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## DEATH TRANSFER TAXATION OF STOCK: EFFECT AND EXTENSIONS OF *FIRST NATIONAL BANK V. MAINE*

BY C. POWELL FORDYCE AND W. C. FORDYCE, JR.

This article deals with a recent decision of the Supreme Court of the United States, namely, *First National Bank of Boston, Executor of the Estate of Edward H. Haskell, deceased, v. State of Maine*.<sup>1</sup> Briefly, this case holds that the imposition by a state of a death transfer tax upon stock of a corporation of the taxing state, owned by a non-resident decedent, is a violation of the Fourteenth Amendment. In addition to analyzing the opinion of the Court, an attempt will be made to review the background of this case, to point out its practical effects, and to consider some of the legal extensions of the doctrines therein enunciated.

To understand the full significance of the *First National* case, one must first study its background, and notice the developments in the law of taxation which led up to it.

Real property has always been and still is taxable only by the state in which it is located, and this is true both of direct property taxes<sup>2</sup> and also of inheritance taxes.<sup>3</sup>

Tangible personal property initially was subject to a property tax where it was more or less permanently located,<sup>4</sup> and also at the domicile of the owner.<sup>5</sup> However, in 1905 the Supreme Court of the United States, in the case of *Union Refrigerator Transit*

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<sup>1</sup> (1932) 52 S. Ct. 174.

<sup>2</sup> 26 R. C. L. 269.

<sup>3</sup> 26 R. C. L. 211, 212.

<sup>4</sup> *Hoyt v. Commissioner of Taxes* (1861) 23 N. Y. 224.

<sup>5</sup> *Bemis v. Board of Aldermen* (Mass. 1867) 14 Allen 366; see *Boyd v. Selma* (1892) 96 Ala. 144, 150, 11 So. 393; and *Goodrich, CONFLICT OF LAWS* (1927) 69.

*Co. v. Kentucky*,<sup>6</sup> held that if such property had acquired a taxable situs in another state, it was taxable only by said state, and not by the state where the owner resided. A similar change took place in regard to inheritance taxation of such property. Originally it was taxable where it was located,<sup>7</sup> and at the domicile of the decedent.<sup>8</sup> However, in 1925 the Supreme Court in the case of *Frick v. Pennsylvania*,<sup>9</sup> held that such property was subject to an inheritance tax only in the state where it had an actual situs.

The taxation of intangible personal property went through much the same process of development. Prior to January 6, 1930, when the Supreme Court decided the case of *Farmers Loan & Trust Co. v. Minnesota*<sup>10</sup> bonds and debts were subject to death transfer taxes in four places, *viz.*: (a) at the domicile of the owner, (b) at the debtor's domicile, (c) where the instruments were found—physically present, and (d) where the owner had caused them to become an integral part of a localized business.<sup>11</sup> Likewise, prior to that time the transfer at death of stock was considered subject to inheritance taxation in four places, *viz.*: (a) at the domicile of the owner,<sup>12</sup> (b) where the corporation was incorporated,<sup>13</sup> (c) where the certificates were found—physically present,<sup>14</sup> and (d) where the owner had caused them to become an integral part of a localized business.<sup>15</sup> On January 6, 1930, however, the Supreme Court in the *Farmers Loan & Trust* case clearly held that only one state, that of the domicile of the owner, could levy an inheritance tax upon

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<sup>6</sup> (1905) 199 U. S. 194.

<sup>7</sup> *Barclay's Trustee v. Commonwealth* (1913) 156 Ky. 455, 161 S. W. 510; *People v. Griffith* (1910) 245 Ill. 532, 92 N. E. 313; and *Floyd v. District Court* (1910) 41 Mont. 357, 109 Pac. 438. See Kroeger, *Constitutional Limitations of State Jurisdiction Over Property for Succession Tax Purposes* (1929) 14 St. Louis L. Rev. 99.

<sup>8</sup> 26 R. C. L. 210.

<sup>9</sup> (1925) 268 U. S. 473.

<sup>10</sup> (1930) 280 U. S. 204.

<sup>11</sup> *Farmers Loan & Trust Co. v. Minn.* (1930) 280 U. S. 204, 209, 210; note (1930) 15 St. Louis L. Rev. 273.

<sup>12</sup> Note (1926) 42 A. L. R. 330; *Bullen v. Wisconsin* (1916) 240 U. S. 625, 631; *Blodgett v. Silberman* (1928) 277 U. S. 1, 18.

<sup>13</sup> Note (1926) 42 A. L. R. 365.

<sup>14</sup> Note (1926) 42 A. L. R. 380.

<sup>15</sup> 26 R. C. L. 214. See also 42 A. L. R. 389.

registered or unregistered bonds and certificates of indebtedness. This principle was applied again in *Baldwin v. Missouri*, decided on May 26, 1930<sup>16</sup> to cover other intangibles, *viz.*, debts owed by Missouri residents to an Illinois decedent, coupon bonds of the United States, and notes made by Missouri citizens which were secured by liens upon Missouri real estate and were payable to said decedent. The fact that these notes and bonds were physically present in Missouri at the time of death was held not to be important. Subsequently, on November 24, 1930, this rule was again invoked in *Beidler v. South Carolina Tax Commission*<sup>17</sup> to prevent South Carolina from levying any inheritance tax upon a debt owed by a South Carolina corporation to the majority stockholder thereof who was domiciled in Illinois at his death. In all of these decisions the question of the taxability of intangibles, which had a business situs separate from the domicile of the owner was excepted. These 1930 decisions established a new rule for the inheritance taxation of intangible property.

Such was the state of the decisions prior to 1931. In that year several state courts were called upon to decide the applicability of the principles set forth in the *Farmers' Loan & Trust*, *Baldwin* and *Beidler* cases to the inheritance taxation of stock. Such courts unanimously agreed that the aforementioned Supreme Court cases could not be thus extended.<sup>18</sup> A variety of reasons were given for this conclusion.<sup>19</sup> These reasons had re-

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<sup>16</sup> (1930) 281 U. S. 586.

<sup>17</sup> (1930) 282 U. S. 1.

<sup>18</sup> *State of Maine v. First National Bank of Boston* (1931) 130 Me. 123, 154 Atl. 103; *In re Lund's Estate* (1931) 183 Minn. 368, 236 N. W. 626; *In re Sachs' Estate* (1930) 247 N. Y. S. 189, 138 Misc. 806, *aff'd* (1931) 250 N. Y. S. 113, 232 App. 433; *Estate of Sanderson* (N. Y. 1932) not yet reported except by Commerce Clearing House Inheritance Tax Service 1930-32 par. 6380; *Gates v. Bank of Commerce* (Ark. 1931) not yet reported except by Commerce Clearing House Inheritance Tax Service 1930-32 par. 6407; *Equitable Trust Co. v. Tax Commission of Kentucky* (Ky. App. 1931) not yet reported except by Commerce Clearing House Inheritance Tax Service 1930-32 par. 6518; *City Bank Farmers Trust Co. v. Tax Commission of Ohio* (Ohio 1932) not yet reported. *Cf.* also *Guaranty Trust Co. of New York v. State* (1930) 36 Ohio App. 45, 172 N. E. 674.

<sup>19</sup> Thus in *State v. First National Bank of Boston*, *supra* n. 18, the Supreme Judicial Court of Maine said that stock in corporations organized under Maine law constituted property within Maine, and that, as Maine granted a privilege essential to the complete devolution of the title to the stock, it could exact a quid pro quo in return. *In re Lund's Estate*, *supra*

ceived judicial sanction for many years.<sup>20</sup> They had even been approved by the Supreme Court of the United States in *Frick v. Pennsylvania*, in which the court declared that Pennsylvania, the domicile of the decedent, must permit the deduction of inheritance taxes paid to West Virginia, Kansas and other states upon the testamentary transfer of stock of corporations organized under their laws. Such other taxes were characterized as paramount taxes, as claims superior to that of Pennsylvania, and as within the power of such states. Similarly, as dicta, Chief Justice Taft, in *Rhode Island Hospital Trust Co. v. Doughton*,<sup>21</sup> said: "So, too, it is well established that the state in which a corporation is organized may provide in creating it for the taxation in that state of all its shares, whether owned by residents or non-residents."

In spite of these decisions, however, it was predicted by some that the same considerations which moved the Supreme Court to protect bonds, notes, and debts,—all intangible choses in action—against unjust and discriminatory double taxation,<sup>22</sup>

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n. 18, the Supreme Court of Minnesota argued that stock has a situs for inheritance tax purposes at the domicile of the corporation, distinguished between stocks and bonds by saying that the property interest in the latter was located at the domicile of the creditor, and said that stock represented an interest in the property of the corporation. In *Gates v. Bank of Commerce*, *supra* n. 18, the Supreme Court of Arkansas justified the tax upon the ground that as the corporation was a creature of its laws, it controlled the relationship between the corporation and the stockholders. In *re Sachs' Estate*, merely cited and relied upon the older New York case of *In re Bronson* (1896) 150 N. Y. 1, 44 N. E. 707, in which the court sustained the imposition of the tax upon the transfer of stock, while exempting the transfer of bonds, in part upon the theory that each share of stock represented distinct interest in the whole of the corporate property, and thus was within the jurisdiction of the state of incorporation.

<sup>20</sup> See for example cases listed in note (1926) 42 A. L. R. 365. See also *Tappan v. Merchants Nat'l Bank* (1874) 19 Wall. 490; *Travelers Ins. Co. v. Conn.* (1902) 185 U. S. 364; and *Corry v. Baltimore* (1905) 196 U. S. 466.

<sup>21</sup> (1926) 270 U. S. 69, 81.

<sup>22</sup> Thus in *Farmers Loan & Trust Co. v. Minn.*, *supra*, n. 11, the Court said that the doctrine, that choses in action ordinarily are subject to taxation both at the debtor's domicile and at the domicile of the creditor, was supported by *Blackstone v. Miller* (1903) 188 U. S. 189, and certain approving opinions, but that such doctrine had disturbed the good relations among states, had produced discontent of a kind expected to subside with the formation of the Union, had a bad practical effect, and had caused nearly two-thirds of the states to try to avoid the consequences thereof by

would likewise cause the Court to accord a similar measure of protection to stock, which, of course, is also a species of intangible property. Such predictions proved sound.

Let us now analyze the *First National* decision. E. H. Haskell died testate while domiciled in Massachusetts. He owned stock in a Maine corporation, which had most of its tangible property in that state. The stock certificates were kept in Massachusetts, which state imposed an inheritance tax upon the transfer thereof. Maine attempted to do likewise, after allowing the Massachusetts tax as a credit upon its tax. The highest court of Maine sustained the tax, holding that the shares were property within its jurisdiction under applicable statutes,<sup>23</sup> and that the

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resort to reciprocal exemption laws. The Court also declared that under currently accepted views, bonds were taxable at four different places, and characterized those views as startling and based upon a wrong premise. It further said that the passing of primitive conditions as to intangible wealth, and the fact that much of the country's wealth was invested in negotiable securities, made protection of it against unjust and oppressive taxation by two states a matter of greatest moment. And finally, after stating that laws in respect of taxation should be construed and applied to avoid unjust and oppressive consequences, the Court said:

We have determined that in general *intangibles* may be properly taxed at the domicile of their owners and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place, similar to that accorded to tangibles.

All of these arguments applied equally to inheritance taxation of stock. The evil effects of multiple inheritance taxation of it had long been bitterly denounced (see pamphlet of Finance Department of Chamber of Commerce of the United States, Sept. 1928, entitled *State Taxes, Local, No. 4*; and comment (1930) 40 YALE L. J. 99). Reciprocal exemption laws generally treated it in the same manner as bonds. Stocks, like bonds, were generally held to be subject to an inheritance tax at four places (see notes 12, 13, 14 and 15.). Primitive conditions had passed as to stock. Thus, while 433, 448, 561 shares were listed on the New York Exchange on January 1, 1925, this number had increased to 1,314,158,762 on April 1, 1932 (New York Stock Exchange Bulletin for April 1932). Furthermore, much of the country's wealth is invested in stock. Even after a declining market of long duration the total market value of all shares listed on the New York Stock Exchange on April 1, 1932 amounted to \$24,501,826,280. (New York Stock Exchange Bulletin for April 1932.)

<sup>23</sup> R. S. Me. (1916) c. 69 sec. 1 provides: "All property within the jurisdiction of this state, and any interest therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, which shall pass by will, by the intestate laws of this state, . . . shall be subject to an inheritance tax for the use of the state as hereinafter provided . . ."

Fourteenth Amendment of the Federal Constitution was not violated. The Supreme Court reversed and remanded the case. The majority opinion was written by Mr. Justice Sutherland. Justices Stone, Holmes and Brandeis dissented.

To sustain his conclusion, Justice Sutherland said that it might be conceded that decisions rendered before the *Farmers Loan & Trust* case would preclude a successful challenge to the judgment of the Maine Supreme Court; that most of these cases were based upon *Blackstone v. Miller*,<sup>24</sup> which had been overruled in the *Farmers Loan & Trust* case; that *Frick v. Pennsylvania* was one of the latest to approve the *Blackstone* case and to give countenance to the general doctrine that intangible property, unlike tangible property, might be subjected to a death transfer tax in more than one state, but that this and all other instances of such approval, whether express or tacit, with the overthrow of the foundation upon which they rest, had ceased to have other than historic interest. Justice Sutherland then reviewed the *Farmers Loan & Trust*, *Baldwin* and *Beidler* decisions, and stated that they established the rule that bonds, notes and credits are subject to the imposition of an inheritance tax only by the state of the domicile of the deceased owner, and said:

The rule of immunity from taxation by more than one state, deducible from the decisions in respect of these various and distinct kinds of property, is broader than the applications thus far made of it. In its application to death taxes, the rule rests for its justification upon the fundamental conception that the transmission from the dead to the living of a particular thing, whether corporeal or incorporeal, is an event which cannot take place in two or more states at one and the same time. In respect of tangible property, the opposite view must be rejected as connoting a physical impossibility; in the case of intangible property, it must be rejected as involving an inherent and logical self contradiction. Due regard for the processes of correct thinking compels the conclusion that a determination fixing the local situs of a thing for the purpose of transferring it in one state carries with it an implicit denial that there is a local situs in another state for the purpose of transferring the same thing there. The contrary conclusion as to in-

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<sup>24</sup> (1903) 188 U. S. 189.

tangible property has led to nothing but confusion and injustice by bringing about the anomalous and grossly unfair result that one kind of personal property cannot, for the purpose of imposing a transfer tax, be within the jurisdiction of more than one state at the same time, while another kind, quite as much within the protecting reach of the Fourteenth Amendment, may be, at the same moment, within the taxable jurisdiction of as many as four states, and by each subjected to a tax upon its transfer by death, an event which takes place, and in the nature of things can take place, in one of the states only.

A transfer from the dead to the living of any specific property is an event single in character and is effected under the laws, and occurs within the limits, of a particular state; and it is unreasonable, and incompatible with a sound construction of the due process of law clause of the Fourteenth Amendment, to hold that jurisdiction to tax that event may be distributed among a number of states. . . .

We conclude that shares of stock, like the other intangibles, constitutionally can be subjected to a death transfer tax by one state only.

The question remains: In which state, among two or more claiming the power to impose the tax, does the taxable event occur? In the case of tangible personalty, the solution is simple: the transfer, that is, the taxable event, occurs in that state where the property has an actual situs, and it is taxable there and not elsewhere. In the case of intangibles, the problem is not so readily solved, since intangibles ordinarily have no actual situs. But it must be solved unless gross discrimination between the two classes of property is to be sanctioned; and this court has solved it in respect of the intangibles heretofore dealt with by applying the maxim *mobilia sequuntur personam*. *Farmers Loan Co. v. Minnesota*, supra, at pp. 211-212; *Baldwin v. Missouri*, supra; *Beidler v. So. Car. Tax Commission*, supra. . . .

The considerations which justify the application of the fiction embodied in the maxim to death transfer taxes imposed in respect of bonds, certificates of indebtedness, notes, credits and bank deposits, apply, with substantially the same force, in respect of corporate shares of stock. And since death duties rest upon the power of the state imposing them to control the privilege of succession, the reasons which sanction the selection of the domiciliary state in the various cases first named, sanction the same selection in the case last named. In each case, there is wanting, on

the part of a state other than that of the domicile, any real taxable relationship to the event which is the subject of the tax. Ownership of shares by the stockholder and ownership of the capital by the corporation are not identical. The former is an individual interest giving the stockholder a right to a proportional part of the dividends and the effects of the corporation when dissolved, after payment of its debts. The Delaware Railroad Tax, 18 Wall. 206, 229-230; Rhode Island Trust Co. v. Doughton, 270 U. S. 69, 81; Eisner v. Macomber, 252 U. S. 189, 213-214. And this interest is an incorporeal property right which attaches to the person of the owner in the state of his domicile. The fact that the property of the corporation is situated in another state affords no ground for the imposition, by that state, of a death tax upon the transfer of the stock. Rhode Island Trust Co. v. Doughton, *supra*. And we are unable to find in the further fact of incorporation under the laws of such state, adequate reason for a different conclusion. . .

Practical considerations of wisdom, convenience and justice alike dictate the desirability of a uniform general rule confining the jurisdiction to impose death transfer taxes as to intangibles to the state of the domicile; and these considerations are greatly fortified by the fact that a large majority of the states have adopted that rule by their reciprocal inheritance tax statutes. In some states, indeed, the rule has been declared independently of such reciprocal statutes. The requirements of due process of law accord with this view:

We do not overlook the possibility that shares of stock, as well as other intangibles, may be so used in a state other than that of the owner's domicile as to give them a situs analogous to the actual situs of tangible personal property. See Farmers Loan Company case, *supra*, at p. 213. That question heretofore has been reserved, and it still is reserved to be disposed of when, if ever, it properly shall be presented for our consideration.

The practical effects of the *First National* decision are many.

In the first place, it establishes national reciprocity of exemption from death transfer taxes upon stock owned by non-resident decedents, a result which the legislatures of the majority of states have been struggling to accomplish for many years. By doing so it supplants the statutes on this subject passed by these states,<sup>25</sup> and effectively ends the power of the

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<sup>25</sup> The Missouri Reciprocal Exemption Statute is R. S. Mo. (1929) sec. 576.



non-reciprocating states to collect inheritance taxes from the legal representatives of deceased non-residents. To executors and administrators who find among the assets of their decedent stocks of corporations organized in one of the latter states, this decision is of great benefit. It relieves them of the burdens and expense which were formerly necessary in order to compute and pay foreign inheritance taxes—business situs excepted.<sup>26</sup> It ends their personal liability for such taxes. It prevents the possibility that they will have to bring or defend foreign suits involving disputes and conflicting theories as to the value of stock; and as to whether transfers were made in contemplation of, or to take effect in possession or enjoyment at, death. And it does much to shorten the delays of administration—delays which in the past frequently kept them from selling stock at advantageous times and prices, and from paying foreign inheritance taxes within the three-year period required for securing credit upon the federal estate tax. In addition, this decision is advantageous to those who inherit property. Because it shortens the delays and lessens the expenses and taxes connected with the administration of estates, such persons will receive more of their ancestor's property, and will be entitled to the beneficial enjoyment thereof much sooner than in the past.

In the second place, this decision will decrease the future inheritance tax returns of less populous states, and correspondingly increase the revenue derived from this source by the larger states. Although this result has been imposed upon some

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<sup>26</sup> According to correspondence received by Prentice-Hall from the various state authorities, and reported in that company's *Inheritance Tax Service*, Vol. 1, *Matters Affecting Several Jurisdictions*, par. 21, the following states and territories still require the legal representatives of non-resident decedents to secure waivers of inheritance taxes: California, Colorado, Hawaii, Idaho, Indiana, Mississippi, Montana, New Mexico, South Carolina, South Dakota, Texas and Wyoming. Illinois requires waivers only from representatives of decedents domiciled in the non-reciprocating states, viz: Arizona, Kansas, Kentucky, Minnesota, Montana and Utah. State authorities of Maine and Minnesota do not require waivers, but say that the transfer agents of corporations organized under their laws probably will require them. States other than those listed do not require waivers since the First National Bank case was decided on Jan. 4, 1932. It is thought that the states which still require waivers, insist upon them in order to be sure that the stock has no actual business situs in the state, or in order to receive information which will make possible the protection of local creditors. No other sound reason exists for such action.

against their will, it is a result which the large majority considered necessary and desirable when they voluntarily adopted their reciprocal exemption statutes. Moreover, it should be noted that this case facilitates the smooth working of our Federal system of government by preventing individual states from subordinating the general welfare to their own selfish interests—a tendency which was expected by Alexander Hamilton to subside with the formation of the Union.<sup>27</sup>

In the third place, the *First National* case, by preventing liens for inheritance taxes upon stock, will cause this form of security to play an even greater part in the financial and credit structures of our country. This result is in accordance with the movement which brought about the adoption of Uniform Stock Transfer Acts in twenty states,<sup>28</sup> under which liens not expressed on the face of the certificate are generally disregarded. The need for such a result was well expressed in *Masury v. Arkansas National Bank, et al.*,<sup>29</sup> in which it was said:

It is a well-known fact that stock certificates frequently circulate in places far remote from the home of the corporation by which they were issued; that in all commercial centers they are commonly transferred from hand to hand like negotiable paper, and that they are hypothecated for temporary loans by simple endorsement and delivery thereof, the latter being perhaps the most common use to which such securities are put. In the great majority of cases, when stock is pledged for a loan, no record of the transfer is made on the books of the corporation, and in the judgment of laymen the making of such a record seems to be a needless formality. The trend of modern decisions has been to encourage the free circulation of stock certificates in the mode last indicated, on the theory that they are a valuable aid to commercial transactions, and that the public interest is best subserved by removing all restrictions against their circulation, and by placing them as nearly as possible on the plane of commercial paper.

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<sup>27</sup> See THE FEDERALISTS, No. 7, referred to by the Supreme Court in the *Farmers Loan & Trust* case, n. 11 above.

<sup>28</sup> See Christy, THE TRANSFER OF STOCK, 770 note, which shows that the following states and territories have adopted such acts: Alaska, Arkansas, Colorado, Connecticut, Idaho, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Virginia and Wisconsin.

<sup>29</sup> (C. C. A. 8, 1899) 93 F. 603, 607.

In the fourth place, the *First National* case nullifies many other state inheritance tax statutes in so far as they impose an inheritance tax upon stock. Those which, like that of Maine,<sup>30</sup> declares that all property within the jurisdiction of the state shall be subject to tax, can no longer be regarded as effective. And by striking down these statutes, this case also vitiates the statutes passed to force foreign executors to pay the tax. Such statutes usually provide that the executors are personally liable for the tax,<sup>31</sup> and that corporations which transfer stock for them without first giving notice to the State Treasurer and Attorney General of the intended transfer, and without first securing a waiver of the tax or receipt therefor from such officials, shall be liable for a fine and for the amount of the tax.<sup>32</sup> Needless to say, this result is of great advantage to such executors and corporations. That this is the result of the *First National* decision, in so far as the Missouri statutes are concerned, was directly held in the case of *Turner et al. v. Shartel et al.*, which was decided by a special statutory three-judge Federal Court on April 2nd of this year.<sup>33</sup>

And in the fifth place, the *First National* decision may become the basis for securing substantial refunds of taxes paid under the old theories of taxation. To discuss in detail the statutory requirements of each state, would unduly lengthen this article.<sup>34</sup>

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<sup>30</sup> N. 23 above. Similarly, R. S. Mo. (1929) sec. 570, provides in part as follows: "A tax shall be and is hereby imposed upon the transfer of any property, real, personal or mixed . . . in the following cases: . . . When the transfer is by will or intestate law of property within the state or within the jurisdiction of the state and the decedent was a non-resident of the state at the time of his death."

<sup>31</sup> R. S. Mo. (1929) sec. 579, in part provides as follows: "All executors, administrators, and trustees of any estate, property, interest therein, or income therefrom, so transferred, shall be personally liable for such tax and interest until they are paid . . ."

<sup>32</sup> R. S. Mo. (1929) sec. 583, provides that Missouri corporations which fail to take these precautions shall be liable to the payment of the amount of the tax and interest, including the charges of capital stock of the corporation, and in addition thereto a penalty of \$1000, and that the payment of such tax, interest, or penalty, or both, may be enforced in an action brought by the State Treasurer in any court of competent jurisdiction.

<sup>33</sup> Not yet reported.

<sup>34</sup> Those interested should consult an article by Oliver P. Field, *The Recovery of Illegal and Unconstitutional Taxes* (1932) 45 HARV. L. REV. 501, in which the author exhaustively discusses the legal difficulties confronting those who attempt to secure refunds.

It should be noted, however, that taxes voluntarily paid probably cannot be recovered from Arizona, Arkansas, California, Florida, Idaho, Illinois or Missouri; that there are no statutory provisions for refund in Alaska, Kansas (after payment into the state treasury), Maine, Michigan (where paid under a mistake of law), Ohio, Texas and Washington (where paid under a mistake of law); and that while refunds may be recovered from Indiana, Iowa, Kentucky, Minnesota, Montana, New York, North Carolina, Oregon, Pennsylvania, Utah and Wisconsin, the time for making claims therefor is strictly limited.<sup>35</sup> Moreover, it should be remembered that in most states refund claims, even though allowed, will usually not be paid unless and until the legislatures appropriate money for this purpose.<sup>36</sup>

Before leaving our discussion of the practical effects of the *First National* case, let us briefly consider the question of how stock may be given a business situs. This question is important, for, as pointed out above, the Supreme Court in the *First National*, *Farmers Loan & Trust*, *Baldwin* and *Beidler* cases, as dicta, intimated that an inheritance tax can be levied upon intangibles by the state where they are given such a situs, regardless of where the deceased owner is domiciled at his death. In view of the fact that the Court in those decisions applied the same rules to bonds, notes, credits, and stock, it may be safely assumed that cases involving business situs of these first three kinds of intangible property apply also to the fourth. According to Judge Cooley<sup>37</sup> there is no business situs in the following cases:

(a) Where the business transacted by the agent in the foreign state is not continuous in character, as where there

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<sup>35</sup> Information received from state authorities by Prentice-Hall and reported in their *Inheritance Tax Service Vol. 1, Matters Affecting Several Jurisdictions*, par. 21.

<sup>36</sup> In this connection it is well, also, to bear in mind that Article 9a of Regulation 70 (1929 edition) promulgated under the Federal Revenue Act of 1926, requires those securing refunds of state inheritance taxes, for which credit has been allowed upon the federal estate tax, to report such refunds to the Bureau of Internal Revenue, and to pay additional federal estate taxes, unless the statutes of limitation have run against the assessment of such taxes. The federal statutes of limitation are contained in secs. 310, 311, and 316 of the Revenue Act of 1926.

<sup>37</sup> 2 Cooley, *THE LAW OF TAXATION* (4th ed. 1924) 1037, *et seq.* See also Robert L. Howard, *Recent Developments and Tendencies in the Taxation of Intangibles* (1931) 32 *MO. LAW BULL.* 25.

is merely a transitory presence of the agent in that state, or merely temporary or isolated transactions.<sup>38</sup>

(b) Where the agent in the foreign state is a mere custodian for safekeeping,<sup>39</sup> clerk, or order taker.

(c) Where the agent or attorney in the foreign state is merely one to make collections.<sup>40</sup>

(d) Where no business is done in the foreign state by the owner or his agent relative to the property taxed.<sup>41</sup>

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<sup>38</sup> Cf. *Martin v. Central Trust Co. of Ill.* (1927) 327 Ill. 622, 159 N. E. 312, holding that certificates of stock, pledged by the testator to an Illinois creditor and located in the State of Illinois at the time of the death of the testator domiciled in New York, had no situs in Illinois for purposes of ancillary administration, where the corporations were organized in other states. See also *Sanchez v. Bowers* (D. C. N. Y. Mar. 23, 1932) not yet reported except by Commerce Clearing House Federal Tax Service for 1932, Vol. 3 par. 9170.

<sup>39</sup> Thus no claim of business situs was made by the United States in *Shenton v. United States* (D. C. S. D. N. Y. 1931) 53 F. (2d) 249, where warrants for stock in a Canadian corporation were held for safekeeping in New York, for the account of a citizen of Great Britain domiciled in Hong Kong at his death. Cf. *Baldwin v. Missouri*, n. 16 above, in which the Supreme Court held that mere presence of United States Government bonds, and notes in Missouri, which were owned by an Illinois decedent, did not give Missouri jurisdiction to levy an inheritance tax upon the testamentary transfer thereof.

<sup>40</sup> See *Ewa Plantation Co. v. Wilder* (C. C. A. 9, 1923) 289 F. 664, which involved collections from bonds and notes. That the rule of this case applies to stock is indicated by two recent decisions of the U. S. Board of Tax Appeals, viz., *Brooks v. Commissioner* C. C. H. no. 6688, 22 B. T. A. 71, and *Estate of Garvan v. Commissioner*, *infra* n. 52. In the former case the decedent, a citizen of Great Britain, was domiciled in Cuba at his death. At that time he owned stock in a foreign corporation and bonds of both foreign and domestic corporations, the paper evidences of which were held for him in New York City for the sole purpose of having the income collected and deposited to his credit in a checking account in New York banks. The Board held that these securities were not a part of any business localized in the United States and that they were not "situated" in the United States within the meaning of sec. 303 (b), Revenue Act of 1926, subjecting such property to the Federal Estate Tax. In the latter case the decedent was domiciled in Australia at his death. He then owned stock in corporations organized in the United States, which was held by the First National Bank of Boston for the purpose of collecting the income therefrom for the account of the decedent. It was stipulated by the commissioner that these certificates had no business situs in the United States.

<sup>41</sup> In this connection it should be noted that in the *amicus curiae* brief of the State of Minnesota, filed in the First National case, n. 1 above, it was contended that stock has a business situs in the state of incorporation merely because it is stock. The Supreme Court in its decision rightly ignored this argument.

(e) Where there is no agent in the state and the owner comes into the state only occasionally.

On the other hand, it seems to be clearly established that stocks, and other forms of intangible property, do acquire a business situs when the agent of the non-resident exercises unlimited authority given him to sell the property intrusted to his care and reinvest the proceeds; to invest the income arising therefrom or to deposit it to his principal's bank account; to pledge the property for loans; to vote the stock; to attend shareholder's meetings; and to do any and all other things as fully as the owner thereof could do.<sup>42</sup> Moreover, business situs once acquired is not lost because of temporary absence of the property from the taxing state, and does not depend for its existence upon the presence of an agent in such state.<sup>43</sup> But if stock is given a separate business situs, and is there made subject to an inheritance tax, it undoubtedly will not be held subject to a second tax at the domicile of the owner.<sup>44</sup>

So much for the practical effects of the *First National* case. What are the possible legal extensions of the doctrines therein enunciated? It would seem that there are several.

Does the *First National* case apply where the decedent was domiciled in a state which imposed no inheritance tax, or in a

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<sup>42</sup> Hill v. Carter (C. C. A. 9, 1931) 47 F. (2d) 869, *certiorari* denied (1931) 52 S. Ct. 10. In this case the court held that because such powers were given to a New York agent by one domiciled in Hawaii, the property so held was not located in Hawaii for purposes of its income tax. See also DeGaney v. Lederer (1919) 250 U. S. 376. Cf. Safe Deposit & Trust Co. of Baltimore, Md. v. Va. (1929) 280 U. S. 83, in which the court refused to permit Virginia, the domicile of beneficiaries of a trust, to levy a property tax upon the intangibles constituting the corpus of the trust which was held by the trust company in Maryland. This case illustrates that the maxim *mobilia sequuntur personam* cannot be invoked to allow unjust and oppressive double taxation, and that it is not of universal application in respect to intangibles. Note 15 ST. LOUIS L. REV. 273.

<sup>43</sup> 2 Cooley, THE LAW OF TAXATION (4th ed. 1924) 1040.

<sup>44</sup> This conclusion is reached in spite of the fact that in *Cream of Wheat Co. v. County of Grand Fork* (1920) 253 U. S. 325, 330, Mr. Justice Brandeis, in answer to an argument of counsel, said: "To this it is sufficient to say that the Fourteenth Amendment does not prohibit double taxation." Although the Supreme Court has never flatly contradicted this statement, in the *First National Bank* case, n. 1 above, the Court said: "We conclude that shares of stock, like the other intangibles, constitutionally can be subject to a death transfer tax by one state only."

foreign country? While it is true that the case is based in part upon the desire of the Supreme Court to extend to stock an immunity from inheritance taxation in more than one place, similar to that accorded to tangibles, the keystone of the opinion is found in the following language used by Justice Sutherland:

A transfer from the dead to the living of any specific property is an event single in character and is effected under the laws, and occurs within the limits, of a particular state; and it is unreasonable, and incompatible with a sound construction of the due process of law clause of the Fourteenth Amendment, to hold that jurisdiction to tax that event may be distributed among a number of states. . .

And since death duties rest upon the power of the state imposing them to control the privilege of succession, the reasons which sanction the selection of the domiciliary state in the various cases first named [those dealing with the inheritance taxes of bonds, certificates of indebtedness, notes, claims and bank deposits], sanction the same selection in the case last named [those dealing with the inheritance taxation of stock]. In each case, there is wanting, on the part of a state other than that of the domicile, any real taxable relationship to the event which is the subject of the tax.

In view of this plain language, it seems clear that the *First National* decision applies in spite of the fact that the decedent was domiciled in a state imposing no inheritance tax, or in a foreign country.<sup>45</sup>

Does the *First National Bank* decision protect intangibles other than stock from multiple inheritance taxation? If we consider the broad general language used by the Court in this case, and in the *Farmers Loan & Trust* case, this question obviously requires an affirmative answer.<sup>46</sup> The decisions speak of "in-

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<sup>45</sup> Nevertheless the Inheritance Tax Commission of Kansas (letter dated February 13, 1932) has ruled that the *First National* case does not exempt from tax stock owned by those domiciled in foreign countries at their death. The Attorney General of Maine has made a similar ruling. However, reciprocal exemption statutes generally put foreigners and nonresident citizens of the United States upon the same basis. See R. S. Mo. (1929) sec. 576.

<sup>46</sup> As pointed out in n. 18 above, the courts of many states refuse to apply the rule of the *Farmers Loan & Trust*, *Baldwin* and *Beidler* cases to stock. This refusal caused the *First National Bank* case to be appealed to the Supreme Court. A strenuous effort was made to confine the former decisions to debts, upon the ground that all the property there is in a debt is located at the domicile of the creditor, but the Supreme Court in the

tangible" property, and do not confine the rules laid down to the specific form of such property before the court.

What effect does the *First National* case, an inheritance tax case, have upon jurisdiction for purposes of ancillary administration in Missouri? Perhaps it has none, if we accept the statement of Judge Learned Hand that stock may have a situs for some purposes at the domicile of the corporation, and for other purposes at the domicile of the owner.<sup>47</sup> However, it seems worthy of note that Justice Sutherland rejected the holding of the Maine Supreme Court, that stock in a Maine corporation is property within Maine, and said that the interest of a stockholder "is an incorporeal property right which attaches to the person of the owner in the state of his domicile." If this statement is applicable to the law of ancillary administration, and means that stock is property only at the domicile of the owner, then no property exists in the state of incorporation which can be made the subject of such administration. But if this language can be so construed, it must be taken as overruling *Baker v. Baker, Eccles Company*<sup>48</sup> in which the Court said that it was clear that the state which creates a corporation has such control over the transfer of its shares that it may administer upon the shares of a deceased non-resident owner. The authority of the *Baker* decision is undermined, however, by the fact that the cases relied upon to support this holding<sup>49</sup> are inheritance tax cases and are impliedly overruled by the *First National* case.

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First National case brushed aside this argument, saying that the difference between bonds and stock is more fanciful than real. For this reason it would seem useless now to contend that any form of intangible property is not within the scope of these decisions.

<sup>47</sup> *Direction der Disconto-Gesellschaft v. U. S. Steel Corp.* (D. C. S. D. N. Y. 1924) 300 F. 741, 746, *aff'd* (1925) 267 U. S. 22. And in this case it was also pointed out that as a share is a legal relationship it can have no spatial character except by virtue of the parties to the relationship; and that wherever either party is, there is the property as respects such parts of the relation as touch that party. See also *Norrie et al. v. Kansas City Southern Ry. Co.* (D. C. S. D. N. Y. 1925) 7 F. (2d) 158, 159, *aff'd* *Norrie v. Lohman* (C. C. A. 2, 1926) 16 F. (2d) 355.

<sup>48</sup> (1917) 242 U. S. 394, 401.

<sup>49</sup> (1896) *In re Bronson* 150 N. Y. 1, 44 N. E. 707; *Greves v. Shaw* (1899) 173 Mass. 205, 53 N. E. 372; *Kingsbury v. Chapin* (1907) 196 Mass. 533, 82 N. E. 700; *Dixon v. Russell* (1910) 79 N. J. L. 490, 76 Atl. 982; *Hopper v. Edwards* (1916) 88 N. J. L. 471, 96 Atl. 667; and *People v. Griffith* (1910) 245 Ill. 532, 92 N. E. 313.



But regardless of whether the United States Supreme Court will apply the *First National* case to questions of ancillary administration, the currently accepted view in Missouri is that stock in Missouri corporations, owned by a non-resident decedent, is not property within this state when there are no debts due Missouri citizens, or unpaid inheritance taxes. Such was the holding of our Supreme Court *en banc*, in the case of *Lohman v. Kansas City Southern Ry. Co.*<sup>50</sup> In this case the Court said, "The question of who is the owner of the certificate depends upon the law of the place where the certificate is"; that shares of a Missouri corporation, represented by appropriate certificates of stock, constitute property in themselves, and have a situs for purposes of ancillary administration, under the facts there involved, in the state of the domicile of the non-resident owner. The Court stated, however, that if there were debts due Missouri citizens, or taxes owed to the state, a different situation would exist.<sup>51</sup>

Does the *First National* case apply to the federal estate tax? This question was squarely presented to the United States Board of Tax Appeals in the case of *Estate of Garvan, the First National Bank of Boston, Admr. v. Commissioner.*<sup>52</sup> In this case Garvan died domiciled in Australia. At that time he owned certificates of stock in corporations organized under the laws of various states of this country, as well as in corporations organized under the laws of foreign countries. These certificates

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<sup>50</sup> (1930) 326 Mo. 819, 33 S. W. (2d) 112.

<sup>51</sup> Those interested in the lack of power of a Missouri Public Administrator to take out ancillary administration upon stock in a Missouri corporation owned by a nonresident decedent should consult *Lohman v. Kansas City Southern Ry. Co.* (1930) 326 Mo. 868, 33 S. W. (2d) 117 and *Lohman v. Kansas City Southern Ry. Co.* (1930) 326 Mo. 842, 33 S. W. (2d) 118, both decided by the Supreme Court of Missouri *en banc*: *Fairchild v. Lohman* (D. C. W. D. Mo. 1926) 13 F. (2d) 252; and *Norrie v. Kansas City Southern Ry. Co.* (D. C. S. D. N. Y. 1925) 7 F. (2d) 158, *aff'd* *Norrie v. Lohman* (C. C. A. 2, 1926) 16 F. (2d) 355. See also R. S. Mo. (1929) sec. 273, providing for a so-called short term administration. As to the situs of stock for purposes of service by publication in a suit to establish title thereto, compare *Jellenik v. Huron Copper Mining Co.* (1900) 177 U. S. 1.

<sup>52</sup> Commerce Clearing House Board of Tax Appeals Service, Feb. 25, 1932, no. 7449.

For a study of international double taxation see *The Tax Magazine* issues of May and October 1931 and of January 1932, published by Commerce Clearing House, Inc.

were held by the First National Bank solely for the collection of the income therefrom for the account of the decedent. The Revenue Act of 1926, under which the Commissioner of Internal Revenue sought to make the certificates subject to a federal estate tax, provided that the tax should be imposed upon the transfer of the net estate of non-residents of the United States;<sup>53</sup> that the value of the net estate should be determined, in the case of a non-resident, by making certain specified deductions from that part of his gross estate which at the time of his death was "situated" in the United States;<sup>54</sup> and that for this purpose "stock in a domestic corporation owned and held by a non-resident decedent shall be deemed property within the United States . . ." <sup>55</sup> The Revenue Act contained no specific provision as to the property location of stock in foreign corporations. The Garvan estate urged that the case of *First National Bank of Boston v. Maine* was controlling, and prevented the imposition of the tax. The majority of the Board sustained this contention as to the stock in foreign corporations, but denied it as to stock in domestic corporations.

The reasoning of the Board is interesting not only because of its effect upon the federal estate tax, but also because of its bearing upon a state inheritance tax sought to be imposed under analogous circumstances. As to the stock in domestic corporations, the Board distinguished the cases of *First National Bank v. Maine*, *Farmers Loan & Trust v. Minnesota*, *Baldwin v. Missouri*, and *Beidler v. South Carolina Tax Commission*, upon the ground that the underlying reason for those decisions was a desire to prevent the injustice of multiplied taxation by two or more states; and stated that the due process clauses of the Fourteenth and Fifth Amendments are different, that the Revenue Act clearly provides for the tax, and that it must assume that Congress intended to, and could, repeal the maxim of *mobilia sequuntur personam* as it applied to stock.<sup>56</sup>

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<sup>53</sup> Sec. 301 (a).

<sup>54</sup> Sec. 303 (b).

<sup>55</sup> Sec. 303 (d).

<sup>56</sup> The Board cited and relied upon *In re Whiting's Estate* (1896) 150 N. Y. 27, 44 N. E. 715, 716, in which the New York Court of Appeals held that the New York legislature had power to employ the maxim *mobilia sequuntur personam* where necessary, and to disregard it where necessary to attain its objects.

Board Member Trammell dissented upon the ground that the domestic stock was property at Garvan's domicile in Australia. He answered the opinion of the majority by saying that *First National Bank v. Maine* held that stock was property at the domicile of the owner, except in cases of business situs, and was controlling; that the power of the United States to tax is limited to persons, property and transactions within the United States;<sup>57</sup> that in this case the person and property and the transfer, with respect to which the tax was levied and which were the subject of the tax, were and occurred beyond the jurisdiction of the United States; that the Fifth Amendment, like the Fourteenth Amendment, prevents the inheritance taxation of stock at the place of incorporation; and that, since *First National Bank v. Maine* was decided, Congress has no power by legislative fiat to declare stock owned by a non-resident to be property within the United States.

In view of the statement in *First National Bank v. Maine* that no state other than the domicile of the owner has any taxable relationship to the event—the transfer from the dead to the living—which is the subject of the tax, it would seem that Mr. Trammell's views are correct. This conclusion appears even clearer as a result of the decision of the Supreme Court in the case of *Heiner v. Donnan*.<sup>58</sup> In that case the Court held that the restraint imposed upon legislation by the due process clauses

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In connection with the Garvan case compare *Sanchez v. Bowers*, n. 38 above. Both of these cases refused to follow Article 50, Regulation 70 (1929 edition), which provides that bonds, stocks, notes, etc., physically located in the United States, constitute property having a situs in the United States. If *Baldwin v. Missouri* applies to federal estate taxes, these cases are sound.

<sup>57</sup> In support of this statement Mr. Trammell cited *United States v. Erie Railroad Co.* (D. C. S. D. N. Y. 1877) 25 Fed. Cas. pp. 1019, 1021, decided by Chief Justice Waite.

<sup>58</sup> (1932) 52 S. Ct. 358. In this case the Court held that that part of Section 302 (c) of the Revenue Act of 1926, which provides that all transfers within two years of death shall be conclusively presumed to have been made in contemplation thereof, and therefore, taxable as a part of the decedent's gross estate, was a violation of the Fifth Amendment.

Incidentally, it should be noted that, in effect, this decision holds unconstitutional a similar conclusive presumption in R. S. Mo. (1929) sec. 570.

As to the importance of this decision see par. 1990, C. C. H. (1932) Vol. (2) in which it is pointed out that the decision makes possible millions of dollars in refunds of federal estate taxes.

of the Fifth and Fourteenth Amendments is the same; and that Congress cannot, by legislative fiat, enact into existence a fact which does not exist in actuality.<sup>59</sup> And if Mr. Trammell's dissent is sound, then it is apparent that no state can levy an inheritance tax upon stock in one of its corporations owned by a person domiciled in a foreign country at his death.

In conclusion it may be said that the case of *First National Bank v. Maine* has had, and will have, a most profound effect upon Federal and State death transfer taxes. It will also undoubtedly be widely extended to both income and property taxation, for, as stated by Mr. Justice Sutherland:

The rule of immunity from taxation by more than one state . . . is broader than the applications thus far made of it.<sup>60</sup>

If it is so extended, it will become a substantial shield of protection against the unjust double taxation sponsored by *Blackstone v. Miller*.

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<sup>59</sup> If sec. 303 (d) does not enact a conclusive presumption of fact, it enacts one of law. Even so considered, the presumption is contrary to the decision in *First National Bank v. Maine*.

<sup>60</sup> As to the extension of this doctrine to state income taxes, see Rottschaefer, *State Jurisdiction of Income* (1931) 44 HARV. L. REV. 1075.