presses is adopted in subsequent decisions, for in this case the court stressed the fact that the petition charged "negligence" rather than "unskillfullness". The opinion seems to admit that if the petition had charged unskillfullness an instruction would have been proper which would have allowed recovery if the defendant physician had merely failed to "possess" the requisite knowledge. If this is true, then the court is departing from its past decisions and is adopting the old common law to the effect that it is the party's own fault if he undertakes without having sufficient skill, or if he applies less than the occasion requires. Story on Bailments sec. 431; 3 Shars. Blacks. p. 122, and note, and p. 169; *Connor v. Winton* (1856) 8 Ind. 315. Perhaps this would be the better rule, since then recovery for damage from treatment by the so called "quacks" would be made easier for innocent victims.

It is interesting to note further that the instruction as affirmed requires "the defendant to possess and use that degree of knowledge, skill and care ordinarily possessed and used by competent and skillful surgeons *in St. Louis or similar communities.*" To use this instruction the jury may judge the defendant either according to physicians in St. Louis, or according to the skill which physicians in similar localities ordinarily possess. In a prevous case the Missouri Supreme Court took the position that there should be no limiting the standard for judging the skill of a physician to the local vicinity of the practitioner. *Krinard v. Westerman,* supra. On the other hand, Missouri has held that a physician should possess and use that degree of skill and learning ordinarily possessed and exercised by members of his profession in similar localities. *Trask v. Dunnigan* (1927) 299 S. W. 116. The federal courts as well as the majority of the states have adhered to the opposite view. *Kallock v. Hoagland* (C. C. A. 6, 1917) 239 F. 252; 21 R. C. L. p. 381 and note.

It may be inferred that the instruction is a departure from the established rule in Missouri, since it allows the jury to choose between two alternatives. The argument against the federal rule is that it subjects one to a test in his own locality regardless of the fact that his particular community may be of higher standard than the average and thereby places the defendant at a disadvantage. Likewise if the locality in which the physician practices fosters a lower grade of physicians than similar communities, then the plaintiff suffers. The safer and more liberal standard in regard to determining the skill and care of a physician seems to be the one which Missouri has followed in the past. Let us hope that this case will not be extended to change that rule. H. G., '35.

TAXATION—UNITED STATES INHERITANCE TAX—"PROPERTY SITUATED IN THE UNITED STATES".—The decedent was a subject of Great Britain and a resident of Cuba. On his death there were found in a safe deposit box in New York City certain stocks and bonds of domestic corporations and other stocks and bonds issued by corporations incorporated outside of the United States. *Held:* Both classes of securities are subject to the federal estate tax. *Burnet v. Brooks* (1933) 53 S. Ct. 457.

The federal statute purports to levy a tax upon that part of the gross estate of non-residents which "at the time of his death is situated in the United states". It specifically provides that for the purpose of this act "stock in domestic corporations owned and held by a non-resident decedent shall be deemed property within the United States". Revenue Act of 1916, 39 Stat. 778; Revenue Act of 1918, 40 Stat. 1098; Revenue Act of 1921, 42 Stat. 280; Revenue Act of 1924, 43 Stat. 305; Revenue Act of 1926, 44 Stat. 72; Revenue Act of 1928, 45 Stat. 862; Revenue Act of 1932, 47 Stat. 280; 26 U. S. C. 1095. The regulations issued by the Commissioner of Internal Revenue specifically imposed a tax upon securities physically in the United States. These statutes were adopted during the period in which it was thought that a state of the United States might tax certificates of stock or bonds which were physically within it even though the decedent was domiciled elsewhere. *Maxwell v. Bugbee* (1919) 250 U. S. 525; note (1926) 42 A. L. R. 378. Likewise, it was then believed that a state could tax stock in domestic corporations even though the decedent resided elsewhere. *Bullen v. Wisconsin* (1916) 240 U. S. 625; *Blodgett v. Silverman* (1928) 277 U. S. 1; note (1926) 42 A. L. R. 330. Subsequently the Supreme Court of the United States shifted its view and ruled that a state could not impose a tax upon securities physically present in it, unless they had acquired a business situs there. *Farmers Loan & Trust Co. v. Minnesota* (1930) 280 U. S. 204; *Baldwin v. Missouri* (1930) 281 U. S. 586. This was extended shortly so as to hold invalid a state tax based on the fact that the corporation was located in the taxing state, although the decedent was domiciled elsewhere. *Beidler v. South Carolina Tax Commission* (1930) 282 U. S. 1 (debts); *First National Bank v. Maine* (1932) 284 U. S. 312; Fordyce and Fordyce, Death Transfer Taxation of Stock (1932) 17 ST. LOUIS L. REV. 287. All these cases referred solely to the due process clause of the Fourteenth Amendment as the constitutional basis for the invalidation of the state taxes.

Under such circumstances it would seem logical that the powers of the United States would be similarly circumscribed because the language of the due process clause of the Fifth Amendment is identical with that of the Fourteenth. It is true that there were dicta in the early case of *Eidman v. Martinez* (1902) 184 U. S. 578 that such a federal tax would be valid, but this case had been decided at a time when the similar state taxes were also valid. The Board of Tax Appeals was called to pass on the questions involved in the principal case in February, 1931. The Board construed the statute so as not to apply to securities in foreign corporations which were merely physically present in the United States, but upheld the tax on securities of domestic corporations. *Brooks v. Commissioner* (1931) 22 B. T. A. 71. This construction was largely based on the view that the construction claimed by the government would render the statute unconstitutional. In the *Estate of Garvan, First National Bank of Boston, Adm'r v. Commissioner* (1932) 25 B. T. A. 612 the same result was reached, although one commissioner dissented on the ground that the tax on the stock of domestic corporations, which was expressly levied by the statute, was made unconstitutional by the

logic of First National Bank of Boston v. Maine. Neither of these decisions were accepted by the Commissioner. On appeal they were both affirmed by different circuit courts of appeal. *Commissioner of Internal Revenue v. Brooks* (C. C. A. 2, 1932) 60 F. (2d) 890; *First National Bank v. Commissioner* (C. C. A. 1, 1933); Commerce Clearing House Federal Tax Service (1933) par. 9158.

This unsettled state of the law has been resolved by the instant decision. Chief Justice Hughes holds that as a matter of interpretation of language the statute is meant to apply to securities physically present in the United States, for it was enacted when it was thought that such securities had a situs for all purposes at the place where they were physically. The opinion explains that the decisions as to the state taxing power are not applicable precedents in that the jurisdiction of the states is "defined in view of the relation of the States to each other in the Federal Union" while in this field the United States possesses "sovereignty in the fullest sense". A similar distinction was utilized in upholding a tax upon a yacht owned by a citizen of the United States but which had a permanent situs in a foreign country, even though at that time it had been held that a state could not tax such property. United States v. Bennett (1914) 232 U. S. 299; cf. Frick v. Pennsylvania (1925) 268 U. S. 473 (which cites the chief earlier cases limiting the power of the states). Although the result in the present case makes possible serious international double taxation, it would seem that this is an evil which should be remedied by international treaties rather than by judicial decisions which might hamper the United States in the negotiations of such compacts. It is to be regretted that the Supreme Court was not more careful in phrasing its decisions as to state taxation, for if their true basis is that given by the present case the due process clause of the Fourteenth Amendment has little to do with the results obtained. G. W. S., '33.