Choses in action, employed in business transactions within a state, acquire a taxable situs in that state.[7] The rational seems to be that it is property used within the state for the purpose of obtaining profit from its use and, therefore, it is of that kind of property that should contribute to the support of the protecting state. The maxim, *mobilia sequuntur personam* was said to be at most a legal fiction "its proper operation being to prevent a mischief, or remedy an inconvenience that might result from the general rule of law."[8]

The application of the "business situs" doctrine to circumstances as those which existed in the instant case seems justifiable. The centralization of business management in a state clearly takes the case out of the operation of the maxim since no element of hardship is present. N. C. '37.

TAXATION—STOCK DIVIDEND AS INCOME.—The petitioner in 1924 and 1926 purchased preferred stock in a corporation whose articles of incorporation provided that holders of preferred stock should receive annual dividends of seven dollars a share in cash or, at the option of the corporation, one share of common stock for each share of preferred. The preferred stock was redeemable at $105 per share plus accrued dividends; and upon dissolution or liquidation was entitled to preferential payment of $100 a share plus accrued dividend and no more. The common stock was entitled in such event to the assets of the company remaining after payment of the preferred. The company for the period of 1925 to 1928 inclusive, elected to pay the preferred dividends in common stock. The point at issue was whether under the Revenue Act of 1926 and 1928 one who purchases cumulative, non-voting, preferred shares of a corporation upon which a dividend is subsequently paid in common shares must, upon a sale or other disposition of the preferred shares, apportion their cost between the preferred and common for the purpose of determining gain or loss. In computing the profit realized by the petitioner the Commissioner allocated to the common stock so received, in each instance, a proportionate amount of the cost of the preferred thereby decreasing the resulting cost basis per share and increasing the income. On appeal: *Held,* that the dividends were not stock dividends within the terms of the statute. *Koshland v. Helvering,* Commissioner of Internal Revenue.[1]

This decision is clearly in line with the previous cases of *Eisner v. Macomber,*[2] and *Peabody v. Eisner.*[3] The effect of all the cases is that a stock dividend distributed to classes of shareholders who have pre-emptive rights to the stock issue in which the "dividend" is paid is not taxable. *Eisner v. Macomber* decided that such a dividend is not income within the meaning of the Sixteenth Amendment. The instant case decided that only such stock

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[7] New Orleans v. Stempel (1899) 175 U. S. 309.

[8] Ibid, at p. 314 of 175 U. S.

[1] (May 18, 1936), 3 U. S. Law Week 942; Revenue Act of 1928, sec. 115 (f), c. 852, 45 Stat. 791, 822; Revenue Act of 1926, sec. 201 (f), c. 27, 44 Stat. 9, 11: A stock dividend shall not be subject to tax."

[2] (1919), 252 U. S. 189.

[3] (1917), 247 U. S. 347.

dividend came within the scope of the Revenue Acts, that otherwise the tax would be on capital and not income as authorized by the Sixteenth Amendment.

"In *Eisner v. Macomber*, it was decided that a dividend in the corporation's common stock paid to the then common stockholders was not income within the meaning of the Sixteenth Amendment and therefore the effort to tax such dividends exceeded the power granted by the Amendment.

"It was said that such a dividend was not income because, by its payment, no severance of corporate assets was accomplished and the pre-existing proportionate interests of the stockholders remained unaltered."[4]

In *Peabody v. Eisner*, the Supreme Court held taxable a dividend on the stock of the Union Pacific Railroad paid in the stock of the Baltimore and Ohio. Such a dividend "is to be governed for all purposes by the same rule applicable to the distribution of a like value in money." That result was clearly dictated by the decision in *Eisner v. Macomber.*

In construing *Eisner v. Macomber*, the Circuit Court of Appeals, in *Commissioner v. Tillotson Mfg. Co.*,[5] said, "Two tests were thus established for distinguishing a taxable from a non-taxable dividend in stock: (1) Severance of assets from the corporation, and (2) Alteration of the pre-existing proportionate interest of the stockholders." By virtue of that interpretation, the Court held taxable unissued common stock issued as dividends to preferred stock holders. And the Board of Tax Appeals, in following the *Tillotson* Case, has held that a dividend in preferred stock paid to common stockholders was not a stock dividend.[6]

Speaking of the Revenue Act of 1921, which contained the same provision about stock dividends, the opinion in the instant case said, "Soon after the passage of that Act, this court pointed out the distinction between a stock dividend which worked no change in the corporate entity, the same interest in the same corporation being represented after the distribution by more shares of precisely the same character, and such a dividend where there had either been changes of corporate identity or a change in the nature of shares issued as dividends whereby the proportional interest of the stockholder after the distribution was essentially different from his former interest."[7]

This language definitely makes the preservation of the corporate entity and the proportionate interests of the shareholders the criteria on which these decisions are based. Since these cases fall clearly into one category or the other in that matter, little difficulty has arisen in applying that test, but in future cases it is probable that the courts will directly consult the regular doctrines of corporation law in regard to pre-emptive rights of stockholders in deciding whether a stock dividend represents income or capital.

W. H. M. '36.

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[4] Koshland v. Helvering, note 1.

[5] (1935) 76 F. (2d) 189.

[6] James H. Torrens (1934) 31 B. T. A. 787.

[7] The Court cited: U. S. v. Phellis (1921) 257 U. S. 156, Rockefeller v. U. S. (1921) 257 U. S. 176, Cullinan v. Walker (1922) 262 U. S. 134, Marr v. U. S. (1924) 268 U. S. 536, all cases involving the re-organization of corporations.