inheritance tax in respect to such property.[17] Also, it was held that an inheritance tax might be exacted in respect to shares of a nonresident in a trust having a local seat,[18] in a partnership[19] or a joint stock association[20] doing business in the state or in a domestic corporation.[21]

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142 Mich. 491, 105 N.W. 1122 (1905); Matter of Houdayer, 150 N. Y. 37, 44 N.E. 718 (1896).

15Roger's Estate, 149 Mich. 305, 112 N.W. 931 (1907).

16Wheeler v. Sohmer, 233 U. S. 434, 34 Sup. Ct. 607, 58 L. ed. 1030 (1914); Popp's Succession, 146 La. 464, 83 So. 765, 26 A. L. R. 1446 (1919); In re Romaine, 127 N. Y. 80, 27 N.E. 759 (1891).

17Re Adams, 167 Iowa 382, 149 N.W. 531 (1914); Re Stanton, 142 Mich. 491, 105 N.W. 1122 (1905); Lewis's Estate, 203 Pa. 211, 52 Atl. 205 (1902), basis of decision being questioned in Schoenbeger's Estate, 221 Pa. 112, 70 Atl. 579 (1908), and in Countess de Noailles's Estate (Re Helena) 236 Pa. 213, 84 Atl. 665 (1912).

18Peabody v. Treasurer, 215 Mass. 129, 102 N.E. 435 (1913); In re Thorne, 145 Minn. 412, 177 N.W. 638 (1920).

19In re Henry, 203 App. Div. 456, 197 N .Y. S. 63 (1922) (affirmed in 237 N. Y. 204, 142 N.E. 506 (1923)); Re DuBois, 99 Mis. 279, 163 N. Y. S. 668 (1917); being cases under a statute providing that the transfer by a nonresident "of an interest in any partner business conducted wholly or partly, within the state" is subject to the tax, which was held to be constitutional in Re Bijur, 127 Mis. 206, 216 N. Y. S. 523 (1926).

20In re Williams, 153 App. Div. 804, 138 N. Y. S. 649 (1912).

21Cases upholding such a tax have been numerous. Among others see McDougal v. Lilienthall, 174 Cal. 698, 164 Pac. 387, L. R. A. 1917 F 267 (1917); People v. Griffith, 245 Ill. 532, 92 N.E. 313 (1910); In re Hallenbeck's Estate, 231 N. Y. 409, 132 N.E. 131 (1921).

A national bank located in the state is treated as a domestic corporation. Greves v. Shaw, 173 Mass. 205, 53 N.E. 372 (1899); Matter of Cushing, 40 Mis. 505, 82 N. Y. S. 795 (1903).

The courts generally denied the power to exact an inheritance tax in respect to the shares of stock of a nonresident decedent in a foreign corporation merely because the corporation owned property in the state, and the Supreme Court of the United States finally put an end to such attempts at taxation in Rhode Island Trust Co. v. Doughton, 270 U. S. 69, 46 Sup. Ct. 256, 70 L. ed. 475 (1926).

However, in 1925 a new limitation on state power to impose inheritance taxes was discovered, which strikes a fatal blow at the scheme of jurisdiction thus evolved from the doctrine that the test of power to impose the tax under the federal Constitution is whether the state is in a position to render an equivalent to the taxpayer by furnishing a law governing the transfer. The Supreme Court of the United States found it in the due process clause of the Fourteenth Amendment to the federal Constitution and exhibited it in the much commented-upon case of *Frick v. Pennsylvania.*[22] Mr. Frick was domiciled in Pennsylvania at the time of his death. He left tangible personal property located in New York and Massachusetts and stock of corporations organized under the laws of states other than Pennsylvania. The taxing officers of Pennsylvania included all of the personal property belonging to Mr. Frick in the estate subject to tax by Pennsylvania, and the action of the taxing officers was upheld by the supreme court of the state. The Supreme Court of the United States, however, reversed the supreme court of Pennsylvania, and held it to be a violation of the due process clause of the Fourteenth Amendment to the federal Constitution to include the New York and Massachusetts tangible property in the value upon which the Pennsylvania tax was computed.

It would seem that the Supreme Court of the United States did not reach such a result by applying the doctrine that jurisdiction for the purpose of imposing inheritance taxes exists when the state seeking to impose the tax furnishes a law governing the transfer. The court was confronted with such a contention but disposed of it by saying that the laws of the state of the owner's domicile have no bearing except as the state where the property is situated adopts them. Mr. Justice Van Devanter, speaking for the court said:
"Other decisions show that the power to regulate the transmission, administration, and distribution of tangible personal property on the death of the owner rests with the state of its situs, and that the laws of other states have no bearing save as that state expressly or tacitly adopts them,—their bearing being attributable to such adoption, and not to any force of their own."

This view of the application of the rules of comity was condemned as little more than a play on words by the Supreme Court

[22] 268 U. S. 472, 45 Sup. Ct. 603, 69 L. ed. 1058.

of the United States over twenty years before its decision in the *Frick* case. In *Eidman v. Martinez*[23] the following appears in the opinion of the court:

"To say that we recognize by comity the law of a foreign domicile as controlling the transmission or succession of personal property because it thereby becomes our law, (and the property therefore taxable) as is indicated in some cases, notably in *Alvany v. Powell*, 2 Jones Eq. 51, is misleading and little more than a play on words. When we speak of our laws we mean to be understood as referring to our own statutory laws of the common law we inherited from the mother country, and when we apply the laws of a foreign domicile we do so, not because they are our laws, but because on principles of comity we recognize those laws as applicable to the particular case. But to speak of such foreign laws as thereby becoming 'intestate laws of any state or territory,' wherein they are enforced, is practically to confound the whole distinction between the law of the situs and the law of the domicile."

If the laws of the domicile do have a bearing on the succession of the property, whether their bearing be attributable to their adoption by the state of situs as its own law or merely to their recognition by the state of situs as the law to be applied, as a practical matter it would seem that the domicile does furnish a rule for distribution. Jurisdiction to exact a tax in return therefor would seem to be present, unless there is some new test of jurisdiction or the nature of the tax has been mistaken.

Although the court dealt with the *Frick* case in such a way as to indicate that the test of jurisdiction to exact an inheritance tax and a direct tax on property is similar, yet it can hardly be said that a new view as to the character of the tax was taken. Cases involving direct property taxes were made use of to sustain the opinion, and the court commented in the following manner on the fact that counsel for the state stressed the distinction between a property tax and a tax on the transfer of property on the death of the owner:

"But, to impose either tax, the state must have jurisdiction over the thing that is taxed; and to impose either without such jurisdiction is mere extortion and in contravention of due process of

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[23] 184 U. S. 578, 22 Sup. Ct. 515 (1901).

law. * * * The jurisdiction possessed by the states of the situs was not partial but plenary, and included power to regulate the transfer both inter vivos and on death of the owner, and power to tax both the property and the transfer."

Thus power to levy an inheritance tax is tested by power to levy a direct property tax, but the court warned against the possible impression that the distinction between the two types of taxes was done away with. The court said:

"Another case cited by the state court is *Plummer v. Coler,* 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 829, where it was held that a state, in taxing the transfer by will or descent of property within its jurisdiction, might lawfully measure the tax according to the value of the property, even though it included tax exempt bonds of the United States; and this because the tax was not on the property, but on the transfer. We think the case is not in point here. The objection to the present tax is that both the property and the transfer were within the jurisdiction of other states, and without the jurisdiction of the taxing state."

The real basis of the decision must, therefore, be found in some new test of jurisdiction. It would seem that the court must have been influenced by the consideration that the facts of the case were such as to support the exaction of a tax on the transfer by another state, and that to subject one transfer to more than one tax would involve a hardship not to be countenanced. More than twenty years before the decision in the *Frick* case the Supreme Court of the United States indicated its regret that "one and the same state should be seen taxing, on the one hand according to the fact of power, and, on the other, at the same time, according to the fiction that, in successions after death, *mobilia sequunter personam* and domicile governs the whole," but at that time the court was not able to discern any constitutional objection to such procedure.[24] The decision must be taken to be the initial application of a principle, finally discovered latent in the due process clause of the Fourteenth Amendment to the federal Constitution, that only one tax may be exacted in respect to one transfer.

[24]Holmes, J. in Blackstone v. Miller, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. ed. 439 (1903).

No such limitation was stated in comprehensive terms, but the Supreme Court of the United States has ever found wisdom "in ascertaining of the intent and application of such an important phrase in the federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded."[25] The decision in the *Frick* case was in fact limited to a tax on the privilege of passing or receiving tangible personal property upon the death of the owner, and Mr. Justice Van Devanter, delivering the opinion of the court, distinguished *Blackstone v. Miller* and *Bullen v. Wisconsin* on the ground that they dealt with intangible property. He said:

"Counsel for the state cite and rely on *Blackstone v. Miller,* 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277, and *Bullen v. Wisconsin,* 240 U. S. 625, 60 L. ed. 830, 36 Sup. Ct. Rep. 473. Both cases relate to intangible personalty, which has been regarded as on a different footing from tangible personalty."

In *Bullen v. Wisconsin* the imposition of an inheritance tax by Wisconsin in respect to property of Mr. Bullen was sustained. Mr. Bullen was domiciled in Wisconsin at the time of his death. The property consisted of stocks, bonds, and notes constituting a fund kept in the hands of a trustee, Mr. Bullen having reserved an absolute power of control and income for life. The case certainly is not necessarily opposed to *Frick v. Pennsylvania* nor to a principle that a tax by more than one state upon one transfer at death is unconstitutional. Admitting that double taxation is condemned, policy may dictate that the domicilary state is to be allowed to a tax in respect to intangibles while the state of situs is to be allowed to tax in respect to tangibles.

In *Blackstone v. Miller* the imposition of a New York transfer tax in respect to property left by Mr. Blackstone was sustained. Mr. Blackstone was domiciled in Illinois at the time of his death, and the property in respect to which the New York tax was imposed consisted of a large sum of money deposited in a New York bank and a debt owing him by a New York firm. If the property be regarded as mere choses in action,[26] the decision causes difficulty

[25]Davidson v. New Orleans, 96 U. S. 97, 242 L. ed. 616 (1878).

[26]One basis given for the decision was that the deposit should be treated

even under the principle generally assumed to be governing prior to the *Frick* case. If the laws of the debtor's domicile govern or control the transfer, the same may be said of the laws of the state where the contract was created, and the laws of every state into which the debtor comes. But such a case certainly is not reconcilable with *Bullen v. Wisconsin* and a doctrine that due process of law contains a prohibition against more than one state taxing one transfer at death.

If, therefore, the court did find in the due process clause such a limitation on state power, when a case presented for decision should require, the court might be expected to overrule either *Blackstone v. Miller* or *Bullen v. Wisconsin.* In 1930 *Farmer's Loan and Trust Company v. Minnesota*[27] was presented. From the facts in the case it appears that Mr. Taylor died while domiciled in New York. He owned and kept in New York negotiable bonds and certificates of indebtedness issued by the state of Minnesota and the cities of Minneapolis and St. Paul. A decision of the supreme court of Minnesota upholding a Minnesota inheritance tax in respect to the property was reversed by the Supreme Court of the United States. After stating that the obligations are to be regarded as if ordinary choses in action, and as such subject to inclusion in the New York transfer tax, Mr. Justice McReynolds, delivering the opinion of the court, said:

"*Blackstone v. Miller,* supra, and certain approving opinions, lend support to the doctrine that ordinary choses in action are subject to taxation both at the debtor's domicile and at the domicile of the creditor; that two states may tax on different and more or less inconsistent principles the same testamentary transfer of such property without conflict with the Fourteenth Amendment. The inevitable tendency of that view is to disturb good relations among states and produce the kind of discontent expected to subside after establishment of the Union. The Federalist, No. VII. The practical effect of it has been bad; perhaps two-thirds of the states have endeavored to avoid the evil by resort to reciprocal exemption laws.

like tangible property, since as a practical matter money in the bank is like money in the pocket. Such an argument is not very convincing and doesn't in any way dispose of the tax in respect to the debt due from the New York firm.

[27] 280 U. S. 204. 50 Sup. Ct. 98, 74 L. ed. 190.

It has been stoutly assailed on principle. Having reconsidered the supporting arguments in the light of our more recent opinions, we are compelled to declare it untenable. *Blackstone v. Miller* no longer can be regarded as a correct exposition of existing law; and to prevent misunderstanding it is definitely overruled."

Four months after the *Farmer's Loan and Trust Company v. Minnesota* was decided, the Supreme Court of the United States, having another case presented to it, extended the decision of that case to bank deposits and included in the prohibitions of the Fourteenth Amendment the power of a state where the evidences of intangible property are physically present to impose an inheritance tax in respect thereof. Carrie Pool Baldwin died while domiciled in Illinois. At the time of her death she owned real estate in Missouri, credits for cash deposited with banks in Missouri, coupon bonds issued by the United States, and promissory notes executed by citizens of Missouri and secured by liens upon lands lying in Missouri. The bonds and notes were physically within Missouri at the time of Carrie Pool Baldwin's death. The Supreme Court of the United States held that Missouri was only entitled to an inheritance tax reckoned upon the value of the realty, and was not entitled to an inheritance tax reckoned upon the value of the personalty.[28] Mr. Justice McReynolds, again delivering the opinion of the court, said:

"We find nothing to exempt the effort to tax the transfer of the deposits in Missouri banks from the principle applied in *Farmer's Loan and Trust Company v. Minnesota,* supra. So far as disclosed by the record, the situs of the credit was in Illinois where the depositor had her domicile. There the property interest in the credit passed under her will; and there the transfer was actually taxed. This passing was properly taxable at that place, and not otherwhere.

"The bonds and notes, although physically within Missouri under our former opinions were choses in action with situs at the domicile of the creditor. At that point they, too, passed from the dead to the living, and there this transfer was actually taxed. As they were not within Missouri for taxation purposes, the transfer was not subject to her power. *Rhode Island Trust Company v. Doughton,* 270 U. S. 69, 46 Sup. Ct. Rep. 256, 70 L. ed. 475, 43 A. L. R. 1374.

[28]Baldwin v. Missouri, 50 Sup. Ct. 436.

"It has been suggested that, should the state of the domicile be unable to enforce collection of the tax laid by it upon the transfer, then in practice all taxation thereon might be evaded. The inference seems to be that double taxation—by two states on the same transfer—should be sustained in order to prevent escape from liability in exceptional cases. We cannot assent."

Thus five years after the decision in *Frick v. Pennsylvania* falls, the power of the state in which the debtor is domiciled and the state where the instruments representing the property are found to tax the transfer at death of intangible property of a nonresident. The doctrine that taxation by more than one state upon the same transfer is prohibited by due process of law is nearly completed by "the gradual process of judicial inclusion and exclusion." The power of a state where a nonresident owner has caused property to become integral parts of a local business to impose an inheritance tax in respect thereto is still to be adjudicated, and somewhat allied are the questions of the power of a state to exact such a tax in respect to shares of a nonresident in a trust having a local seat, a partnership or joint stock association doing business in the state, or in a domestic corporation.

In *Farmer's Loan and Trust Company v. Minnesota,* the court recognized that the chain of cases was not completed:

"*New Orleans v. Stemple,* 175 U. S. 309, 20 Sup. Ct. Rep. 110, 44 L. ed. 174; *Bristol v. Washington County,* 177 U. S. 133, 20 Sup. Ct. Rep. 585, 44 L. ed. 701; *Liverpool, etc. Co. v. Board of Assessors for the Parish of Orleans,* 22 U. S. 346, 31 Sup. Ct. Rep. 550, 55 L. ed. 762, L. R. A. 1915-C 903, recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner, if they have become integral parts of some local business. The present record gives no occasion for us to inquire whether such securities can be taxed a second time at the owner's domicile."

If the due process clause of the Fourteenth Amendment to the federal Constitution prohibits the states from adopting both theories (situs and domicile) as a basis of jurisdiction to impose inheritance taxes in respect to intangible personal property in some situations it would seem that it does in all, and that a choice must be made. The legislature of New York, following the decision in *Farmer's*

Loan and Trust Company v. Minnesota, chose the theory of domicile in respect to intangibles generally.[29] However, the choice between the principles need not be the same in respect to intangible property in all situations, any more than it need be the same in respect to tangibles and intangibles.

Jurisdiction to impose inheritance taxes being tested by jurisdiction to impose direct property taxes, the cases cited by the court must be reckoned with and perhaps indicate that the theory of situs will be adopted when dealing with securities which are within the state employed in a local business. However, cases of shares in trust having a local seat and a partnership or joint stock association doing business in the state would seem to present much the same situation, and in 1928 the Supreme Court of the United States held that the state of the domicile of a deceased partner might exact the tax in respect to his interest in a partnership organized and doing business in another state.[30]

Cases of shares of stock in corporations perhaps may be regarded as presenting a different situation, inasmuch as ownership of stock in a corporation depends upon the law creating the corporation. The Supreme Court of the United States has recognized that shares of stock may be subjected to a property tax by the state of incorporation,[31] but has also recognized that they may be taxed by the state of the owner's domicile.[32] Also, the imposition of inheritance taxes with respect to shares of stock by both the state of the decedent's domicile and the state in incorporation apparently has received the sanction of the court. In *Frick v. Pennsylvania* it was held that the state of domicile could not deny the right to deduct the tax paid to the state of incorporation on the transfer of stock. Mr. Justice Van Devanter, delivering the opinion of the court said:

"The decedent owned many stocks in corporations of states other than Pennsylvania, which subjected their transfer on death to a tax and prescribed means of enforcement which practically gave those states the status of lienors in possession. As those states had created the corporation issuing the stocks, they had power to impose

[29]Sec. 249, ch. 710, Laws of 1930.
[30]Blodgett v. Silberman, 277 U. S. 1, 48 Sup. Ct. 410, 72 L. ed. 749.
[31]Tappan v. Merchant's National Bank, 19 Wall. 490, 22 L. ed. 189 (1873).
[32]Wright v. Louisville & N. R. R., 195 U. S. 219, 25 Sup. Ct. 16 (1904).

the tax and to enforce it by such means, irrespective of the decedent's domicile, and the actual situs of the stock certificates. Pennsylvania's jurisdiction over the stocks necessarily was subordinate to that power. Therefore, to bring them into the administration in that state it was essential that the tax be paid. The executors paid it out of moneys forming part of the estate in Pennsylvania and the stocks were thereby brought into the administration there. We think it plain that such value as the stocks had in excess of the tax is all that could be regarded as within the range of Pennsylvania's taxing power."

Thus the court seems to recognize that the jurisdiction of the state of incorporation to impose an inheritance tax in respect to stock owned by a nonresident, which was upheld by the court six years before its decision in the *Frick* case,[33] is based on actual power over the property and is primary. Under a doctrine of one tax on one transfer, the result would seem to be that the jurisdiction of the state of the owner's domicile must give way. However, three years after the decision in the *Frick* case, the Supreme Court of the United States upheld the power of the state of the owner's domicile to impose an inheritance tax in respect to stock in a foreign corporation.[34]

It is, therefore, perhaps still a question whether the domicile of the owner of shares will prevail over the seat of a trust, the state in which a partnership or joint stock association is doing business, and the state in which a corporation is incorporated. But if the Supreme Court of the United States is consistent in its decisions it seems that one or the other must prevail. Jurisdiction no longer may be tested only by an inquiry into whether the state renders an equivalent to the taxpayer by furnishing a law governing or controlling the transfer, but the scheme of inheritance taxation adopted by many of the states of the Union must be reworked to conform

[33]Maxwell v. Bugbee, 250 U. S. 525, 40 Sup. Ct. 2, 63 L. ed. 1124 (1919). In this case New Jersey was allowed to compute the rate on the transfer of stock in a domestic corporation owned by a nonresident by the total estate wherever located. So far as the case allows property outside the state to enter into computation of the tax in respect to the stock, it is difficult to reconcile with Frick v. Pennsylvania, in which case it was referred to as being on the border line.

[34]Blodgett v. Silberman, 277 U. S. 1, 48 Sup. Ct. 410, 72 L. ed. 749 (1928).

to a new doctrine that due process of law prohibits the exaction of more than one tax in return for the privilege incident to one transfer. Statutes imposing the tax in respect to property of a resident decedent are invalid in so far as they include tangible property having a situs in another state, and statutes imposing the tax in respect to property within the state of a nonresident decedent are invalid in so far as they include choses in action merely because of the residence of the debtor or the physical presence of the evidences of the property. However, the Supreme Court of the United States is the final arbitrator of what jurisdiction is to be preferred for the purpose of imposing inheritance taxes in other cases where the facts are such that it may be claimed to give intangible property a situs away from its owner.