

# ST. LOUIS LAW REVIEW

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Vol. XIV

FEBRUARY, 1929

No. 2

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## CONSTITUTIONAL LIMITATIONS OF STATE JURISDICTION OVER PROPERTY FOR SUCCESSION TAX PURPOSES

BY HARRY W. KROEGER

### I. GENERAL CONSIDERATIONS

Inheritance taxes are not taxes on property, but upon the privilege of transmitting property by will or descent or of succeeding to property by inheritance.<sup>1</sup> The distinction is vital, and by reason of it state succession tax laws have received constitutional sanction which has not been accorded to general property tax laws. Thus it has been held<sup>2</sup> that a succession tax in respect of United States bonds is not unconstitutional because it impairs the borrowing power of the United States.<sup>3</sup> So also it has been held that a succession tax in respect of bonds of the taxing state, which were exempted from property taxation, was not violative of the contract clause of the Federal Constitution.<sup>4</sup> Without violation of the fourteenth amendment, a state may impose different rates of taxation upon successions by persons standing in different relationships to the decedent, increasing the rates with the remoteness of the relationship, and employ graduated scales of tax rates in the case of each class of beneficiary, applying in sliding scale higher rates to larger bequests and legacies.<sup>5</sup>

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<sup>1</sup> *Stebbins v. Riley* (1925), 268 U. S. 137, 141.

<sup>2</sup> *Plummer v. Coler* (1900), 178 U. S. 115.

<sup>3</sup> *Cf. McCulloch v. Maryland* (1819), 4 Wheat. 316.

<sup>4</sup> *Orr v. Gilman* (1902), 183 U. S. 278.

<sup>5</sup> *Magoun v. Illinois Trust and Savings Bank* (1898), 170 U. S. 283.

Transmission or succession, and not property, being the subject matter upon which the state in imposing an inheritance tax<sup>o</sup> acts, it follows that the constitutional problems arising in connection with the types of transfers sought to be taxed, the manner of imposition of the tax, and the classifications of the subject matter made by the taxing statute are to be gauged by standards having relation to the subject matter of the tax, and that the constitutional inhibitions, to which direct property taxes are subject, do not apply. It does not follow, however, by the same token, that, when the state *measures* a succession tax by the amount or value of the *property* involved in the succession, the constitutional limitations on its *jurisdiction* over the property for direct taxation purposes are inoperative.

It is to the problems of the constitutional limitations of state jurisdiction over property for succession tax purposes, that I direct the inquiry of this paper. That the subject matter of succession taxation is a privilege, I do not presume to question. That the distinction between property taxation and succession taxation, based on the privilege nature of the latter, is not a vital determinant of many constitutional issues, I do not contend. But that a state may constitutionally measure a succession tax by property over which it has no jurisdiction for the purposes of direct taxation, I believe, notwithstanding early authority to the contrary, to be open to question.

The problem naturally divides itself into two topics: First, what property of a resident decedent may a state take into consideration in measuring the succession tax to be imposed; and secondly, over what property of a non-resident decedent has a state jurisdiction so as to enable it to measure a succession tax which it imposes? In the case of any given decedent, the question may be stated in the converse, as follows: What are the claims of the state of his domicile, and what are the claims of foreign states asserting jurisdiction to tax with reference to any portion of the decedent's property?

It has not been denied that, to justify, under the provisions of the fourteenth amendment of the Federal Constitution, a tax on a succession, the state must have some sort of jurisdiction

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<sup>o</sup> Since practically all of the state inheritance tax laws are in their nature succession tax laws, I shall, throughout this paper, denominate them by the latter and more specific term.

over the property which measures the tax. It will be seen from the cases herein cited, that such jurisdiction has not always been postulated upon the same grounds on which jurisdiction to impose a direct property tax is sustained. The privilege character of the succession tax has been invoked to justify the power to tax where jurisdiction to impose direct property taxes has been denied. Thus it has been said that the state of a decedent owner's domicile may tax the succession by virtue of the fact that the law which governs and regulates the succession is a law of that state's creation. So also the jurisdiction of a foreign state to impose a tax, and measure it by certain property, has been thought sustainable by reason of the fact that recourse to the courts of that foreign state was or might be necessary in order to effectuate the transfer of the property in succession, or to enable the beneficiary to realize thereon. Such was the constitutional dogma at the time of the decision of the case of *Blackstone v. Miller*<sup>7</sup> in which it is expressed as follows:

“But it is plain that the transfer does depend upon the law of New York, not because of any theoretical speculation concerning the whereabouts of the debt, but because of the practical fact of its power over the person of the debtor. The principle has been recognized by this court with regard to garnishments of a domestic debtor of an absent defendant. . . . What gives the debt validity? Nothing but the fact that the law of the place where the debtor is will make him pay. It does not matter that the law would not need to be invoked in the particular case.”

More recently the Supreme Court of the United States in the case of *Rhode Island Hospital Trust Company v. Doughton*<sup>8</sup> speaking through Chief Justice Taft, expressed a view of jurisdiction to measure a succession tax by given property, which varies materially from the expressions of the *Blackstone* case and which, I submit, renders invalid, in the constitutional dogma of today, a succession tax in respect of property which the state had no constitutional jurisdiction to tax directly.

“The tax here is not upon property, but upon the right of succession to property, but the principle that the subject to be taxed must be within the jurisdiction of the state ap-

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<sup>7</sup> (1903), 188 U. S. 189, 205.

<sup>8</sup> (1926), 270 U. S. 69, 80.

plies as well in the case of a transfer tax as in that of a property tax. A state has no power to tax the devolution of the property of a non-resident unless it has jurisdiction of the property devolved or transferred."

It is my general conception that the law of due process as applied to state jurisdiction over property for succession tax purposes, is the joint making of the older dogma, so far as questions were settled at the time that dogma prevailed, and of the newer dogma so far as questions have come more recently to the Supreme Court of the United States for decision and so far as they may come in the near future. If my conception be a true one, then cases involving property taxes and cases involving succession taxes may be interchangeably cited to sustain or oppose the validity of either of such taxes. In such event also, it would follow that the nature of succession taxes, as taxes imposed upon the privilege of succession, would have no bearing upon the law of due process in its application to the property with respect to which a succession tax is imposable, whatever vitality a distinction, based upon such privilege, between succession taxes and property taxes might have in questions of classification for the purposes of taxation under the due process clause, or in constitutional questions arising under clauses of the Federal Constitution other than the fourteenth amendment.

I shall consider, first, the claims of the domiciliary state to taxing jurisdiction, and then certain claims of the foreign states to such jurisdiction in respect of types of property concerning which the Supreme Court of the United States has spoken.

## II. JURISDICTION OF DOMICILIARY STATE

Before the case of *Frick v. Commonwealth of Pennsylvania*<sup>9</sup> was decided, it had been generally thought that the state of the domicile of a decedent had the power to tax the succession to all of the decedent's personal property, tangible and intangible.<sup>10</sup> Such property devolves according to the law of the state of the owner's domicile.<sup>11</sup> By the law of that state, the proper construction of the decedent's will is to be determined, and according to that law the persons entitled to distribution, if the dece-

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

<sup>10</sup> See note, 16 HARV. L. REV. 522, 523.

<sup>11</sup> *Ennis v. Smith* (1852), 14 How. 400, 424.

dent left no will, is to be ascertained. Because the state created the right to succeed to the property, it was supposed that it had justifiable ground to impose a tax on the succession thereto. If succession taxes are privilege taxes, it would seem to follow that no state should have a better claim to tax the succession than the state which by its law created the right to succession, or, in the case of personalty, the law of the decedent's domicile. Not only had the Supreme Court of the United States upheld the tax with respect to intangible personalty, but it had uttered dicta which justified the assumption that no distinction between the case of intangible personalty and chattels would be made. Thus in *Blackstone v. Miller*,<sup>12</sup> Mr. Justice Holmes said:

"To come closer to the point, no one doubts that succession to a tangible chattel may be taxed wherever the property is found, and none the less that the law of the situs accepts its rules of succession from the law of the domicile, or *that by the law of the domicile the chattel is part of a universitas and is taken into account again in the succession tax there.*"

A similar dictum may be found in the opinion of Mr. Justice Holmes in *Bullen v. Wisconsin*,<sup>13</sup> decided as late as 1916.

*Frick v. Commonwealth of Pennsylvania*<sup>14</sup> has fixed the law relating to tangible personalty to the contrary. This case involved a Pennsylvania statute providing that, where a person domiciled in that state should die seized or possessed of property, real or personal, a tax should be levied on the transfer of the property, by will or intestate laws, whether the property be in that state or elsewhere. Mr. Frick died domiciled in Pennsylvania, leaving an estate which included real estate in various states, a collection of rare paintings, furniture and art treasures, housed in a building in New York especially constructed for that purpose, considerable other tangible personal property located in Mr. Frick's New York and Massachusetts residences, and various stocks in corporations of states other than Pennsylvania, the certificates for which were kept outside of Pennsylvania. The court held that the taxing statute was unconstitutional insofar as it imposed a tax upon the succession to realty

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<sup>12</sup> (1903), 188 U. S. 189, 204.

<sup>13</sup> 240 U. S. 625, 631.

<sup>14</sup> *Supra*, note 9.

and tangible personalty physically situated outside the state of Pennsylvania, but that the tax upon the succession to the stock of foreign corporations standing in the name of decedent was valid. Neither did the denial by the court of the power to tax with respect to extra-state realty, nor the affirmation of the power to tax with respect to the stock, run counter to the law as it had been conceived to be. The denial of the power to impose a tax with respect to chattels physically without the state was a radical departure. Mr. Justice Van Devanter, delivering the opinion of the court, said:<sup>15</sup>

“The Pennsylvania statute is a tax law, not an escheat law. This is made plain by its terms and by the opinion of the state court. The tax which it imposes is not a property tax but one laid on the transfer of property on the death of the owner. This distinction is stressed by counsel for the state. 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 law. Here the tax was imposed on the transfer of tangible personalty having an actual situs in other states—New York and Massachusetts. This property, by reason of its character and situs, was wholly under the jurisdiction of those states and in no way under the jurisdiction of Pennsylvania. True, its owner was domiciled in Pennsylvania, but this neither brought it under the jurisdiction of that state nor subtracted anything from the jurisdiction of New York and Massachusetts. In these respects the situation was the same as if the property had been immovable realty. 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 the death of the owner, and power to tax both the property and the transfer.”

The contention made by the Commonwealth that the tax was not a tax upon extra-state property, but upon the privilege of succession, and it was therefore permissible to use as a basis of taxation the total value of the estate, was rejected by the court. It may be said that a measure of taxation based on extra-territorial values is an unconstitutional measure, and the tax based thereon an unconstitutional tax.

By the *Frick* case, the rule as to succession taxes is brought

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<sup>15</sup> *Supra*, note 9, l. c. 492.

into conformity with the rule as to direct property taxation of chattels, as expressed in *Union Refrigerator Transit Company v. Kentucky*.<sup>16</sup> Although the former are still conceded to be privilege taxes, the power of the state to tax is confined to the same constitutional limitations, as to extra-territoriality, as are direct *ad valorem* taxes.

The *Frick* case is by no means a denial of the right of the state to impose a tax with respect to intangible personalty. It recognizes without question the right of the Commonwealth of Pennsylvania to impose a tax with respect to shares of stock owned by Mr. Frick in corporations organized under the laws of other states, but it appears that the court limits Pennsylvania to taxing the residue of their value after the deduction of succession taxes paid to the states where the corporations were respectively chartered.<sup>17</sup> The latter holding is based on the theory that such stocks are not brought into Pennsylvania administration until after payment of the foreign succession tax—a conception which, also, is difficult to reconcile with the privilege theory of succession taxation, since the *privilege* of succession vests immediately upon the death of the owner.

As in the *Frick* case the Supreme Court spoke its denial of the constitutional power of the domiciliary state to tax with respect to tangibility physically located in another state, so in a recent case, *Blodgett v. Silberman*,<sup>18</sup> it spoke its affirmation of that power with respect to personal intangibility. The latter case concerned the right of the State of Connecticut to impose a tax on the succession to certain property of Robert B. Hirsch, who died a resident of that state. Among the items as to which the right of the state to tax was disputed were: the decedent's interest in a New York limited partnership doing business in New York, the proceeds of a policy of life insurance issued by a New York insurance company and payable to the estate, shares of stock in New York, New Jersey and Canadian corporations, the certificates representing which were kept in New York, and bonds of the United States also kept in New York. As to all of these items, over which the state's sole claim of jurisdiction rested upon the place of the decedent's domicile,

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<sup>16</sup> (1905), 199 U. S. 194.

<sup>17</sup> *Supra*, note 9, l. c. 497.

<sup>18</sup> (1928), 48 S. Ct. 410, 72 L. Ed. (Adv.) 470.

the court sustained the tax. "For present purposes," said Chief Justice Taft for the court, "it suffices that intangible personalty has such a situs at the domicile of its owner that its transfer on his death may be taxed there."

Of particular interest in the case is the treatment of the United States bonds. The Connecticut Court of Appeals, distinguishing public securities from the obligations of private debtors, had declared the former to be a "species of tangible personal property," and hence, under the new orthodoxy of the *Frick* case, taxable only at the place where they might be physically located. Support for this view was sought, and found, to the Connecticut court's satisfaction, in the much quoted dictum of Mr. Justice Field in *State Tax on Foreign Held Bonds*:<sup>19</sup>

"It is undoubtedly true that the actual situs of personal property which has a visible and tangible existence, and not the domicile of its owner, will, in many cases, determine the state in which it may be taxed. The same thing is true of public securities consisting of state bonds and bonds of municipal bodies, and circulating notes of banking institutions; the former, by general usage, have acquired the character of, and are treated as, property in the place where they are found, though removed from the domicile of the owner; the latter are treated and pass as money wherever they are."

Mr. Justice Field was in the *Foreign Held Bonds* case dealing with the validity of a Pennsylvania tax on the income to non-residents from interest on the bonds of domestic corporations. The quoted passage was therefore mere dictum, but even if taken at face value, it clearly did not go so far as to define public securities as tangible property. From the proposition, contained in the dictum, that public securities are taxable by the state wherein the paper is physically located, the Connecticut court jumped to the proposition that the power of that state to tax was *exclusive* and denied the jurisdiction of the state of the owner's domicile. Such a denial was a distinct departure, justifiable, under prevailing law, only if public securities constitute tangible property. Were it true that the debt inhered in the paper which expressed the obligation, and had no inde-

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<sup>19</sup> (1872), 15 Wall. 300, 323.



pendent existence, it might well be considered tangible property. But such is not the case in the instance of the public securities, any more than it is in the case of the private securities which the Connecticut court admitted were taxable in the domiciliary state. In reversing the decision of the Connecticut court respecting its holding on public securities, Mr. Justice Taft, delivering the opinion of the Supreme Court, said:<sup>20</sup>

“The question here is whether bonds, unlike other choses in action, may have a situs different from the owner’s domicile such as will render their transfer taxable in the state of that situs and in only that state. We think bonds are not thus distinguishable from other choses in action. It is not enough to show that the written or printed evidence of ownership may, by the law of the state in which they are physically present, be permitted to be taken in execution or dealt with as reaching that of which they are evidence, even without the presence of the owner. While bonds often are so treated, they are nevertheless in their essence only evidences of debt. The Supreme Court of Errors expressly admits that they are choses in action. Whatever incidental qualities may be added by usage of business or by statutory provision, this characteristic remains, and shows itself by the fact that their destruction physically will not destroy the debt which they represent. They are representative, and not the thing itself.”

In its principal holding that the succession to intangible personalty is taxable in the state of the decedent owner’s domicile, the *Silberman* case makes no new law. The doctrine had been repeatedly stated by the Supreme Court of the United States in property tax cases,<sup>21</sup> where the naked question of jurisdiction over the property is presented, and in a leading income tax case.<sup>22</sup> The restatement is, however, interesting from various angles. In the first place, because it not only brings the law of jurisdiction in succession tax cases into conformity with the law in property tax cases, but cites as a leading authority for its holding *Kirtland v. Hotchkiss*,<sup>23</sup> which upheld the jurisdiction

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<sup>20</sup> *Supra*, note 18, l. c. 415.

<sup>21</sup> *Darnell v. Indiana* (1912), 226 U. S. 390; *Hawley v. City of Malden* (1914), 232 U. S. 1; *Fidelity & Columbia Trust Company v. City of Louisville* (1917), 245 U. S. 54; *Citizens National Bank of Cincinnati v. Durr* (1921), 257 U. S. 99.

<sup>22</sup> *Maguire v. Trefry* (1920), 253 U. S. 12.

<sup>23</sup> (1879), 100 U. S. 491.

of the state of the owner's domicile to tax bonds evidencing debts owing from nonresidents, "wherever actually held or deposited," and regardless of the existence in another state of property mortgaged as security therefor. Secondly, being superimposed upon the *Frick* case, it crystallizes the law governing the power of the domiciliary state into a simple rule, *viz.*, the state may tax the succession to all intangible personalty of a decedent, and such of his tangible property as has physical presence in the state; but it may not tax the succession to tangible property located without the state. Queries as to whether *Frick v. Pennsylvania* would be followed by further decisions limiting the power of the domiciliary state may be resolved. Finally and most interestingly, the opinion declined to rationalize the result attained. The maxim *mobilia sequuntur personam*, "insofar as it relates to intangible property," the Court considered so fully sustained by the cases, that it must be treated as settled, "whether it approve itself to legal philosophic test or not." The court does not speak of the "privilege" of the state furnishing the law of succession to tax it. The *ratio decidendi* is simply *stare decisis*.

Upon what distinction between tangible and intangible personalty is the denial of the power of the domiciliary state to tax in the case of the former type of property (unless physically within the state), and the upholding of that power in the case of the latter, to be postulated? What is the true theory of the domiciliary state's power to impose a tax with respect to *all* the intangible personalty of a decedent? In most instances, there are bases of taxation independent of the mere residence of the decedent in the state. Thus the bonds of the decedent's estate may be physically present in the state, or the corporations in which the decedent owns stock may be chartered under the laws of the domiciliary state. But suppose all independent bases of taxation be eliminated, and the state's claim to tax is based solely upon the decedent's residence in the state. Such is the problem presented by the *Silberman* case.

It can no longer be asserted without qualification, that the power of the state of the domicile to tax is based upon the privilege of succession to the property which its law creates. That law is applied to the devolution of chattels, but succession to chattels is not therefore taxable. That the Supreme Court

has abandoned the "law-of-devolution" theory of taxation as a basis of decision, may be observed from the following passage from the *Frick* opinion:<sup>24</sup>

"Obviously the accepted domiciliary law could not in itself have any force or application outside that state. Only in virtue of its express or tacit adoption by the states of the situs could it have any force or application in them."

It appears from this that not only was the tax on the succession to chattels bad because the domiciliary state was attempting, in the exercise of its supposed privilege, to reach extra-territorial values, but also because it didn't have any privilege to begin with.

While taxation of the succession to intangible personalty by the domiciliary state, is not within the ban of the *Frick* case, because intangibles have no territoriality, but on the contrary the power to so tax has been affirmed by the *Silberman* case, yet the *Frick* case has, I submit, broken down the reasoning on which such taxation had theretofore been considered sustainable, *viz.*, because it furnishes the law of succession, the state of the domicile may levy an excise tax.<sup>25</sup> If that state does not have the power to tax when, as in the *Frick* case, it does not *apply* its law of devolution, the mere *origin* of the law of devolution does not vest the power.

It has likewise been asserted that the jurisdiction obtained through domiciliary administration, in the courts of probate, gives the domiciliary state the power to tax. With the advent of the *Frick* decision, however, this theory likewise falls, for chattels located in foreign states come into domiciliary administration but under that decision are not therefore taxable.

I recognize that it may still be contended that the law-of-devolution theory or the probate-jurisdiction theory (which is really a corollary of the former) still hold good except insofar as they may be crossed and limited by the doctrine of extra-territoriality announced in the *Frick* case. The domiciliary state, it may be said, has plenary jurisdiction over the succession to all personal property of its subjects, because it furnishes the law which affirms and regulates that succession. Where it

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<sup>24</sup> *Supra*, note 9, l. c. 494.

<sup>25</sup> See Beale, *Jurisdiction to Tax* (1919), 32 HARV. L. REV. 587, 624.

attempts to tax tangibles located outside the state, such tax is subject to the objection of extra-territoriality, but where it taxes intangibles, no vice exists because intangibles have no territoriality nor extra-territoriality. Hence there is no hindrance to the state's exercise of its plenary jurisdiction.

Such reasoning would, in my mind, be a forced adaptation of an old theory to the new state of law. It was fashioned in the model of a supposed constitutional distinction between real and personal property. The law, as it now stands, distinguishes only between tangible and intangible property.

It being the rule that the state may not impose a tax with respect to tangible property, (unless physically located in the state), but may impose a tax with respect to intangible personalty, it seems proper to deny or affirm its jurisdiction on the basis of the natures, respectively, of those classes of property. The rights of the owner of tangible property lie in possession. The rights of the owner of intangible personalty lie in action. Through its jurisdiction over the person, it is submitted, the domiciliary state also has jurisdiction over the choses in action which have no existence independent of the owner who can enforce them, and which constitute his legalistic personalty. A share of stock would seem therefore to be within the taxing jurisdiction of the domiciliary state, not because it is personalty, but because it is a chose in action. The succession thereto would seem to be taxable, not by reason of that state's legal tolerance of that succession, but because the chose-in-action inhered in the decedent owner, whose passing resulted in the succession.

### III. JURISDICTION OF FOREIGN STATES—DEBTS

The jurisdiction of the domiciliary state to tax the succession to intangibles is not a territorial jurisdiction, and its power is, therefore, in no sense a denial of the power of another state to tax, if the latter has constitutional jurisdiction. In and of itself double taxation of succession is free from constitutional vice.<sup>26</sup>

What are the grounds of jurisdiction which a state, other than that of the decedent owner's domicile, may have to justify a tax on the succession to portions of his intangible personal

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<sup>26</sup> *Blackstone v. Miller* (1903), 188 U. S. 189, 205, 207; *Maxwell v. Bugbee* (1919), 250 U. S. 525, 538.

property? Or, since, as will be seen, the grounds of jurisdiction depend upon the nature of the property, the question may be more properly stated in the converse—What attributes of the various types of intangible personalty lend themselves to the constitutional power of the foreign state to tax? I shall consider, in this paper, only two classes of intangibles, debts and corporate shares.

A debt is the obligation of one juristic person, a debtor, to pay another juristic person, a creditor, a sum of money. The obligation may arise by virtue of an act done in a definite place, but the cause of action based thereon is transitory. The debt may or may not be evidenced by a negotiable instrument, to which special attributes, having their origin in the law merchant, attach; and it may or may not be secured by collateral. Such are the fundamental characteristics of this type of chose in action.

(a) *State of the Domicile of the Debtor.*

The owner of the debt dies. The state where he was domiciled at the time of his death, exacts a succession tax. Can the state, where the debtor is domiciled, likewise exact a tax? Under the decision in *Blackstone v. Miller*,<sup>27</sup> which still stands, such a tax is without constitutional vice.

While decided in 1903, the criticism to which the *Blackstone* case has been subjected, and the virtual refusal of some state courts to follow it, project a certain amount of doubt into the future as to whether or not it will stand unmodified.

The case of *State Tax on Foreign Held Bonds*<sup>28</sup> was in the fabric of the law, when the *Blackstone* case was decided. While the holding of the earlier case was merely that a state tax of five per cent, payable at source, on amounts disbursed as interest on bonds of domestic corporations was unconstitutional when applied to amounts paid to nonresidents of the state, the opinion therein expressed a view on the power of the state of the debtor's domicile to tax property, which is at variance with the result of the *Blackstone* case. The court's dictum (opinion of Mr. Justice Field) was as follows:<sup>29</sup>

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\* (1903), 188 U. S. 189.

\* (1872), 15 Wall. 300.

\* *Supra*, note 28, l. c. 319.

"Corporations may be taxed, like natural persons, upon their property and business. But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors, is simply to misuse terms. All the property there can be, in the nature of things in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be."

In *Blackstone v. Miller*, a New York tax on the succession to promissory notes made by a resident of New York and a deposit kept in a New York bank were sustained as to an Illinois decedent's estate. The much quoted passage from the opinion of Mr. Justice Holmes, upholding the tax, was as follows:<sup>30</sup>

"If the transfer of the deposit necessarily depends upon and involves the law of New York for its exercise, or in other words, if the transfer is subject to the power of the state of New York, then New York may subject the transfer to a tax. *United States v. Perkins*, 163 U. S. 625, 628, 629, 41 L. ed. 287, 288, 16 Sup. Ct. Rep. 1073; *M'Cullough v. Maryland*, 4 Wheat. 316, 429, 4 L. ed. 579, 607. But it is plain that the transfer does depend upon the law of New York, not because of any theoretical speculation concerning the whereabouts of the debt, but because of the practical fact of its power over the person of the debtor. The principle has been recognized by this court with regard to garnishments of a domestic debtor of an absent defendant. *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797. See *Wyman v. Halstead*, 109 U. S. 654, sub nom. *Wyman v. United States ex rel. Halstead*, 27 L. ed. 1068, 3 Sup. Ct. Rep. 417. What gives the debt validity? Nothing but the fact that the law of the place where the debtor is will make him pay. *It does not matter that the law would not need to be invoked in the particular case.*"

*State Tax on Foreign Held Bonds* is thus in effect an apotheosis of the view that jurisdiction to tax intangibles must be found in the presence in the state of some *attribute of the chose* giving it value. *Blackstone v. Miller* is in effect an apotheosis of the

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<sup>30</sup> *Supra*, note 27, l. c. 205.

view that the jurisdiction may be based upon the potential protection given to the right by the laws of the taxing state. Are the views reconcilable by reason of the one having reference to property taxation, and the other to succession taxation? Is the configuration of the *Blackstone* case woven into the fabric beside that of the *State Tax* case, or does the weaving of the former obliterate all but the historical background created by the latter? Fundamentally the view of the *Blackstone* case is that the tax is justifiable on the basis of the potential protection afforded by the laws of the state of the debtor's domicile. Since that protection is not a peculiar incident to the succession, but one which subsists during the entire period of ownership, and should, therefore, if it justifies a succession tax, also justify a property tax, it seems that in logic *Blackstone v. Miller* must supersede *State Tax on Foreign Held Bonds*. It may perhaps be urged that, for the purpose of founding administration, contract debts are assets at the domicile of the debtor,<sup>31</sup> and, since the personal representative must procure ancillary administration in the latter state to collect his debt, the succession is under the jurisdiction of that state. But the debtor may voluntarily pay the personal representative,<sup>32</sup> from which it appears that the protection afforded the succession is like the protection afforded the living creditor, merely potential.

Thus far I have merely submitted that the logic of the *Blackstone* case is applicable to property taxation also. Whether it or the logic of the *State Tax* case is more in line with the trend of more recent Supreme Court decisions is another question.

The doctrine of the *Blackstone* case has been ably defended by Professor Carpenter,<sup>33</sup> who urged, in a vein almost prophetic of the *Frick* case, so far as that case goes, that the fiction *mobilia sequuntur personam* furnishes no basis for a tax by the state of the decedent owner's domicile, and that exclusive jurisdiction to tax debts should reside in the state of the debtor's domicile, since that state gives the protection which makes the debt valuable to the creditor. The reasoning of the *State Tax* case was criticised as a misconception,<sup>34</sup> it being asserted that the tax law was

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<sup>31</sup> See *Wyman v. Halstead* (1883), 109 U. S. 654, 656.

<sup>32</sup> See *Wilkins v. Ellett* (1869), 9 Wall. 740.

<sup>33</sup> *Jurisdiction over Debts* (1918), 31 HARV. L. REV. 905 *et seq.*

<sup>34</sup> *Supra*, note 33, l. c. 929.

not an attempt to tax debts as assets of the debtor. If it be admitted, however, that no assets reside with the debtor, it is difficult to see how the debtor's presence brings into the taxing state any jurisdiction over any attribute of the chose so as to make it amenable to taxation. As has been pointed out by Professor Beale,<sup>35</sup> the tax, if upon the property of the debtor amenable to the payment of the debt, is a second tax upon the same interest in the same thing, and, if upon the intangible right, is a tax on a vacuum, for at the residence of the debtor the chose in action is a liability.

From the standpoint of practical operation, the *Blackstone* doctrine has been subjected to severe criticism.<sup>36</sup> It has been pointed out that, if the tax is based upon the potential necessity of the personal representative availing himself of the courts of the debtor's state to collect the debt, it would logically then follow that every state where the debtor had property would have a claim to tax, for the power of the courts of those states might have to be invoked in attachment or garnishment suits, and those states, too, afford potential protection. Where the debtor owns debts, and the debtor of the debtor owns debts, the complete power to tax can only be found by the unravelling of Chinese boxes.

The *Blackstone* case has had a short history in the Supreme Court of the United States. Its doctrine has been stated, without consideration, and as dictum, in *Maxwell v. Bugbee*<sup>37</sup> and *Baker v. Baker, Eccles & Company*.<sup>38</sup> In the state courts, however, the reaction to it is very interesting.

It will be recalled that the case came up by way of writ of error to the Court of Appeals of New York, where the decision in favor of the tax<sup>39</sup> had been based solely on the ground that a bank deposit was assimilable to cash. Both before<sup>40</sup> the *Blackstone* case, and after,<sup>41</sup> it has been the law in New York that

<sup>35</sup> Jurisdiction to Tax (1919), 32 HARV. L. REV. 587, 603.

<sup>36</sup> See Beale, *supra*, note 35, l. c. 604.

<sup>37</sup> (1919), 250 U. S. 525, 543.

<sup>38</sup> (1917), 242 U. S. 394, 401.

<sup>39</sup> In re *Blackstone's Estate* (1902), 171 N. Y. 682, 64 N. E. 1118.

<sup>40</sup> *Matter of Bronson* (1896), 150 N. Y. 1, 5, 44 N. E. 707.

<sup>41</sup> *Matter of Fearing* (1911), 200 N. Y. 340, 344, 93 N. E. 356; *Matter of Lowell* (1924), 208 App. Div. 201, 204, 206, 203 N. Y. S. 312, affirmed (1924), 239 N. Y. 532, 14 N. E. 183.



bonds of New York corporations, actually held outside the state by nonresident decedents, were not subject to the succession tax in New York as "property within the state."

The Appellate Division in *Matter of Lowell*<sup>42</sup> considered the *Blackstone* case, but felt itself bound to ignore the authority of the *Blackstone* case in view of the later decisions of the New York Court of Appeals in *Matter of Gordon*,<sup>43</sup> and in *Matter of Fearing*.<sup>44</sup> The latter court in the *Gordon* case, holding that the proceeds of a life insurance policy issued by a domestic insurance company to a nonresident decedent were not subject to New York succession tax, said of the *Blackstone* case:<sup>45</sup>

"The Supreme Court of the United States in the opinion delivered by Judge Holmes, however, deemed it wise to go beyond this ground [that bank deposits were assimilable to cash] and holds that a tax could be sustained even upon the theory that the deposit was an ordinary debt. But this holding was unequivocally based upon the conditions disclosed in that case, which were that the debtor resided within the state and that the creditor must come there and take advantage of the laws of the state for the purpose of enforcing his claim."

Obviously this is no distinction.

In view of the fact that the Court of Appeals should have felt itself bound to distinguish the case before it from the *Blackstone* case, inquiry may properly be raised as to whether a real conflict of decision subsists in the treatment of the taxability of the succession to obligations owed by a resident of the state to a nonresident decedent. Strictly speaking, the New York courts were, in the cases cited, considering merely the question, are such obligations "property within the state" within the meaning of the state taxing statute? The United States court in the *Blackstone* case responded to the question, assuming that the state has attempted to exercise the power to impose a tax, do constitutional limitations supervene? To the extent that these questions are substantially, and not merely superficially, different, no conflict of decision subsists. However, the real test

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<sup>42</sup> *Supra*, note 41.

<sup>43</sup> (1906), 186 N. Y. 471, 79 N. E. 722.

<sup>44</sup> *Supra*, note 41.

<sup>45</sup> See p. 475, case, *supra*, note 43.

of constitutional limitation, applied from *State Tax on Foreign Held Bonds to Rhode Island Hospital Trust Company v. Doughton*,<sup>46</sup> has been one of jurisdiction over the property subjected to tax. Thus it was said in the latter case (a succession tax case to which I shall have future occasion to advert), "it goes without saying that a state may not tax property which is not within its territorial jurisdiction." Unless it may be asserted that the corporate bonds which were the subject of the tax in the *Lowell* case, were not "within the state" as that phrase was employed in the state taxing statute, but were "within the state" for the purposes of due process, the New York court ran the gauntlet of the *Blackstone* case, and a differentiation such as was made of the latter case on the basis of the facts involved was in order.

Is there such a difference between the statutory connotation of property "within the state" and the constitutional connotation of that term, which ought to lead to a different result when applied to property in the same situation so far as the state jurisdiction is concerned? Such difference, if it exists, must be postulated on the doctrine that taxing statutes must be strictly construed against the sovereign.<sup>47</sup> But ought not an equally strict construction of what constitutes property "within the state" be employed when constitutional limitations are concerned? While the incidence of double or triple taxation by various states of a succession may be without constitutional objection, it furnishes substantial reason why the highest court of the land should equally strictly construe the doctrine of jurisdiction over the property, when a state attempts to impose a tax on the basis of so tenuous a ground of jurisdiction over a debt as jurisdiction over the debtor. It is therefore submitted that if a decision of that court, affirming state jurisdiction over certain property, is followed by state decisions denying the state jurisdiction on the ground that the property is not "within the state," such state decisions must at least be taken as suggesting reconsideration by the Supreme Court of the United States of its doctrine, even though the connotation of property "within the state" may be different in the two cases.

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<sup>46</sup> (1926), 270 U. S. 69, 80.

<sup>47</sup> See *U. S. v. Merriam* (1923), 263 U. S. 179, 188; *Schwab v. Doyle* (1922), 258 U. S. 529, 534.

The Supreme Judicial Court of Massachusetts, in *Bliss v. Bliss*,<sup>48</sup> held the succession to debts owed by a partnership to a nonresident decedent not taxable in Massachusetts where the partnership business was carried on, distinguishing the case before the court from the *Blackstone* case on the theory that the partnership had property in the state of the owner's domicile, and it was therefore unnecessary for the personal representative to have recourse to the Massachusetts courts to collect the debt. If it be remembered that potential, and not actual, recourse to the courts of the debtor's state was according to *Blackstone v. Miller* the basis of that state's power to tax, the Massachusetts court would seem to be in the position of finding differences, rather than distinctions, to justify a contrary holding.

A number of state decisions have willingly followed *Blackstone v. Miller*.<sup>49</sup> Others have shown a distinct disinclination to adopt its doctrine.<sup>50</sup> The latter cases have the merit of conformity with the current of state decision contrary to the constitutional power of the state of debtor's domicile to impose a property tax on debts.<sup>51</sup> Not only the doctrinal and practical objections interposed by Professor Beale to the decision in the *Blackstone* case, but also the disinclination of strong state courts to follow it, leave it to be hoped that the case will be overruled, and a coherence between the law of succession taxation and the law of property taxation, relating to the power to tax a debt by virtue of jurisdiction over the debtor, will be achieved.

(b) *State Where Negotiable Paper May Be Lodged.*

Two special classes of debts require consideration, *viz.*, negotiable instruments and debts secured by mortgage or pledge.

The leading case on negotiable instruments is *Wheeler v. Sohmer*,<sup>52</sup> which involved the power of the State of New York to

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<sup>48</sup> (1915), 221 Mass. 201, 109 N. E. 148.

<sup>49</sup> State ex rel. Graff v. Probate Court of St. Louis County (1915), 128 Minn. 371, 150 N. W. 1094; State ex rel. Marsh v. Probate Court of St. Louis County (1926), 168 Minn. 508, 210 N. W. 389; State ex rel. Knox County Collector v. Bunce (1915), 187 Mo. A. 607, 173 S. W. 101; see also cases cited by Carpenter, 31 HARV. L. REV. 926, note 67.

<sup>50</sup> Cases cited, *supra*, notes 41 and 43; Walker v. People (1918), 64 Colo. 143, 171 Pac. 747; Gilbertson v. Oliver (1906), 129 Iowa, 568, 105 N. W. 1002; People v. Blair (1917), 276 Ill. 623, 115 N. E. 218; McLaughlin v. Cluff (1925), 66 Utah 245, 240 P. 161; see also, note 42 A. L. R. 354, 357.

<sup>51</sup> See cases cited by Beale, 32 HARV. L. REV. 605, note 90.

<sup>52</sup> (1914), 233 U. S. 434.

tax the succession to four promissory notes made by a resident of Illinois and secured by mortgages on Chicago real estate and several notes of the Southern Railway Company, a Virginia corporation. The decedent owner was a resident of Connecticut and the sole ground of jurisdiction of the State of New York was the presence of the notes in a safe deposit box in New York. In sustaining the tax, the court, speaking through Mr. Justice Holmes, said:<sup>53</sup>

“But it is plain that bills and notes, whatever they may be called, come very near to identification with the contract that they embody. An endorsement of the paper carries the contract to the endorsee. An indorsement in blank passes the debt from hand to hand so that whoever has the paper has the debt.”

The effect of the *Wheeler* case on the law of due process as applied to succession taxes can only be judged in the light of the property tax cases which had anteceded. *Buck v. Beach*<sup>54</sup> had been decided only seven years before the *Wheeler* case. There the court held invalid an Indiana property tax on notes made by residents of Ohio and owned by a resident of New York, but kept in a safe in Indiana. No business was transacted in regard to the notes in Indiana. A few days before maturity, they were customarily sent to an Ohio agent of the owner for collection. As the custody of the securities in Indiana was interrupted only by the annual shipment thereof into Ohio a day or two before tax assessment day in Indiana, after which they were immediately returned to the latter state (a point which the court did not consider controlling), the decision appears to be a denial that permanent physical presence of negotiable instruments was sufficient to justify the tax.

*Buck v. Beach* was superimposed upon two lines of authority which sustained property taxes on negotiable instruments where jurisdiction was based solely upon presence in the state of the paper. Thus there was a line of authority to the effect that where the owner of negotiable instruments maintained and administered them through an agent in a state other than that of the owner's residence, they acquired what was designated as

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<sup>53</sup> See p. 439, case, *supra*, note 52.

<sup>54</sup> (1907), 206 U. S. 392.

“business situs” in the state of their administration.<sup>56</sup> A second line of authority is based upon the decision in *State Tax on Foreign Held Bonds, supra*, and upholds the jurisdiction of the state to tax instruments under seal present in the state.

The divergence of opinions among the justices in the *Wheeler* case presents a very interesting study in parallelism between due process as applied to property taxes and due process as applied to succession taxes. The majority opinion, rendered by Mr. Justice Holmes, after announcing the theory, as above quoted, that near-identification of negotiable instruments with the contracts which they embody justified a succession tax by the state where the paper was found, distinguished the case at bar from the *Buck* case on the ground that in the latter case the paper was only temporarily present in the taxing state. If the statement of facts in the *Buck* case is correct, the continued presence of the paper in the state was interrupted only by its temporary excursion from the state over tax day. Mr. Justice McKenna, in a separate opinion in the *Wheeler* case, took issue with the Holmes opinion in its interpretation of the *Buck* case, but concurred in the result reached in the case at bar on the theory that a succession tax is not a tax on property but upon the transfer of the property, and since the laws of the state where the paper was found were invoked to accomplish the transfer, it had jurisdiction to tax. Due process as applied to succession taxes admitted, in Mr. Justice McKenna’s opinion, of broader jurisdiction to tax than due process as applied to property taxes. Mr. Justice Pitney agreed with Mr. Justice McKenna. Mr. Justice Lamar, in a dissenting opinion in which Chief Justice White and Mr. Justice Van Devanter concurred, felt that *Buck v. Beach* stood broadly for the principle that the presence of a negotiable instrument in the state furnished no jurisdiction to tax, and that that decision was controlling in the matter of succession taxes as well as property taxes.

This then was the situation: Six Justices upheld the power of the state where a negotiable instrument was lodged, to tax the succession thereto. Five Justices believed that *Buck v. Beach*

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<sup>56</sup> *New Orleans v. Stempel* (1899), 175 U. S. 309; *Bristol v. Washington County* (1900), 177 U. S. 133, 141; *State Assessors v. Comptoir National d’Escompte* (1903), 191 U. S. 388, 403; *Insurance Company v. New Orleans* (1907), 205 U. S. 395, 400.

should be broadly interpreted as announcing a contrary doctrine as applied to property taxation. Yet seven judges applied reasoning which admitted of no distinction between the rules of due process to be applied to the two types of taxation. The "privilege" doctrine was responsible for the concurrence of two Justices in the result, a concurrence necessary to the result, but the "privilege" doctrine itself was ignored by the rest of the Court.

The law of due process in relation to the taxation of the succession to negotiable instruments as propounded by the Supreme Court of the United States is thus far from being an apotheosis of the privilege doctrine. The sentiment of the court which decided it, may be said to have been dominantly positivistic in the sense of opining that the power to tax must be based upon actual jurisdiction over the res and not upon potential jurisdiction over a cause involving the res. Who may say that the court is not now ready to discard *Buck v. Beach* as that case has been heretofore broadly interpreted to deny the power to impose a property tax?

(c) *State of the Locus of Mortgage or Collateral Security.*

On the question as to whether the jurisdiction of the state over property mortgaged or pledged to secure a debt invests the state with power to tax the succession to the debt, where no other jurisdiction over the debt exists, the Supreme Court of the United States has not spoken. Conceivably the power to tax in such instance may be based upon two independent doctrines, both known to the law of due process, the first based upon the fact that the mortgagee or pledgee has an interest in property located in the state, the second based upon the fact that, to enforce his debt against the security, he must have recourse to the processes of the law of the place where the security is.

The Supreme Judicial Court of Massachusetts, in *Hawkrige v. Treasurer and Receiver General*,<sup>56</sup> held that where a non-resident died the owner of a mortgage on land situated in the Commonwealth, the succession was taxable under a statute taxing the succession from nonresidents of "all real estate within the Commonwealth or any interest therein." According to

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<sup>56</sup> (1916), 223 Mass. 184, 111 N. E. 707.

Massachusetts law, a mortgage passes the legal title to real estate, but the court indicated that its opinion would have been the same had the mortgage been only a lien. Common law mortgages and lien mortgages alike create an interest in real estate. The real question was and is, can jurisdiction over the collateral confer jurisdiction over the debt? This question the Massachusetts court answered in the affirmative.

The *Hawkridge* case, if not a lineal descendant, at least bears kinship to a property tax case decided by the Supreme Court of the United States, *viz.*, *Savings and Loan Society v. Multnomah County*.<sup>57</sup> That case involved an Oregon statute which assessed mortgaged real estate for taxation to the mortgagee to the extent of the mortgage debt, and provided for the assessment of the residuary value, after the deduction of the amount of the debt, to the mortgagor. The Savings and Loan Society was a California corporation which held notes secured by mortgages on Oregon real estate, the notes and mortgages being kept in California. The sheriff of Multnomah County advertised the mortgages for sale for non-payment of taxes, and the Savings and Loan Society sought to enjoin the sale, invoking the Fourteenth Amendment. The court held that injunction was properly denied, saying:<sup>58</sup>

“And it (the state) may for the purposes of taxation, either treat the mortgage debt as personal property, to be taxed like other choses in action, to the creditor at his domicile; or treat the mortgagee’s interest in the land as real estate, to be taxed to him, like other real property, at its situs.”

The court placed much emphasis on the fact that there was no double taxation, the equity of redemption only being assessed against the mortgagor. The inference was that, had the whole value of the property been assessed against the mortgagor, an additional tax on the property interest therein of the mortgagee would have been void as twice taxing the same interest in the same thing. In such event the state might still have had recourse to the taxation of mortgage debts generally as personal property—constitutional double taxation—but would have been

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<sup>57</sup> (1898), 169 U. S. 421.

<sup>58</sup> *Supra*, note 57, l. c. 427.

inhibited in the case before the court because of the fact that the owner was a nonresident and kept the securities outside the state.

Suppose we assume the narrow interpretation of the *Savings and Loan Society* case and confine its application to statutes clearly differentiating between, and separately assessing, the interests of mortgagor and mortgagee. Even here the spelling out of the state authority is surrounded with difficulty. A sale of the mortgagee's interest in the land is made for non-payment of taxes. What does the purchaser at the sale get? Fundamental principles of law would seem to deny him the right to the mortgage notes. The mortgagee has a personal right of action on the notes, which is wholly transitory, and which he can enforce against the maker thereof independently of the mortgage. Over these notes, when held by nonresidents and kept outside the state, the state has no jurisdiction and, it would seem, could pass no title by a tax sale. Suppose that an Oregon maker were sued on his notes in a California court by a California citizen, would his defense that the notes were sold for non-payment of taxes on the mortgage interest securing the notes be good? It seems that the California court would be bound to ignore the mortgage, in the same manner as if the mortgagee had relinquished its lien preserving his right of action on the notes, and render judgment for the plaintiff. Conversely, it would seem equally true that the mortgagor would not be protected by paying the purchaser at the tax sale, because the purchaser would get no mortgage debt by virtue of the sale—merely a mortgage securing some one else's notes—namely, nothing.

The fundamental difficulty in the theory that a state may tax either a mortgage interest, or the succession to a mortgage interest as is the holding of the *Hawkridge* case, is that the debt is not inherent in the mortgage interest or collateral security. True, the mortgagee may find it necessary to resort to the mortgage in order to collect his debt. But that is another basis of jurisdiction which the Massachusetts court did not invoke. Mere jurisdiction over the collateral res is not of itself tantamount to jurisdiction over the debt. The latter is transitory and should not be anchored to the res for the mere purposes of taxation.



The Michigan court in *In re Rogers' Estate*<sup>60</sup> went to the full extent of adopting the privilege doctrine to justify a tax on the succession to mortgage debts owned by nonresidents. Since the creditor may need to have recourse to the laws of the state where the mortgaged property is situated, it said, that state may impose a tax on the protection which it affords. This is *Blackstone v. Miller* in a slightly different guise. The reasoning advanced by the critics of an assumed jurisdiction by virtue of the debtor's residence in the state, largely applies here. If the privilege doctrine is law, then, for an actual jurisdiction over the debt, the state may substitute a potential jurisdiction to enforce it and thereby spell out a power to tax. Likewise analogous objections based upon practicality apply. If the existence of mortgage security in the state justifies a tax on the succession to the mortgage debt, then the owner of a general mortgage bond of the Atchison, Topeka and Santa Fe Railroad Company owes fealty to the ten or more sovereigns whose domains the rails of that carrier traverse, to each to the extent that the value of property within the domain bears to the total property mortgaged. It is no answer that, in such case, since the debt might be satisfied without recourse to the intra-state property, the power to tax does not subsist. This was made the basis of denying the applicability of the *Blackstone* case by two well meaning courts,<sup>60</sup> without observation, however, of the fundamental fact that the *Blackstone* doctrine is wholly based upon the potentiality of recourse to the state law. Where one court affirms jurisdiction because recourse *may* be had and another denies it because it *may not* be taken, that is necessarily contrariety of doctrine.

Fortified by the reasoning of both the Massachusetts court and the Michigan court, a tax on the succession to debts owing to nonresidents secured by a mortgage of property in the state has been upheld in Iowa<sup>61</sup> and Maryland.<sup>62</sup> The weight of au-

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<sup>60</sup> (1907), 149 Mich. 305, 112 N. W. 931.

<sup>61</sup> See *State v. Chadwick* (1916), 133 Minn. 117, 157 N. W. 1076, 158 N. W. 637; *Fuller v. South Carolina State Tax Commission* (1923), 128 S. C. 14, 121 S. E. 478.

<sup>62</sup> *Chaffin v. Johnson* (1925), 200 Iowa 89, 204 N. W. 424.

<sup>63</sup> *Helser v. State* (1916), 128 Md. 228, 95 A. 539.

thority by a milligram is to the contrary.<sup>63</sup> It seems a sound doctrine that secured debts should not be taxable except in those states where the debt would be taxable if unsecured, for recourse to the security is until default a mere contingency.

What position will be taken by the Supreme Court of the United States when the question comes to it on the constitutional issue, is merely conjectural. Perhaps there are those who hope that it will find the Multnomah County case to rest upon the peculiar provisions of the Oregon tax law there involved, and feel itself free to render a decision strictly limiting *Blackstone v. Miller*.

#### IV. JURISDICTION OF FOREIGN STATES—CORPORATE SHARES

The conceivable grounds of jurisdiction to tax the succession to corporate stock appear to be five: (a) residence of the decedent at the time of his death, (b) domestic incorporation, (c) existence of corporate property or conduct of the corporate business, (d) physical presence of the certificates representing the stock, and (e) presence of the corporate transfer books in the state.

##### (a) *Jurisdiction of Domiciliary State Reviewed.*

That the state of the decedent owner's last domicile may tax the succession to corporate stock was decided by the Supreme Court of the United States in *Frick v. Commonwealth of Pennsylvania*<sup>64</sup> and *Blodgett v. Silberman*.<sup>65</sup> Those decisions achieved a consistency of the law of due process relating to succession taxes with the law of due process relating to property taxes, for it had been definitely settled by *Hawley v. Malden*<sup>66</sup> that the state of the owner's domicile may impose *ad valorem* taxes on corporate stock. Since the power of the state to tax the property lays no claim to special privilege and finds its justification only in jurisdiction over the res, it would follow that such juris-

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<sup>63</sup> Walker v. People (1918), 64 Colo. 143, 171 P. 747; State v. Chadwick (1916), 133 Minn. 117, 157 N. W. 1076, 159 N. W. 637; Matter of Fearing (1911), 200 N. Y. 340, 93 N. E. 356; Fuller v. South Carolina State Tax Commission (1923), 128 S. C. 14, 121 S. E. 478; McLaughlin v. Cluff (1925), 66 Utah 245, 240 P. 161.

<sup>64</sup> (1925), 268 U. S. 473.

<sup>65</sup> (1928), 48 S. Ct. 410, 72 L. Ed. (Adv.) 470.

<sup>66</sup> (1914), 232 U. S. 1.

diction, sustained as to property taxes, should, *a fortiori*, be sustained as to succession taxes.

(b) *State of Incorporation.*

But not only does the *Frick* case affirm the jurisdiction of the state of the owner's domicile over corporate stock, but it also affirms the jurisdiction of the state where the corporation was chartered. This is the necessary effect of the holding in the case that the power of the Commonwealth of Pennsylvania, where Mr. Frick had been domiciled at the time of his death, to tax, was limited to the value of the stocks owned by him in excess of the tax imposed by the states where the corporations were located. The allowance of a deduction for taxes imposed by the latter states from the value of the corporate stock for the purposes of determining the amount of the tax in the state of the decedent owner's domicile, necessarily involved the decision that the taxes deducted were constitutional.

There is nothing new here. The state courts have practically unanimously sustained the power to tax the succession to stocks where jurisdiction was based solely upon domicile of the corporation within the state.<sup>67</sup>

Moreover, in *Corry v. Baltimore*,<sup>68</sup> the Supreme Court of the United States had sustained the constitutionality of a property tax imposed by the state of the corporation's domicile on corporate stock owned by nonresidents. The theory of the jurisdiction is generally stated as follows: Since the state of incorporation grants the stockholders the franchise to be a corporation, it may impose, as a condition to their holding of such franchise, the duty of paying taxes on their respective shares. To say that the state imposes an express condition of taxing power on the grant of the franchise is to resort to fiction. If the jurisdiction must be spoken of in terms of metaphysics, I prefer the following statements: the interests, which a share of stock represents, are expressed by the charter of the corporation and inhere in its franchise to exist as such, and *that franchise is property within the state*. By virtue of the existence of that franchise, the stockholders' indivisible interests in the corporate property are created, defined, and transmuted into

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<sup>67</sup> The cases are collected in 42 A. L. R. at p. 365.

<sup>68</sup> (1905), 196 U. S. 466. And see *Tappan v. Bank* (1873), 19 Wall. 490, for the origin of the doctrine.

a corporate title. However, it is scarcely necessary to interpret the rule in terms of metaphysics. If the doctrine of business situs is accepted as a basis of taxation—and there seems little doubt that it inheres in the law of taxation—its justification extends to and embraces the case of corporations chartered in the taxing state. It is a legal fact, if not always a business fact, that the stockholder's business is administered in the place where the corporation is chartered. There the stockholder's interests has in law its business situs.

The really new departure of the *Frick* case in respect to taxation of corporate stock is the attempt to assign priority of claim to the state of incorporation. Observe the following passage of Mr. Justice Van Devanter's opinion:<sup>69</sup>

"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 corporations issuing the stocks, they had power to impose 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 a 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. Re Miller, 184 Cal. 674, 683, 16 A. L. R. 694, 195 Pac. 413. So much of the value as was required to release the superior claim of the other states was quite beyond Pennsylvania's control. Thus the inclusion of the full value in the computation on which that state based its tax, without any deduction for the tax paid to the other states, was nothing short of applying that state's taxing power to what was not within its range."

This is an empirical and practical view. Its equity oppresses no conscience. To the succession at the domicile of the decedent, the stock has such value only as may be ascertained by deducting from its market value, the amount of the tax

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<sup>69</sup> See p. 497, case, *supra*, note 64.

charged against it by the state of incorporation. However, to those who adhere to a notion that the power of the domiciliary state to tax is a *quid pro quo* for the protection afforded by the law controlling the succession, the conception of such power being *subordinate* to the power of another state must be quite unintelligible. For, if the claim of the domiciliary state rest upon such protection, such claim must attach at the very moment of the owner's death and pervade the succession in its nascency.

(c) *States in which Corporation Has Property or Transacts Business.*

The third inquiry, *viz.*, whether a state has power to tax the succession to a nonresident's stock in a foreign corporation which holds property and transacts business in the state, virtually resolves itself into the question, whether the protection afforded that property and the tolerance accorded that business furnish ground to pierce the veil of corporate entity. That question was squarely before the Supreme Court of the United States in *Rhode Island Hospital Trust Company v. Doughton*,<sup>70</sup> which reversed a decision of the Supreme Court of North Carolina<sup>71</sup> sustaining jurisdiction to tax.

The facts of the case were these: The decedent, George Briggs, was domiciled in Rhode Island at the time of his death. Among his personal property was a block of stock in the R. J. Reynolds Tobacco Company, a New Jersey corporation, which, however, was licensed to and did do business in North Carolina. Two-thirds in value of its property was located in North Carolina. The state authorities assessed a tax based on two-thirds of the value of the stock, claiming the right to do so under a statute which expressly provided that property within the state subject to succession taxes should include bonds and shares of stock of foreign corporations owning property in the state if fifty per cent or more of its property be located in the state, the valuation, upon which the tax was to be computed, to be the proportion of the total value of the bonds or shares which the corporate property located in the state bore to the total corporate property. The executor, in order to obtain transfer of the stock, was forced to pay the tax under protest, and the jurisdic-

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<sup>70</sup> (1926), 270 U. S. 69.

<sup>71</sup> (1924), 187 N. C. 263, 121 S. E. 741.

tion to tax was put into issue by a suit to recover the amount thereof.

The state's claim to jurisdiction based upon corporate property in the state, could scarcely have been presented more favorably, either from the standpoint of the explicitness of legislative intent expressed by the statute to exercise the taxing power, or from the standpoint of the fact of jurisdiction over a substantial amount of corporate property. The constitutional issues of the case were therefore clearly defined.

The opinion of the Supreme Court of the United States by Chief Justice Taft has, in the earlier pages of this paper, been cited as exemplary of the court's present philosophy to regard the state's power to tax succession as co-extensive with its jurisdiction over the property. As applied to corporate stocks, it denied that jurisdiction over the corporate property is tantamount to jurisdiction over the stockholders' interests therein. Between the two the corporate entity intervened. Likewise the court declined to hold that the corporation's licensing to do business in the state and doing such business constitute the shares property within the state.<sup>72</sup>

"The owner of the shares of stock in a company is not the owner of the corporation's property. He has a right to his share in the earnings of the corporation, as they may be declared in dividends, arising from the use of all its property. In the dissolution of the corporation he may take his proportionate share in what is left, after all the debts of the corporation have been paid and the assets are divided in accordance with the law of its creation. But he does not own the corporate property. . . .

"North Carolina cannot control the devolution of New Jersey shares. That is determined by the laws of Rhode Island where the decedent owner lived or by those of New Jersey, because the shares have a situs in the state of incorporation. . . .

"In an addendum to its opinion in this case, the supreme court of North Carolina suggests that the jurisdiction of the state to tax the shares of the New Jersey corporation may be based on the view that the corporation has been domesticated in North Carolina. So far as the statutes of the state show, it has been authorized to do and does business in the state, and owns property therein and pays a fee

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<sup>72</sup> *Supra*, note 70, l. c. 81, 83.

for the permission to do so. It has not been reincorporated in the state. It is still a foreign corporation and the rights of its stockholders are to be determined accordingly."

In accomplishing this result, the court overrode considerations which were not without equitable merit. The North Carolina court, while unable convincingly to identify the stockholder's interest in the corporation with his interest in the corporate property, so as to spell out a succession to the property which might be taxable, relied largely upon the view that the protection afforded the property inured ultimately to the stockholder, and justified the tearing of the corporate veil. The opinion emphasized the privilege nature of succession taxes, and invoked the doctrine of *Blackstone v. Miller*.<sup>73</sup> In so doing the court demonstrates the elasticity of that doctrine and the uncertainty of the tests of its application.

The weight of authority among the state courts prior to the *Rhode Island Hospital* case had denied that shares owned by a nonresident decedent in the stock of a foreign corporation owning property in the taxing state, were property "within the state" in the statutory sense.<sup>74</sup> That such shares were not property "within the state" in the constitutional sense had been foreshadowed by *Tyler v. Dane County, Wisconsin*.<sup>75</sup>

(d) *State of Locus of Stock Certificates.*

Our fourth inquiry into claims of taxing power with respect to shares of corporate stock concerns the jurisdiction of a state to tax the shares of a nonresident decedent in a foreign corporation where the certificates evidencing the shares are physically present in the state. Where the shares are the property of a resident decedent, or where the certificates are to shares in a domestic corporation, of course, an independent ground of jurisdiction to tax exists. The question here is one of taxing power where the sole ground of jurisdiction is the presence of the certificates in the state.

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<sup>73</sup> *Supra*, note 71, l. c. 277.

<sup>74</sup> *State v. Dunlap* (1916), 28 Idaho 784, 156 P. 1141; *People v. Dennett* (1916), 276 Ill. 43, 114 N. E. 493; *Oakman v. Small* (1918), 282 Ill. 360, 118 N. E. 775; *Welch v. Treasurer General* (1916), 223 Mass. 87, 111 N. E. 774; *State v. Walker* (1924), 70 Mont. 484, 226 P. 894; *Re Harkness* (1921), 83 Ok. 107, 204 P. 911; *Shepard v. State* (1924), 184 Wis. 88, 197 N. W. 844; *cf. Matter of McMullen* (1922), 199 App. Div. 393, 192 N. Y. S. 49, affirmed (1923), 236 N. Y. 518, 142 N. E. 266; see Beale, "Progress of the Law: Taxation" (1925), 38 HARV. L. REV. 281, 291; note in 42 A. L. R. 413.

<sup>75</sup> (1923), 289 F. 843.

So far as I am aware, the Supreme Court of the United States has not had the question before it for decision. Although in the *Rhode Island Hospital* case, it mentioned the presence of the certificates as a possible basis of claim, the point was not there involved, since the certificates were located at the decedent's domicile, and no view was required or stated. The Louisiana court in sustaining the tax under consideration<sup>76</sup> cited as authority for its decision *Direction der Disconto-Gesellschaft v. United States Steel Corporation*.<sup>77</sup> In the latter case, a German corporation, alleging itself to be the owner of shares in the United States Steel Corporation, claimed the right to have new certificates issued to it, and to have outstanding certificates in the hands of the British Public Trustee cancelled. At the outbreak of the war, plaintiff had been the owner of the shares, causing the certificates to be endorsed in blank and deposited with a London branch. The Public Trustee had seized the certificates under the British Enemy Act, and had procured a transfer on the books of the Steel Corporation. Relief was denied on the ground that title to the shares had passed in accordance with the laws of New Jersey (where the corporation was chartered), permitting transfer of title by endorsement and delivery of the certificate, and the laws of England respecting the validity of the delivery. Manifestly the decision involved no holding that the shares of stock were located in England. The most that can be contended for the authority of the case is that the unequivocal recognition of the passing of title by endorsement and delivery furnishes ground for the position that the shares inhere in the certificates and have physical location where the certificates may be. Said the Louisiana court in the *Newell* case:<sup>78</sup>

“The transferable value of the stock lies therefore wholly in the certificates; and thus the certificates are by law made the corporeal or physical representatives of the stock itself, so that, where the said certificates are, there also the stock itself is physically located.”

The justification for a tax on the succession to stock in the state of the locus of the certificate is the same as that interposed to

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<sup>76</sup> *Newell v. Tremont Lumber Company* (1926), 161 La. 649, 109 So. 344. (1925), 267 U. S. 22.

<sup>78</sup> *Supra*, note 76, l. c. 652.



support such a tax on the succession to negotiable instruments. And the question is, has a stock certificate such a character as to bring it within the *ratio decidendi* of *Wheeler v. Sohmer*?

The Massachusetts court in *Kennedy v. Hodges*,<sup>79</sup> held that shares of stock do not inhere in the certificates evidencing them so as to be property subject to administration in the state where the certificates may be found at the time of the owner's death. The considerations leading to such a conclusion are considerations equally applicable to the question of amenability to succession taxation, and a quotation from the decision may be adopted in lieu of extended discussion of the nature of stock certificates:<sup>80</sup>

"A certificate for shares of stock in a corporation, although evidence of title, does not constitute the title. It is not the stock. 'Shares in a corporation are not chattels personal susceptible of possession, actual or constructive. . . . A share in a corporation is a right to participate in the profits, or in a final distribution of the corporate property pro rata.' *Field v. Pierce*, 102 Mass. 253, 261. Failure on the part of a corporation to issue the certificate does not impair the rights of a stockholder who is notwithstanding entitled to be treated as such. *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 203 Mass. 159, 198, and cases cited. A certificate of stock is not necessary to the existence of the property. 'It certifies to a fact which exists independently of itself.' *Pacific National Bank v. Eaton*, 141 U. S. 227, 234. The paper upon which the certificate is printed is not the thing of value, but the ownership in the fractional part of the assets of the corporation. This analysis of the nature of a certificate of stock makes it difficult to conceive of the certificate itself as capable of having an independent situs. No doubt modern commercial usage treats certificates of stock as possessing some of the attributes of property. They are generally bought and sold and pass by delivery when properly indorsed like ordinary chattels, but such transfers are subject to equities in favor of the owner named in the certificate, and title ordinarily can be transferred only on the books of the company upon surrender of the certificate. *Baker v. Davie*, 211 Mass. 429, 437. They may be hypothecated and pledged, and be the subject of replevin or an action of conversion. Statutes may provide for their at-

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<sup>79</sup> (1913), 215 Mass. 112, 114, 102 N. E. 432.

<sup>80</sup> See p. 114, case, *supra*, note 79.

tachment. For some purposes and under some circumstances certificates of stock may be more than evidence and many possess some of the incidents of property and be 'a constituent of title.' *Hatch v. Reardon*, 204 U. S. 152, 161; *Simpson v. Jersey City Contracting Co.*, 165 N. Y. 193; *Meritt v. American Steel Barge Co.*, 24 C. C. A. 530, 537; *Opinion of the Justices*, 196 Mass. 603; *Puget Sound National Bank v. Mather*, 60 Minn. 362. Nevertheless, we are aware of no decision which has gone to the extent of holding certificates of stock to be the equivalent of the shares they represent, or to be the shares themselves, or to be capable of an independent situs except possibly by express statute. See *Buck v. Beach*, 206 U. S. 392. They bear many analogies to deeds of real estate or bills of sale of personal property. We are able to perceive no reason for holding them in a case like this to be the property itself or anything more than evidence of it. It is anomalous to think of such property having a possibility of a situs in three different places, namely, at the domicile of the owner, at the domicile of the corporation and in the jurisdiction where the certificate itself may chance to be."

Except in Louisiana, the state courts have generally denied that shares of stock are property within the state for the purposes of succession taxation merely by reason of the presence of the certificates.<sup>51</sup> Such a rule appears sound both as a matter of statutory construction and as a matter of constitutional limitation. Aside from the technical consideration that complete legal title to the shares passes only by transfer on the books of the company, the negotiability, which the owner has potential power to confer upon the certificates by endorsement in blank, is a qualified negotiability, not as broad as the negotiability attaching to bills and notes, and not, it seems, of the dignity requisite to identify the certificate with the shares. In the contrast between representatives of title, such as promissory notes, and mere evidences of title, such as deeds to real estate, stock certificates would seem more readily assimilable to the latter. That the doctrine of *Wheeler v. Sohmer*, a doctrine itself originated by a divided court, will be extended to

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<sup>51</sup> *People v. Griffith* (1910), 245 Ill. 532, 92 N. E. 313; *Matter of James* (1894), 144 N. Y. 6, 38 N. E. 961; *In re McMullen's Estate* (1922), 199 App. Div. 393, 192 N. Y. S. 49, affirmed (1923), 236 N. Y. 518, 142 N. E. 266; *Cassidy v. Ellerhorst* (1924), 110 Ohio St. 535, 144 N. E. 252.

include stock certificates, as well as bills and notes, seems unlikely.

(e) *State of the Locus of the Transfer Books.*

If shares are transferable only on the books of the company, does the presence of the books within the taxing state, without further ground of jurisdiction, vest the power to tax the succession thereto? This is the fifth inquiry into the sources of the taxing jurisdiction over corporate stocks. Admitting the fundamental character of succession taxes as taxes on the transfer of property, yet, according to the test of power to tax announced in the *Rhode Island Hospital* case, such transfer tax should not be exigible unless the property were within the jurisdiction of the state. In view of this fundamental consideration, the question may be restated as follows: Does the presence of the transfer books in the state carry with it the presence of the stock?

The purpose of having the books in the state seldom has any relation to the rights of the stockholders, but usually arises out of a business convenience, *viz.*, to have the books accessible to the exchange where trading in the shares takes place. The transfer office represents merely an incidental function in the corporate life, and it should, no more than the office where directors' meetings are held or the auditing department is housed, have dignity to bring the stockholders' property within the state. The principle of the *Rhode Island Hospital* case, *viz.*, the state where the corporation transacts business does not thereby acquire jurisdiction over its stock so as to tax the succession thereto, should, in my opinion, govern. While not discussing the constitutional features, the New York court in *Dunham v. City Trust Company*<sup>82</sup> has reached the result that successions to shares of stock are not taxable by reason of the presence of the transfer office in the state.

The law relating to corporate stock, while incompletely developed, gives little scope to the theory that power to tax has sources *ultra jurem rei*, and seems wholly explicable without resort to the privilege nature of succession taxation.

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<sup>82</sup> (1906), 115 App. Div. 584, 101 N. Y. S. 87, affirmed (1908), 193 N. Y. 642, 86 N. E. 1131.

## V. CONCLUSION

In the treatment of the power of a state to tax the succession to intangible personal property of nonresidents, I have touched only upon debts and corporate shares. I have not attempted to discuss problems relating to partnerships, unincorporated associations, business trusts, real estate holding trusts, railway equipment trusts, executory contracts for the sale of land, and a multitude of other species of choses in action. To have done so would have resulted in a catalogue of powers.

In my selection of debts and corporate shares, I have been guided by the fact that these types of choses in action are the most frequently discovered constituents of decedents' estates and by the additional and naturally consequent fact that they have the most frequently been the subjects of adjudication. Around them the fires of controversy have played, and hence my conclusions may not in all, nor even in most, instances pass unconsumed.

In examining the power of the domiciliary state and of foreign states to tax, but one case decided by the Supreme Court of the United States has presented itself within the scope of this paper which, as I conceive the law, justifies the assumption, that, because succession taxes are not property taxes but taxes on the privilege of succession, a state has power to measure the succession tax by property which it has no power to tax directly. That case is *Blackstone v. Miller*. While the result therein reached, that the state of the debtor's residence may tax the succession to the debt upon the demise of the creditor, may be so firmly embedded in the law that there is little hope of its being overruled, yet there is reason to believe that the result would have been very different had the case arisen twenty years later.

One other case, *Wheeler v. Sohmer*, has attained a result, as to jurisdiction for the purposes of succession taxation, which is at variance with the theretofore existing rule as to jurisdiction over property for the purposes of direct taxation. It will be recalled that there a tax on the succession to negotiable instruments by the state of the locus of the paper was sustained. But in that very case the expressions of opinion by a majority of the court constitute, as we have seen, an apotheosis of the

doctrine that jurisdiction for succession tax purposes is identical with jurisdiction for direct taxation.

The more recent cases, *Frick v. Commonwealth of Pennsylvania*, *Blodgett v. Silberman*, and *Rhode Island Hospital Trust Company v. Doughton*, are clear in the enunciation of the principle that to measure a succession tax by property values, there must be jurisdiction over the property, and in those cases succession tax decisions and property tax decisions are interchangeably cited. I submit that it remains only to state definitely, that the privilege character of succession taxation has no further influence in extending the jurisdiction of the state to measure a succession tax by the value of property which it has no power to tax directly.