

## STATE INHERITANCE TAXES INTERSTATE CONFLICTION, CONFUSION, CONFORMITY

Death taxes are not new. Some form of taxation at death or impost was levied by the early Egyptians in the Seventh Century Before Christ and has been perpetuated by the Romans, the nations of Europe, and the United States.<sup>1</sup> With the exception of Nevada, all the states of the United States have death tax legislation.<sup>2</sup>

The term "death taxes" is a general term. It may include either "inheritance" tax, "succession" tax, "estate" tax, or "transfer" tax. The incidence of tax in the inheritance tax is imposed on the privilege of receiving, whereas the incidence of the estate tax falls on the decedent's estate.<sup>3</sup> The death tax is not a property tax, but an excise tax,<sup>4</sup> and relates to the transmission of the property from the dead to the living. This right to transmit property is not a natural right but is one created by statute.<sup>5</sup> Thus the sovereign states may impose various restrictions or limitations on the right to receive or transmit property.

Suppose for a moment that a resident of state A dies in state B and includible in his estate are real property located in states A, B and C, tangible personal property located in states A, B and D, and intangible personal property located in states A, B, E, F and G. Assuming all these states have some form of death tax, which one will have "jurisdiction" to tax? State A may claim that the decedent was domiciled in A and therefore "we have jurisdiction to levy a death tax"; state B may likewise claim jurisdiction by means of domicile; state C may claim, "we have afforded protection and rights to the realty located in our state," and thereby claims jurisdiction to levy a death tax; states D, E, F and G may claim jurisdiction to tax on the basis of "physical situs" or "business situs" within their respective states, and on that basis attempt to levy a death tax.

Is it possible for all these states to tax the particular property in decedent's estate, or will the incidents of tax be restricted to one state? If all the states may establish a sufficient nexus to levy a death tax, is there any possible solution that will limit or reduce the tax burden on decedent's estate?

The purpose of this paper is to digest the basic conflicts of jurisdiction to levy a death tax based on domicile and situs, to interpret the failure of the courts to reconcile these conflicts and to analyze the possi-

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<sup>1</sup> In re Inman's Estate, 101 Ore. 182, 199 Pac. 615 (1921).

<sup>2</sup> CCH, INH. EST. AND GIFT TAX REP. ¶1100.

<sup>3</sup> See BOWE, TAX PLANNING FOR ESTATES (1955).

<sup>4</sup> Keeny v. New York, 222 U.S. 525 (1911). It may be made a property tax by state constitution; 3 CLEV.-MAR. L. REV. 65 (1954).

<sup>5</sup> U.S. v. Perkins, 163 U.S. 625, 627 (1896).

ble solutions to the dilemma emphasizing the reciprocal agreements between the states.

INTERSTATE CONFLICTS AND LIMITATIONS—  
DOUBLE DOMICILE? DOUBLE SITUS?

That a state must have jurisdiction of the subject matter in order to tax is elementary law. The basic conflict arises over the question of what indicia will constitute jurisdiction. "Domicile"<sup>6</sup> and "situs"<sup>7</sup> are, substantially, the foremost indicia a state will seek in order to impose a death tax.<sup>8</sup>

Whether or not a decedent is a resident or domiciliary<sup>9</sup> of a certain state is a question of fact.<sup>10</sup> Existing domicile, whether of origin or by selection, continues until a new one is acquired.<sup>11</sup> Two factors must be present to effectuate a change of domicile: (1) intention to acquire a new domicile and (2) actual change of residence.<sup>12</sup> Some factors that a court may use in determining a decedent's domicile are actual residence, church affiliations, club membership, deeds, actual time of residence, principal place of business, or place where decedent worked.<sup>13</sup> As a result, two states might claim that a decedent was domiciled in their respective states at the same time; consequently each state might claim jurisdiction to tax.<sup>14</sup> This notion might produce harsh death tax consequences. As a matter of fact, it could reduce the assets of an estate to a negligible size if enough states should levy their death taxes.

The other basis for a state to claim jurisdiction sufficient to authorize the levy of a death tax is situs. Hence we denote an interplay between

<sup>6</sup> The word "domicile" comes from the Latin word *domus* meaning home or dwelling. *Minick v. Minick*, 111 Fla. 469, 478, 149 So. 483, 487 (1933).

<sup>7</sup> Latin meaning situation or location. *Heston v. Finley*, 118 Kan. 717, 236 Pac. 841 (1925).

<sup>8</sup> This statement is based upon a synopsis of many articles and cases.

<sup>9</sup> Domicile and residence are used interchangeably. CCH, *INH. EST. AND GIFT TAX REP.* ¶1425.

<sup>10</sup> BEALE, *CONFLICT OF LAWS*, §15.2 (1935).

<sup>11</sup> *Feehan v. Trefry*, 237 Mass. 169, 129 N.E. 292 (1921).

<sup>12</sup> *Huffman v. Lacksinger*, 190 Wis. 97, 208 N.W. 913 (1926); *In re Moir's Estate*, 207 Ill. 180, 69 N.E. 905 (1904); A, living in Washington City, voting in Ohio and intending to return to Ohio, was held to be domiciled in Ohio. *Hill v. Blumenberg*, 19 Ohio App. 404 (1924); see also *Est. of E. Dorrance*, 309 Pa. 151, 163 Atl. 303 (1932) and 115 N.J. Eq. 268, 170 Atl. 601 (1934); BEALE, *op. cit. supra* note 10.

<sup>13</sup> For a discussion of these factors, see CCH, *INH. EST. AND GIFT TAX REP.* ¶1425; see also 3 *CLEV.-MAR. L. REV.* 65 (1954).

<sup>14</sup> *Texas v. Florida*, 306 U.S. 398 (1939); *Est. of G. E. Hartman*, 70 N. J. Eq. 664, 62 Atl. 560 (1906). "[A] man . . . can have only one [domicile] for the purpose of succession. . . . [T]he absurdity would be monstrous, if it were possible, that there should be a competition between two domiciles as to the distribution of the personal estate." *Somerville v. Lord Somerville*, 5 Ves. 750, 31 Eng. Repr. 31 (Ch. 1801).

the words situs and domicile in certain circumstances. An important distinction must be made at this time. Whether a state will be able to conclude that it has a sufficient contact with the subject matter to be taxed will turn on the type of property in the decedent's estate—real estate, tangible personalty or intangible personalty. The situs of real estate, without further complications of fact, is the state in which it is located.<sup>15</sup> The situs of tangible property generally is in the state of physical location, and this may be a state other than where decedent was domiciled.<sup>16</sup> Intangible personal property might have a "fictional" situs in the domicile of the decedent as well as an "actual" situs in the state where it is found. In determining whether intangible personalty may be taxed in a state of actual situs other than the decedent's domicile, the courts will consider whether or not the transfer of such intangibles was protected by the direct contact with the laws of that state. The term "business situs" is used in describing the contact that intangibles have with the taxing state. Thus where the intangible personalty is found to have acquired a business situs in a certain state, that state may levy its tax. Some of the elements which the courts may consider in determining business situs are: (1) physical presence of property in the taxing state; (2) property employed in carrying on business in the taxing state; (3) resident agent in the taxing state; (4) debtor residing in the taxing state; and (5) trust located and administered in the taxing state.<sup>17</sup>

The problems facing the courts in this area are of no small importance. To assist in analyzing the problem of interstate conflicts and limitations of jurisdiction in the area of death taxes, it will be helpful to divide the discussion into two separate categories. First, where a decedent's estate is subject to a tax being levied by a non-domiciliary state. Second, where the domicile of the decedent is not in question, but the estate is subject to a tax being levied on a non-domiciliary state.

*Domiciliary—Resident State: Vexation of Double Domicile*

Returning to the problem of the decedent domiciled in state A with real property located in States A and B includible in his estate, it seems clear that state A may levy a death tax upon the transfer of the real estate located in state A, while state B may not levy a tax on that property.<sup>18</sup> Similarly, state B may not tax the devolution of realty outside its jurisdiction. However, if the real estate interest of the decedent is in the form of a mortgage, shares of stock of a real estate trust or a similar type of property interest, some courts may have trouble in deciding first whether the interest is realty or personalty and if personalty,

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<sup>15</sup> *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 204 (1905).

<sup>16</sup> *Frick v. Pennsylvania*, 268 U.S. 473 (1924).

<sup>17</sup> For an excellent analysis of business situs, see *LAND, TRUSTS IN THE CONFLICT OF LAWS*, §50.2 (1940).

<sup>18</sup> *Louisville and Jeffersonville Co. v. Kentucky*, 188 U.S. 385 (1903); *Union Refrigerator Transit Co. v. Kentucky*, *supra* note 15.

whether it is within their taxing jurisdiction.<sup>19</sup> Thus a Maine court, following the rule of *lex rei sitae*, held that a realty trust composed solely of real estate was real property and not personal property; therefore only the state of actual situs was authorized to tax, irrespective of decedent's domiciliary state.<sup>20</sup> Where real estate was sold and the proceeds were distributed pursuant to instructions in a will, it was held that the interests of those beneficiaries who died before the real estate was sold was intangible personal property, not real property.<sup>21</sup> Although decedent's real estate may be outside the domiciliary jurisdiction, state A may nevertheless be able to derive some revenue by taxing the transfer.<sup>22</sup>

### 1. Tangible Personal Property

The development of the death tax in the area of tangible personal property has been more complex than that of real property. Continuing with the hypothetical problem where the decedent domiciled in state A has tangibles located in States A and D, we again ask, "Which of these states may tax?" In 1925 the United States Supreme Court handed down the famous decision of *Frick v. Pennsylvania*,<sup>23</sup> relating to the taxable jurisdiction of tangibles. In that case, the Supreme Court held that a domiciliary state did not have sufficient jurisdiction to exact an inheritance tax on the transfer of tangible personalty situated in another state. The court compared the tangible personal property to "immovable realty" and gave to the Frick Art Collection a single situs. Before this decision, the maxim *mobilia sequuntur personam* had been followed and thereby a domiciliary state could tax the tangible personalty located in another state. It was thought that the situs of tangibles followed the domicile of their owner. However, those state decisions were not strictly confined to tangibles like a ring or a car. But it now seems to be thought that the situs of tangibles may become detached from that of their owner.

When a state reaches beyond its borders and fastens upon tangible property, it confers nothing in return for its exaction. Since the state of location has all but complete dominion over the physical objects sought to be measured for tax . . . no other state can offer quid pro quod.<sup>24</sup>

<sup>19</sup> CCH, INH., EST. AND GIFT TAX REP. ¶90,408 (North Carolina Attorney General opinion holding an oil lease on property in state B to be realty and outside state A's taxing jurisdiction); see also 1921 Ohio Op. Atty. Gen. 209.

<sup>20</sup> *Bates v. Judge of Probate*, 131 Me. 176, 160 Atl. 22 (1932). But where corpus of trust contained both realty and personalty, the court considered property as intangible, and held that the domiciliary state may tax. In re Stephenson's Estate, 171 Wis. 452, 177 N.W. 579 (1920).

<sup>21</sup> *Haas v. Holman*, 143 Ore. 141, 21 P. 2d 795 (1933); but see *Matter of Estate of Swift*, 137 N.Y. 77, 32 N.E. 1096 (1893).

<sup>22</sup> See further discussion under INTANGIBLE PERSONAL PROPERTY, *infra*.

<sup>23</sup> 268 U.S. 473 (1924).

<sup>24</sup> *Treichler v. Wisconsin*, 338 U.S. 251, 256 (1949), citing *Frick v. Pennsylvania*, *supra*, note 23.

The *Frick* decision then stands for the proposition that only the state where tangible personal property is permanently kept is the proper taxable situs of that property, thus denouncing the maxim of *mobilia sequuntur personam* in the area of tangibles. Before this notable decision, estates here had been burdened with double taxation—the state of domicile and the state of actual situs both levying a death tax.

A problem arises in applying the *Frick* doctrine where two states disagree as to whether certain property is classified as tangible or intangible. In *Blodgett v. Silberman*,<sup>25</sup> Connecticut, the domiciliary state, claimed that cash in a safe deposit box in New York was intangible property and thus taxable by Connecticut by applying the *mobilia* maxim; New York, on the other hand, insisted the property was tangible. The Supreme Court ruled in favor of New York by applying the *Frick* doctrine.

Whether or not the tangible personalty is permanently located in the taxing state is another element in determining situs. If the property were loaned for a short time or if it were transitory, one would expect the domiciliary state to retain the taxing authority to the exclusion of a "physical situs" state.<sup>26</sup>

Briefly, the determination of whether State A or State D may exact a death tax is limited to the location or situs of the tangibles. One state may tax; two states may not tax. However, double domicile remains a concealed threat to the notion of single taxation.

## 2. Intangible Personal Property

Jurisdiction to impose death taxes with respect to intangible personalty "has been the subject of protracted and violent controversy".<sup>27</sup> At this juncture, domicile and situs become heterogeneous and a new path emerges—multiple taxation. Since this subdivision is quite complex and involved, part of the topic will be discussed under the heading *Non-domiciliary—Non-resident State*. With an effort to focus the discussion on the decedent resident of State A with intangibles located in various states, the impact of the *mobilia sequuntur personam* doctrine discussed in connection with the *Frick* and *Blodgett* doctrines will be analyzed.

Those cases held that State A, the domicile of the decedent, may include intangibles with a "physical" or "business" situs in States D, E, F and G in the taxable estate of our imaginary decedent. About 1930 a series of cases began holding that intangibles were taxable only by the state of domicile. *Farmers Loan and Trust Co. v. Minnesota*<sup>28</sup> set the

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<sup>25</sup> 288 U.S. 1 (1927).

<sup>26</sup> *City Bank Farmers Trust Co. v. Schnader*, 293 U.S. 112 (1934); *Frick v. Pennsylvania*, *supra*, note 23; *Union Refrigerator Transit Co. v. Kentucky*, *supra*, note 15; *LAND, TRUST IN THE CONFLICT OF LAWS* (1940).

<sup>27</sup> *MAGILL AND MAGUIRE, CASES ON TAXATION*, 540 (4th ed. 1947).

<sup>28</sup> 280 U.S. 204 (1930).

pace by indicating that double taxation should be stopped. In the same year, *Baldwin v. Missouri*<sup>29</sup> restricted the taxing power over notes and bonds to the domicile of the creditor which was considered to be the situs of the debts. The effect of these decisions was to overrule many previous decisions which had allowed double taxation.<sup>30</sup> Then in 1932, the United States Supreme Court in *First National Bank of Boston v. Maine*,<sup>31</sup> held that shares of stock of a domestic corporation owned by a nonresident were not taxable by the state of incorporation, but only by the state of decedent's domicile. The court reserved comment on possible "business situs" saying, "we do not overlook the possibility that shares of stock, as well as other intangibles, may be so used in a state other than that of the owner's domicile as to give them a situs analogous to the actual situs of tangible personal property."

Further analysis of this problem will be dealt with later, but it seems clear by these holdings that State A, if it holds itself to be the domicile of the decedent, has jurisdiction to levy a death tax on the intangibles in the decedent's estate notwithstanding their situs in another jurisdiction. Then, if State B holds itself also to be a domiciliary state, it could also levy a death tax.

One famous case that seems to be appropriate to mention in conclusion is *Estate of E. Dorrance*.<sup>32</sup> Dr. Dorrance, whose total estate was approximately \$115,000,000, was considered by the Pennsylvania Courts to be a resident of Pennsylvania. His estate was assessed an inheritance tax of approximately \$17,000,000. New Jersey thought Dr. Dorrance was a resident of their state also, and levied their death tax of approximately \$15,000,000. Five times this case was appealed to the United States Supreme Court and five times the Court refused to take jurisdiction of the case. The estate consisted chiefly of intangible personal property; thus the principles and rules heretofore pronounced would pull into each state substantially the entire estate for purposes of death taxation. Of course, if realty or tangibles had been considered, domicile alone would not be sufficient to empower a state to levy death taxes on the decedent's whole estate.

It doesn't take much imagination to see how an estate could be reduced to a negligible amount by adherence to the *Dorrance* case. The various suggestions offered to alleviate this multiple tax burden will be interpreted later in this paper.<sup>33</sup>

#### *Nondomiciliary—Nonresident State: Vexation of Double Situs*

Turning to the incidence of tax that attaches to a state claiming

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<sup>29</sup> 281 U.S. 586 (1930).

<sup>30</sup> Kidder cites 33 cases holding physical presence in a taxing state to be sufficient nexus for levying an inheritance tax regardless of decedent's domicile. KIDDER, STATE INHERITANCE TAX AND TAXABILITY OF TRUSTS (1934).

<sup>31</sup> 284 U.S. 312 (1932).

<sup>32</sup> 309 Pa. 151, 163 Atl. 303 (1932) and 115 N.J. Eq. 268, 170 Atl. 601 (1934).

<sup>33</sup> See SOLUTIONS OTHER THAN RECIPROCITY, *infra*.

jurisdiction based on situs, it will now be assumed that the domicile of the decedent is fixed in one state.

Resuming the reference in our hypothetical fact situation where A is the domiciliary state and B is the nondomiciliary state, could State B levy a death tax upon the succession to real estate located in State A? Much of what was said previously under *Domiciliary State* relative to real estate will apply to this discussion. In *Matter of Estate of Swift*,<sup>34</sup> the New York court rejected the argument posed by counsel advocating the acceptance by the court of the equitable conversion doctrine. In that case, "neither the doctrine of equitable conversion of bonds, nor any fiction of situs of movables can have any bearing upon the question under advisement."<sup>35</sup> Some states have adopted this view while others have rejected it.<sup>36</sup> This could easily lead to an estate being taxed by two different states. If State B, where the land lies, rejects the argument, it will claim that the real estate is still within its jurisdiction and levy a tax. At the same time, State A, the domiciliary state, by accepting the doctrine, will base a claim on the *mobilia* maxim governing intangibles and levy a tax. In a recent Maryland Attorney General Opinion, it was held that real estate in Maryland which was directed to be sold by the will of a nonresident decedent was not, under the theory of equitable conversion, relieved from the Maryland Inheritance Tax.<sup>37</sup> Again we note that if realty is the subject matter in question, only the state wherein the realty lies may levy the death tax upon that part of the estate; but if the equitable conversion doctrine is considered, a conflict of jurisdiction to tax may arise.

### 1. Tangible Personal Property

Where the decedent domiciled in State A dies owning tangible personalty in State B, the emphasis is placed on whether or not State B may levy a death tax based on the "physical situs" of the property. It was concluded earlier that State A was not the proper state of jurisdiction to tax, but is State B the proper taxable jurisdiction? In *City Bank Farmers Trust Co. v. Schnader*,<sup>38</sup> where the facts were the converse of the *Frick* case, the Supreme Court adhered to the rule that the situs of tangibles may become divorced from the domicile of the owner thereof and be taxed solely by the state of "physical situs." Like the *Frick* case, the *Schnader* case was concerned with an art collection. But in the latter case the collection was claimed to be subject to a death tax by the state of situs, while in the former case the collection was alleged to be taxable by state of domicile. Both cases resolved the conflicts in favor of the state of situs. Whether or not the state attempting to levy the tax is the

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<sup>34</sup> 137 N.Y. 77, 32 N.E. 1096 (1893).

<sup>35</sup> *Ibid.*

<sup>36</sup> CCH, INH. EST. AND GIFT TAX REP. ¶1605 A.

<sup>37</sup> CCH, INH. EST. AND GIFT TAX REP. ¶18,472.

<sup>38</sup> 293 U.S. 112 (1934).

state of situs will depend upon whether the tangible personalty is permanently or temporarily located in a certain jurisdiction.<sup>39</sup>

Thus a general rule evolves with respect to tangibles: regardless of decedent's domicile, if the tangible personalty within his estate acquires a physical situs in a given state, that state and only that state may levy a death tax on that property.

## 2. Intangible Personal Property

The most controversial area involves the taxability of intangible personalty by a nonresident state. This problem is represented by the assumption previously presented where a domiciliary decedent of State A owns intangibles located in States E, F and G. We have seen that State A could include all of the intangibles in the decedent's estate for the purpose of measuring its death tax. Could States E, F and G also levy a death tax on those intangibles located within their respective jurisdictions?

Some background would be helpful in understanding the difficulty presented by this hypothetical situation. In 1903 the United States Supreme Court, through its decision in *Blackstone v. Miller*,<sup>40</sup> held that New York could impose a death tax on bank deposits located in that state and owned by a domiciliary of Illinois. Here the Court squarely faced this issue of double taxation. Mr. Justice Holmes said: "No doubt this power on the part of two states to tax on different and more or less inconsistent principles leads to some hardships . . . but these inconsistencies infringe no rule of constitutional law." He did not believe that it was the duty of the Supreme Court to alleviate all economic hardships created by the states. This overlapping of two heterogeneous bases for jurisdiction to tax, domicile and situs, caused double taxation until 1930, when *Farmers Loan and Trust Co. v. Minnesota*<sup>41</sup> overruled the *Blackstone* case. During this period it was thought that double taxation of intangibles was unconstitutional and that the only proper taxing jurisdiction was the domiciliary state.<sup>42</sup> In *Baldwin v. Missouri*,<sup>43</sup> an Illinois resident had cash deposits, bonds and notes in Missouri. The notes were secured by land located in Missouri. Missouri attempted to exact an inheritance tax on these intangibles, but the court held that Missouri did not have a sufficient nexus to tax based on business situs. Mr. Justice Stone dissented on the ground that there was a sufficient basis to permit Missouri to levy a tax. He mentioned that it afforded protection to the securities, that there was necessary resort to Missouri's laws and that there was no proof that the securities had no business situs in that state.

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<sup>39</sup> *Supra* note 26. Coins and bank notes in a safe deposit box might even be treated as tangibles, thereby invoking the *Frick* rule. *Blodgett v. Silberman*, *supra* note 25.

<sup>40</sup> 188 U.S. 189 (1903).

<sup>41</sup> *Supra*, note 28.

<sup>42</sup> See *LAND, op. cit. supra*, note 26.

<sup>43</sup> *Supra*, note 29.



Then the state courts began to give a different twist to "business situs." Some began to hold that where a trust was administered and located in State E, that state acquired the situs and could tax the succession, whereas the domiciliary state could not tax.<sup>44</sup>

In 1939 the *Curry*<sup>45</sup> and *Graves*<sup>46</sup> decisions, which reinstated the "pre-1930" rule were handed down, and once again double taxation of intangibles was allowed. In these cases, the settlor of a trust was domiciled in State A and the trust *res* was located and administered in State E. Mr. Justice Stone, speaking for the Court in the *Curry* case, stated:

But when the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state, in such a way as to bring his person or property within the reach of the tax gatherer there, the reason for a single place of taxation no longer obtains, and the rule (*mobilia sequuntur personam*) is not even a workable substitute for the reasons which may exist in any particular case to support the constitutional power of each state concerned to tax. . . . It is undeniable that the state of domicile is not deprived, by the taxpayer's activities elsewhere, of its constitutional jurisdiction to tax and consequently that there are many circumstances in which more than one state may have jurisdiction to impose a tax and measure it by some or all of taxpayer's intangibles.<sup>47</sup>

This view seems to be midway between the two earlier doctrines in that the nondomiciliary state must establish some type of business situs in order to tax.

Referring again to the hypothetical problem, State A could clearly tax; State E, if it is the place where securities are kept, where the trust is administered, or where business is conducted, could tax;<sup>48</sup> State F, the domicile of that trustee, could tax.<sup>49</sup> The domicile of the beneficiaries in either State E or F might sway an undetermined court.

In 1942, *Graves v. Schmidlapp*<sup>50</sup> held that the state (A) of domicile of the donor of a power of appointment may tax as well as the state (C) of domicile of the donee. The intangible property was located in State A. Before this decision, state courts as well as the United States Supreme Court had held that where a trust was created and administered in State G in favor of a life beneficiary (resident of State A) who ex-

<sup>44</sup> *MacClurkan v. Bugbee*, 106 N.J.L. 192, 150 Atl. 443 (1930).

<sup>45</sup> *Curry v. McCanless*, 307 U.S. 357 (1939).

<sup>46</sup> *Graves v. Elliot*, 307 U.S. 385 (1939).

<sup>47</sup> *Supra*, note 45.

<sup>48</sup> *Curry v. McCanless*, *supra* note 45; *Graves v. Elliot*, *supra* note 46. See also *New Orleans v. Stempel*, 175 U.S. 309 (1899).

<sup>49</sup> 67 A.L.R. 393 (1930).

<sup>50</sup> 315 U.S. 657 (1942).

exercised a power of appointment upon death, State A could not impose a succession tax upon the transfer.<sup>51</sup>

One further loophole the Supreme Court closed was the right of a nondomiciliary state (H) to tax stock of a corporation incorporated under the laws of that state. If the situs of a share of stock is in the state of incorporation, the *Frick* decision would permit the nondomiciliary-situs state to tax. If the maxim *mobilia sequuntur personam* applies the state of decedent's domicile (A) could tax. *State Tax Comm. of Utah v. Aldrich*<sup>52</sup> held that both State A and State H could tax. Mr. Justice Jackson had this to say:

Weighing the highly doctrinaire reasons advanced for this decision against its practical effects on our economy and upon our whole constitutional law of state taxation, I can see nothing in the court's decision more useful than the proverbial leap from the frying pan into the fire.<sup>53</sup>

As mentioned earlier, this area of taxation presents many conflicts of opinion concerning this resulting double taxation based on double situs. A "fictional" situs is created in the domiciliary state and an actual or business situs is allowed to remain in another state. Under the *Curry* and *Graves* doctrines multiple taxation is permissible. The Fourteenth Amendment of the Constitution of the United States is no argument against it; the benefit and protection theory seemed to be firmly imbedded in our law and was even extended in *Greenough v. Tax Assessors*.<sup>54</sup> A resident of New York created a testamentary trust of intangibles located in New York. One of the trustees was a resident of New York while the other trustee was a resident of Rhode Island, which state levied a personal property tax on one half the value of the corpus. The General Laws of Rhode Island, c. 30, §9 (1938), provided in part as follows:

Intangible personal property held in trust . . . shall be taxed to such . . . trustee . . . in the town where the . . . trustee resides; and if there be more than one such . . . trustee, then in equal proportions to each of such . . . trustees in the towns where they respectively resided.

The United States Supreme Court upheld the tax by saying the tax did not violate the due process clause of the Fourteenth Amendment. The state of the trustee's residence affords him protection as the owner of intangibles; he can sue and be sued therein; he has the benefit and protection inherent in the Rhode Island government. "[T]he resident trustee was the possessor of an interest in the intangibles . . . sufficient to

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<sup>51</sup> *Wachovia Trust Co. v. Daughton*, 272 U.S. 567 (1926); *McMurty v. State*, 111 Conn. 594, 151 Atl. 252 (1930); *Walker v. Treasurer and Receiver General*, 221 Mass. 600, 109 N.E. 647 (1915).

<sup>52</sup> 316 U.S. 174 (1942); see also dissenting opinion of Mr. Justice Stone in *First National Bank v. Maine*, 284 U.S. 312 (1932).

<sup>53</sup> 316 U.S. at 195.

<sup>54</sup> 331 U.S. 486 (1946).

support a proportional tax for the benefit and protection afforded to that interest by Rhode Island." The Court stated that it was not considering the "expediency of the levy" nor "its economic effect on the economy of the taxing state," but that its only question to be resolved was "whether or not a provision of the Constitution forbids this tax."

In conclusion, it seems as though there is no constitutional impediment to the multiple taxation of intangibles where a nonresident state can show the property was, at least partially protected by the direct contact with the laws of that state. To limit taxation of intangibles to the state of business situs might be strongly recommended, and then approach intangibles as we did tangibles in the *Frick* case.<sup>55</sup>

Further examples of this problem would merely be repetitions, but what has been said clearly shows the two problems the states must consider in deciding which of many states could tax or *should* tax the devolution of property upon death.<sup>56</sup> Many of the states have handled the problems by various systems; authors of articles have offered solutions to cope with the problem. In the succeeding portions of this paper, these proposals and existing remedies will be taken up in accordance with the manner in which they remedy the tax burden imposed by double domicile and double situs.

#### RECIPROCITY

Reciprocal agreement statutes, dating back to 1907 when states wanted to lessen the burden of multiple taxation of intangibles, were given some attention after the *Curry* and *Graves* decisions.<sup>57</sup> The effect of such agreements is: "We will not tax the *intangibles* transferred from resident decedents of *your* state, if you will refrain from taxing the intangibles passing from residents of *our* state." Since intangibles not only seem to be the main constituents of estates, but also the source of the problem concerning domicile and situs, the emphasis of reciprocity agreements is on intangibles.<sup>58</sup>

In 1910 the National Tax Association drafted a model inheritance tax provision which would limit the taxation of intangibles to the domiciliary state.

The tax imposed by this act in respect of personal property

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<sup>55</sup> See *Buck v. Beach*, 206 U.S. 392 (1907); also see Harrow, *Conflict of Laws in Decedent's Estates*, 20 A.B.A.J. 116 (1934).

<sup>56</sup> For an excellent discussion of the evolution of the multiple state tax doctrine, see Brown, *Multiple Death Taxation of Intangibles—What Now?*, 75 TRUSTS AND ESTATES 269 (1942); see also 1 VANDERBILT L. REV. (1947); LAND, *op. cit. supra* note 26.

<sup>57</sup> For the historical setting behind reciprocal status, see 8 SPECIAL REPORT OF THE STATE TAX COMMISSION, N.Y. 28 (1935); see also Brady, *Death Taxes—Developments and Reciprocity*, 15 A.B.A.J. 465 (1929).

<sup>58</sup> Heller and Harris, *Administration of State Death Taxes*, 26 IOWA L. REV. 628 (1941).

(except tangible personal property having an actual situs in this state) shall not be payable

- (a) if the transferor at the time of his death was a resident of a state . . . which at the time of his death did not impose a transfer tax or death tax of any character in respect of property of a resident of this state (except tangible personal property having an actual situs in such state) . . . or
- (b) if the laws of the state . . . of residence of the transferor at the time of his death contained a reciprocal exemption provision under which non-residents were exempted from transfer taxes or death taxes of every character in respect to personal property (except tangible personal property having an actual situs therein), provided the state . . . of residence of such nonresidents allowed similar exemption to residents of the state . . . of residence of such transferor. . . .

For purposes of this section, intangible personal property means incorporeal property, including money, deposits in banks, mortgages, debts, receivables, [etc.].<sup>59</sup>

Many states have adopted some sort of plan to mitigate the harshness of the *Curry* and *Graves* decisions. One group of states has decided not to tax intangibles of nonresidents under any circumstances; but another group permits taxation of intangibles of nonresidents whenever they have jurisdiction over the property; the remaining jurisdictions have adopted, either *in toto* or with some modification, the Model Inheritance Tax Law.<sup>60</sup>

Those states that have adopted *in toto* the inheritance tax law as drafted by the Committee on a Model Inheritance Tax Law exempt intangibles of a nonresident decedent domiciled in a state which exempts intangibles either by reciprocity or by not bring them within the scope of its statute. Absence of a taxing act also invokes the exemption. The states that have adopted only paragraph (b) of the suggested plan seem to indicate an intention to extend reciprocity only to those states exempting intangibles by way of reciprocity. Ohio seems to fall under this latter category.<sup>61</sup> The Department of Taxation in Ohio, in a ruling dated July 7, 1939, made the following comment on the Ohio Reciprocal Statute:

Under the reciprocal exemption provided by Ohio Rev. Code §5731.10, et. seq. shall not be construed as imposed upon successions passing from a decedent resident of any other state . . . with respect to personal property, except tangible personal

<sup>59</sup> 1910 PROC. NATL. TAX ASSN. 279-89.

<sup>60</sup> For the state by state breakdown of reciprocal provisions see CCH, INH. EST. AND GIFT TAX REP. ¶12,080.

<sup>61</sup> OHIO REV. CODE §5731.10 (1953).

property having actual situs in the state, to the extent to which successions passing from a decedent resident of any other state . . . with respect to personal property, except tangible personal property having actual situs in the state, to the extent to which successions passing from decedents, resident of this state, are exempt from inheritance, estate or death taxes by such other state. . . .

Thus Ohio will exempt intangibles located in Ohio owned by a non-resident decedent, providing the domiciliary state affords like exemption; but if the domiciliary state is one which completely exempts the transfer from a death tax, Ohio would probably tax the transfer. About 1930 Ohio had reciprocity agreements with 36 states, territories, and countries.<sup>62</sup>

In applying these reciprocal exemption statutes, one of the first inquiries is whether or not the nonresident state has jurisdiction to levy a tax. It was shown earlier in this paper how a state may acquire that jurisdiction of intangible personalty. Assuming the state has proper authority to levy a death tax, the next inquiry is whether the reciprocal exemption statute actually comes into play.

Assume that a decedent domiciled in Massachusetts dies leaving intangibles located in Iowa. The Iowa statute<sup>63</sup> requires as a condition precedent to the application of the statute that the intangibles be taxed in the state of domicile. If Massachusetts levied an inheritance tax based on domicile, it seems that Iowa would exempt those intangibles from being taxed. If Massachusetts did not tax the transfer, Iowa could levy its death tax. Suppose that decedent's intangibles had a taxable situs in a reciprocating state, Michigan,<sup>64</sup> which adopted the model statute proposed by the National Tax Association. If Massachusetts law imposes no transfer tax or death tax of any character in respect of property of Massachusetts' domiciliaries, the intangibles would then be exempt from taxation in the non-resident state, Michigan. If the intangible personalty were situated in one of the states that has no provision for reciprocity and taxes the transfer of a nonresident in the non-domiciliary state<sup>65</sup> and Massachusetts levied an inheritance tax based on domicile, it is more probable than not that the intangible will be taxed by both the domiciliary state and the non-domiciliary state. If this be so, it appears that we are right back where we started with double taxation.

Decedent, resident of a state whose reciprocity laws are the same as the reciprocity laws of the nonresident state,<sup>66</sup> dies leaving intangibles in his estate. Either double taxation or a stalemate could result, unless the

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<sup>62</sup> See CASSIDY AND DARGUSCH, *THE LAWS OF ESTATE AND INHERITANCE TAXATION* (1930).

<sup>63</sup> IOWA CODE ANN. §450.91 (1949).

<sup>64</sup> MICH. STAT. ANN. §§7.561, 7.561(1), and 7.579 (1950).

<sup>65</sup> For example Mississippi; MISS. CODE ANN. §9262-32 (Supp. 1956).

<sup>66</sup> Each state exempts "from transfer taxes or death taxes of every character in respect to [intangibles]" provided the other state grants an exemption.

states' administrators worked out a compromise. The problem could be amplified by inquiry into what constitutes "like" or "similar" property to be exempted in those states that so provide. If the reciprocity laws of a domiciliary state provided for exemption conditioned upon the non-domiciliary state's providing for "like" or "similar" exemption and if the non-domiciliary state's reciprocity laws were substantially the same, the resulting issue of "like" exemption could become involved. The domiciliary state might levy a tax based on the fictional situs principle and the non-domiciliary state, deciding that the domiciliary state would not afford like exemption, might levy a tax based on business situs.

A similar conflict could arise where the two competing states cannot agree as to whether certain properties are tangibles or intangibles. It will be noted that the Model Inheritance Tax Law specifically excludes from its scope "tangible personal property having an actual situs in this state." Most of the reciprocal statutes of the states incorporate the same language. But if two reciprocating states are not in accord as to what tangibles or intangibles will encompass, the reciprocal laws may have a retaliatory effect. "The failure to define tangibles and intangibles may lead to trouble. What may be tangible in one state may be intangible in another. . . ." <sup>67</sup>

For further illustration of an instance where reciprocal laws may not fully provide relief from double taxation might be created, suppose State A's death tax laws do not impose a tax on estates less than \$100,000, whereas State B begins estates at \$25,000. If a resident of State A should die leaving \$100,000 of intangible personalty in State B, of course State A would not impose a tax on this first \$100,000. But the reciprocity problem is whether or not State B will impose a death tax on the difference between \$100,000 and \$25,000. If State B has a reciprocal agreement with State A whereby State B will not tax intangibles of a resident of State A, if a "like exemption" was allowed by the laws of State A, State B might proceed to impose a death tax on the \$75,000, providing reciprocity to the extent of the \$25,000. If State B's laws were similar to the Wisconsin reciprocal statute "provided that this section shall not apply unless a tax is imposed on the transfer of said property by the laws of the state . . . of residence," State B may decide that its reciprocity laws do not apply. The result could be an exemption of \$100,000 by State A, but a full tax on the \$75,000 by State B. If the amount of intangibles in the state were \$200,000 instead of \$100,000, double taxation is likely to result. Based on the foregoing discussion, State B might contend that it would grant exemption up to \$25,000, but tax all excess amounts because State A does not grant a "like exemption." State A will, of course, tax any amount exceeding the first \$100,000. An estate could escape a death tax altogether by a certain combination of states. If de-

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<sup>67</sup> Brady, *Death Taxes—Flat Rates and Reciprocity*, 14 A.B.A.J. 309, 312 (1928).

cedent were a resident of Nevada, a state which has no death law, and died leaving intangible personalty in a state that has adopted the proposed Inheritance Tax Law either *in toto* or has adopted only paragraph (a), no death tax would be imposed. Nevada of course would not tax. The nonresident state, if adopting the law *in toto*, would not tax because of paragraph (a) of the reciprocal exemption law, which exempts the transfer from tax if the resident state "did not impose a transfer tax or a death tax of any character in respect of property of resident of this state." If the nonresident state had only adopted paragraph (b), it is possible that it would not impose a tax, but, as indicated previously, Ohio may not provide for this exemption.

Different combinations of facts could be considered to show one state taxing, both states taxing, or no state taxing. Nevertheless, reciprocity has offered at least a possible solution to double taxation. In *Estate of Stewart v. State*,<sup>68</sup> a resident of the District of Columbia owned stock in a Wisconsin corporation. The certificate of stock was kept in the resident state. This stock was bequeathed in trust and the income therefrom was to be used for cancer research. The nonresident state levied an inheritance tax on this transfer as the charitable purpose was not restricted to the District of Columbia.<sup>69</sup> Wisconsin also tried to levy an inheritance tax on that stock held in the Wisconsin corporation. Wisconsin had a reciprocal exemption statute which provided as follows:

Personal property of a nonresident decedent made taxable under this chapter (except tangibles with situs in Wisconsin) shall not be subject to the tax so imposed if a like exemption was allowed at the time of death of such decedent by the laws of the state . . . of decedent's residence in favor of residents of this state, *provided that this section shall not apply unless a tax is imposed on the transfer of said property by the laws of the state . . . of residence.*<sup>70</sup>

Because of this reciprocal statute and because the District of Columbia had levied a tax, it was claimed that Wisconsin should live up to her bargain and not create double taxation. But since the District of Columbia had no reciprocal exemption statute, it was claimed the Wisconsin reciprocal statute was not applicable and therefore Wisconsin should tax. The Wisconsin Supreme Court held that, although the District of Columbia did not have a reciprocal exemption statute, it did have a statute which fixed the situs of intangibles at the domicile of the owner;<sup>71</sup> and thereby had the situation been reversed, the District of Columbia

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<sup>68</sup> 258 Wis. 211, 47 N.W. 2d 742 (1951); see also *State v. Estate of Robbins*, 258 Wis. 206, 47 N.W. 2d 889 (1951).

<sup>69</sup> D.C. CODE, tit. 27, §160(e) (1940).

<sup>70</sup> Wis. STATS. §72.01(9) 1957. The italicized language was added by amendment in 1945.

<sup>71</sup> D.C. CODE, §47-1629 (1940); not applicable to intangibles employed in business in D.C.

would not have taxed. Thus the District of Columbia statute offered the same protection as would a reciprocal statute.

In Ohio, there is a unique situation whereby an estate gets protection from a multiple tax burden in three ways. Ohio Revised Code §5731.07 provides that the inheritance tax shall not apply to intangibles of a nonresident decedent unless such intangibles were employed by him in carrying on a business in Ohio. A presumption that intangible property of a nonresident in Ohio is subject to the inheritance tax may be rebutted by showing that its presence in Ohio was merely temporary, transitory or accidental.<sup>72</sup> A revocable trust created by a nonresident decedent has no business situs in Ohio sufficient to authorize Ohio to levy an inheritance tax unless the assets of the trust were employed in some permanent business in Ohio.<sup>73</sup> Another means to reduce the inequities of double taxation is the credit provision of Ohio Revised Code §5731.08. If an inheritance tax has been assessed and paid in another state, the beneficiaries may offset any Ohio inheritance tax by the amount of tax paid to the other jurisdiction provided that the amount does not exceed the Ohio inheritance tax on the same property.<sup>74</sup> Because of Ohio Revised Code §5731.07, the Ohio reciprocity provisions are very rarely used. Since Ohio must have jurisdiction of the subject matter in order for the reciprocity provisions of the Ohio Revised Code §5731.10 to become effective, and since very few intangibles are used "in business" in Ohio,<sup>75</sup> the reciprocal law of Ohio does not drastically affect revenues.<sup>76</sup> By placing the principle of the Wisconsin court in *Estate of Stewart v. State*, *supra*, beside the notion that Ohio will not tax intangibles unless they have acquired a situs in Ohio, the Ohio reciprocity statute may be unnecessary in such a situation.

Attempting to analyze the different reciprocal statutes by a synoptic approach, various combinations were applied to a given situation as indicated in the Comparative Reciprocal Provisions Table. Group 1 denotes those states that have adopted the Model Inheritance Tax Law. Thus, a Group 1 state would not tax the intangibles of a decedent who at the time of his death was domiciled in a state which exempts intangibles of a Group 1 domiciliary either by (a) imposing no death taxes of

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<sup>72</sup> 1919 OHIO OP. ATTY. GEN. 1327.

<sup>73</sup> *Estate of Parmelee*, 7 Ohio Op. 455, app. dism'd., 134 Ohio St. 420 (1938). As to taxability of shares of stock owned by a nonresident see *Guaranty Trust Co. of N.Y. v. Tax Comm.*, 36 Ohio App. 45, 172 N.E. 674 (1930); *City Bank Farmers Trust Co. v. Tax Comm.*, 480 Ohio Bar 622, 181 N.E. 877 (1932); 1921 OHIO OP. ATTY. GEN. 177.

<sup>74</sup> Russell Mack, Chief of the Ohio Inheritance Tax Division, thought OHIO REV. CODE, §5731.08, as well as the refund provision of the OHIO REV. CODE §5731.20, should be eliminated from Ohio laws because they hampered revenue collection and were antiquated.

<sup>75</sup> According to Mr. Russell Mack.

<sup>76</sup> Mr. Mack estimated that in the past five years, the Ohio reciprocal provisions have involved no more than \$5,000 in revenue.



## COMPARATIVE RECIPROCAL PROVISIONS TABLE

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 Decedent dies in state A leaving intangibles with taxable situs in state B.
 

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DOMICILE STATE (A)	NONDOMICILE STATE (B)
1. If state A exempts all intangibles of non-residents and A: tax	(a) State B exempts all intangibles of nonresidents: B: no tax (b) State B has reciprocal laws of Group 1: B: no tax (c) State B has reciprocal laws of Group 2: B: <i>may</i> tax or <i>may not</i> tax (d) State B has reciprocal laws of Group 3: B: no tax
2. If state A taxes intangibles of non-residents and A: tax	(a) State B exempts all intangibles of nonresidents: B: no tax (b) State B has reciprocal laws of Group 1: B: tax (c) State B has reciprocal laws of Group 2: B: tax (d) State B has reciprocal laws of Group 3: B: no tax
3. If state A has reciprocal statute of Group 1 and A: tax	(a) State B exempts all intangibles of nonresidents: B: no tax (b) State B has reciprocal laws of Group 1: B: no tax (c) State B has reciprocal laws of Group 2: B: no tax (d) State B has reciprocal laws of Group 3: B: no tax
4. If state A has reciprocal laws of Group 2 and A: tax	(a) State B exempts all intangibles: B: no tax (b) State B has reciprocal laws of Group 1: B: no tax (c) State B has reciprocal laws of Group 2: B: no tax (d) State B has reciprocal laws of Group 3: B: no tax

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DOMICILE STATE (A)	NONDOMICILE STATE (B)
5. If state A has reciprocal laws of Group 3 and A: tax	(a) State B exempts all intangibles: B: no tax (b) State B has reciprocal laws of Group 1: B: no tax (c) State B has reciprocal laws of Group 2: B: no tax (d) State B has reciprocal laws of Group 3: B: no tax
6. If state A has no death taxes whatsoever (Nevada) and A: no tax	(a) State B exempts all intangibles of nonresidents: B: no tax (b) State B has reciprocal laws of Group 1: B: no tax (c) State B has reciprocal laws of Group 2: B: <i>may</i> tax or <i>may not</i> tax (d) State B has reciprocal laws of Group 3: B: no tax

any character upon the transfer of intangibles from the estate of a non-domiciliary or (b) providing reciprocity. Group 2 denotes those states that have adopted only paragraph (b) of the Model Inheritance Tax Law. Consequently, the latter type state will provide exemption by reciprocity. A Group 3 state grants reciprocity only where the state of domicile levies an inheritance tax.

Some of the illustrations must of course be qualified; but in reducing the statutes to categories to emphasize the possibility of double taxation that still may exist, the table may indicate what combination is the most satisfactory solution.

Perhaps much of the optimism of some authors favoring reciprocity<sup>77</sup> should be reconciled with some realism. But that statement could be weighed against the fact that there does not appear to be much litigation in recent years concerning reciprocity. Hence the problem may not be as monstrous as a cold analysis of suppositions would reveal. Some states have gone so far as to declare circumstances under which their reciprocal

<sup>77</sup> ". . . [W]ithin a very short time we ought to have national reciprocity throughout the forty-eight states of the Union without the help of any court. At any rate the movement is progressing." Chairman Edwards, 1939 PROC. NATL. TAX ASSN. 406. "Reciprocal statutes are once more the only positive bar to double or even multiple taxation." Kappes, *Double Taxation by the States—A New Tax Hazard*, 13 TAXES 15, 18 (1940).

statutes will operate.<sup>78</sup> The variance in language and structure of states' laws unnecessarily provokes confused issues. It should be noted that issues could become more complicated where the domicile of decedent at the time of his death is superimposed on the reciprocity laws. Even with the enactment and use of reciprocity laws, the problem of double domicile remains.

#### SOLUTIONS OTHER THAN RECIPROCITY

In the famous *Dorrance* case<sup>79</sup> we saw that an estate could be taxed by more than one state, each state claiming to be the domiciliary state. Then the reciprocal laws of the various states were examined showing how the states coped with multiple taxation based on double situs. Have any other plausible solutions to avoid double taxation been afforded or suggested?

In Florida a person may formally disclaim a state as his domicile by filing in the office of the clerk of courts a sworn statement to the effect that he is a "bona fide resident" of Florida.<sup>80</sup>

In *Farmers Trust Co. v. Schnader*,<sup>81</sup> the Supreme Court took jurisdiction to decide which of two conflicting states had the proper domicile; but three years later the Court refused to find jurisdiction in *Worcester County Trust Co. v. Riley*<sup>82</sup> holding that the Federal Interpleader Act could not be used to settle disputes between two states, each claiming to be the domiciliary state. Then came *Texas v. Florida*<sup>83</sup> qualifying the *Riley* case by permitting appeal to the United States Supreme Court where those states, by claiming decedent as a resident and asserting the right to tax the entire succession on death, would consume the entire assets of a decedent's estate. Soon after these cases, a Uniform Act for Compromises of Death Taxes was proposed by the National Conference of Commissioners on Uniform State Laws. Subsequent to this suggestion for relief from multiple taxes, some states adopted statutes whereby the arbitration and compromise arrangements between the conflicting states became possible.<sup>84</sup> Today there are twenty-three states that afford some relief of double domiciliary disputes by means of compromise or arbitration.<sup>85</sup> By means of these provisions, a taxing official of State A enters into a written arrangement with the taxing officials of State B. Under such an arrangement each state receives some proportionate share of the revenue. If a compromise cannot be reached, the case goes to an

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<sup>78</sup> The Pennsylvania Secretary of Revenue on August 16, 1939, declared that reciprocity shall extend to 35 states and territories.

<sup>79</sup> *Supra*, note 12.

<sup>80</sup> FLA. STAT. ANN. §222.17(4).

<sup>81</sup> *Supra*, note 26.

<sup>82</sup> 302 U.S. 292 (1937).

<sup>83</sup> *Supra*, note 14.

<sup>84</sup> For further historical setting see Comment, 30 B.U.L. REV. 396 (1950).

<sup>85</sup> The states are listed in CCH, INH. EST. & GIFT TAX REP. ¶12,035.

arbitration board and that board decides the issue of domicile. The board's decision, as it pertains to death taxes, is final. One drawback to submission to the arbitration board is that one state, by losing its claim to domicile, will lose revenue that it might have derived by means of the compromise arrangement. But at least the estate is not expended by excessive taxes, as was possible under the *Dorrance* series of cases. Determining domicile is difficult. "A slight shift of emphasis in applying the formula produces contradictory results."<sup>86</sup> The use of the term "benefit conferring" in lieu of "domicile" has been suggested as a means of avoiding the notion that one person can have only one domicile at a given time.<sup>87</sup> For those in high tax brackets, there is a comforting principle: "It is well settled that a man may change his habitancy or domicile from one town to another, merely because he wishes to diminish the amount of his taxes."<sup>88</sup> Some states have provided means to enforce domiciliary death tax laws.<sup>89</sup>

Another solution to settle the disturbing problem of multiple taxation is the intervention of one state in the court proceedings of another state.<sup>90</sup>

There is some support for the idea of having the Federal Government relinquish its estate tax to the states. Practically speaking, the Federal Government could perhaps return more money to the states if the United States should ever "monopolize" the death tax field. The cost of administration could surely be reduced. But the "values associated with the autonomy of state and local government" should not be lost; thus perhaps the states should develop their "crediting devices."<sup>91</sup> The other side of the argument runs like this:

Where were the states when the banks went under? . . .  
Where have the states landed in the development of their tax systems? Then inheritance and duplicate taxation until the Federal Government stepped in with its credit provision. . . .  
The whole system of unfair duplicate taxation with necessary conflicts and wasteful administration is on the road to collapse.

The problems are mostly national in scope. Nothing effective can be done in the regulation or stabilization of economic affairs unless the area of planning and control coincides with the boundaries of the free movement of economic life. For many problems that area is now [1933] the nation.<sup>92</sup>

Is the system on "the road to collapse"? It seems that the states have

<sup>86</sup> Dissenting opinion of Justice Frankfurter in *Texas v. Florida*, *supra*, note 14, at p. 429.

<sup>87</sup> 30 B.U. L. REV. 396, 406 (1950).

<sup>88</sup> *Draper v. Hatfield*, 124 Mass. 53 (1878).

<sup>89</sup> See CCH, *INH. EST. & GIFT TAX REP.* ¶12,030.

<sup>90</sup> See *Matter of Trowbridge*, 266 N.Y. 283, 194 N.E. 756 (1935).

<sup>91</sup> Groves, *Retention of Estate and Gift Taxes by the Federal Government*, 38 CALIF. L. REV. 28 (1950).

<sup>92</sup> Prof. Gulick, *N.Y. Times*, June 28, 1933, p. 11, cols. 5-6.

taken great initiative and made remarkable headway, considering the obstacles to be hurdled.

The credit provision permitted in some states, including Ohio, has a touch of "equity" in its approach. Ohio and Kentucky have credit provisions which mitigate double taxation. The agreement between these two states provided that "securities and deposits of nonresident decedents which are in either state for safekeeping only, are not taxable except in the state where decedent resided."<sup>93</sup>

Before the adoption of the Uniform Act for Compromise of Death Taxes, a series of articles appeared suggesting that Congressional statutes should confer jurisdiction upon the United States Supreme Court to settle disputes based on conflicting domiciliary claims of the states.<sup>94</sup>

It thus appears that a tax by one state, and only one state, has been the favored suggestion. If states would enact legislation to the effect that intangibles would not be subject to a death tax, and that the rate of tax on all other property would be advanced accordingly, a movement to convert all property into intangibles would likely be forthcoming. To avoid this possible evasion, it is suggested that intangibles should be taxed in the domiciliary state. To avoid confusion in determining what property is intangible, all states should define what items will be so considered. Perhaps the *Frick* rule should be expanded to include the intangible personalty and place the situs thereof within the single state of business situs. A study of economic principles to determine which state—domicile or business situs—should suffer by no tax or gain by taxing would lend to some rational conclusion. The benefit and protection doctrine which underlies much of the basis for authorizing a state to tax would provide a starting point. The compromise provisions which apportion to some extent the incidents of the tax coupled with the *Frick* rule might also be worthy of consideration.

#### CONCLUSION

Although the matter of interstate conflicts of jurisdiction to impose death taxes on the devolution of wealth once seemed to be an insurmountable dilemma, "the states have now, with one or two exceptions, completely succeeded in avoiding the multiple death taxation of intangibles."<sup>95</sup> However, the machinery by which the states have been conquering the double domicile and double situs dilemma could be more adequately lubricated. Those states that seem to counter the thrust of another state's tax on the former's residents by taxing their own residents again, seem to this

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<sup>93</sup> Oates, *Boarder Problems in Tax Administration: Ohio-Kentucky*, 1942 PROC. NATL. TAX ASSN. 91, 94.

<sup>94</sup> 1935 PROC. NATL. TAX ASSN. 201; 1936 PROC. NATL. TAX ASSN. 87; 1937 PROC. NATL. TAX ASSN. 453; 1938 PROC. NATL. TAX ASSN. 741; 1939 PROC. NATL. TAX ASSN. 407; 1940 PROC. NATL. TAX ASSN. 232.

<sup>95</sup> TAX INSTITUTE, FEDERAL-STATE-LOCAL TAX CORRELATION, 142 (1954).

writer to be implementing the notion of "an eye for an eye." One author, in emphasizing the "ugly aspects of state death taxation," could not agree with the conclusion that multiple state taxation is not important because "it is mainly at the expense of the millionaires."<sup>96</sup> One view justifying a tax on the devolution of property at death, claims that the accumulation of wealth of a prosperous decedent should not be retained in the family tree, but should be distributed to all the residents of a state; by this view a death tax "fosters equality of opportunity."<sup>97</sup>

The states have made a forward step with their reciprocity and compromise agreements, but much is yet to be done if multiple burdens are to be reduced to a single burden. Perhaps the centralization approach would offset the sapping of a single estate by the various states. A practical approach might lie in the states relinquishing their jurisdiction to the federal government, which body could distribute the revenue to the states in a way similar to the distribution by the state to the counties thereof. In support of this argument, notwithstanding the administrative advantage, is the notion that millionaires under the present system may shift their domicile and affairs to a low taxing state or to one not levying a death tax on any estate. In so doing the decedent deprives one state of possible revenue and offers little or none to another. With a central body controlling the funds, the competitive spirit of the states in luring the decedent into a lenient taxing state might be avoided or at least partially reduced. The federal government, by enacting the 80% tax credit, took a movement in this direction. To what extent the states will proceed in relinquishing their power to levy a death tax on certain property to another state or to the United States will be an interesting development to scrutinize; but the probabilities of such a development occurring are weak, and justifiably so.

Death taxes are "a good potential revenue raiser which can be a useful element in the permanent tax structure and merit special attention at times when the [federal] government is faced with the need for large scale spending."<sup>98</sup> These taxes provide stability to a well organized governmental economy, even though a single instance may demonstrate a small proportion of state's revenue being derived from these taxes. Should the United States Supreme Court reverse its position with regard to the jurisdiction of states to tax intangibles, and declare that only one state may constitutionally tax, based either on domicile or situs, we might perceive the waning of reciprocity and the waxing of apportionment and compromise statutes.

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<sup>96</sup> Groves, *supra*, note 91.

<sup>97</sup> Block, *Economic Objectives of Gratuitous Transfer Taxation*, 4 NATL. TAX J. 139 (1951).

<sup>98</sup> *Id.* at 146.