

1927

## The Doctrine of the Federal Courts As to the Situs of Personal Property for Purposes of Taxation

F. Warner Fischer

Follow this and additional works at: [https://openscholarship.wustl.edu/law\\_lawreview](https://openscholarship.wustl.edu/law_lawreview)



Part of the [Law Commons](#)

---

### Recommended Citation

F. Warner Fischer, *The Doctrine of the Federal Courts As to the Situs of Personal Property for Purposes of Taxation*, 13 ST. LOUIS L. REV. 058 (1927).

Available at: [https://openscholarship.wustl.edu/law\\_lawreview/vol13/iss1/6](https://openscholarship.wustl.edu/law_lawreview/vol13/iss1/6)

This Note is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact [digital@wumail.wustl.edu](mailto:digital@wumail.wustl.edu).

## THE DOCTRINE OF THE FEDERAL COURTS AS TO THE SITUS OF PERSONAL PROPERTY FOR PURPOSES OF TAXATION

Taxation by a state of property over which it has no jurisdiction is a taking of property without due process of law within the meaning of the Fourteenth Amendment.<sup>1</sup> On this ground the federal courts have authority in certain cases to consider the validity of state tax laws; but there have been other grounds of federal jurisdiction existing even before the Fourteenth Amendment, such as diversity of citizenship, and, in cases where a tax on a debt is collected by deducting it from the payment by the debtor to the creditor, the impairment of contract clause of the Constitution.<sup>2</sup> It is not surprising, therefore, that in a century and a quarter of judicial history, the federal courts have produced a considerable volume of decisions on the question of jurisdiction to tax, of which those dealing with the problem in connection with the situs of personal property will be considered herein.

"All subjects over which the sovereign power of a State extends, are objects of taxation;<sup>3</sup> but those over which it does not extend are, upon the soundest principles, exempt from taxation."<sup>4</sup> Since "a State has jurisdiction of all persons and things within its territory which do not belong to some other jurisdiction,"<sup>5</sup> it follows that a tax is properly levied by a state only upon property situated within its territorial limits, either actually or in contemplation of law.<sup>6</sup> This rule is easily applied to real property; but its application to personalty is complicated by the ancient legal fiction ascribing to chattels a situs at the domicile of their owner regardless of their actual location. The maxim *mobilia sequuntur personam* seems to have originated as a rule of convenience in disposing of decedents' estates;<sup>7</sup> but, in an age when personal property consisted chiefly of articles which were small, easily concealed, and usually kept at the owner's domicile in fact, the maxim was deemed ap-

<sup>1</sup> Tyler v. Dane County et al., 289 F. 843 (1923); Frick v. Pennsylvania, 268 U. S. 473, 45 Sup. Ct. 603, 69 L. ed. 1058 (1925).

<sup>2</sup> e. g. State Tax on Foreign-Held Bonds, 15 Wall. 300, 21 L. ed. 179 (1873); New York, L. E. & W. R. Co. v. Pennsylvania, 153 U. S. 628, 14 Sup. Ct. 952, 38 L. ed. 846 (1894).

<sup>3</sup> See also similar statements in Providence Bank v. Billings, et al., 4 Pet. 514, 7 L. ed. 939 (1830); County of Lane v. Oregon, 7 Wall. 71, 19 L. ed. 101 (1869); Union Pac. Co. v. Peniston, 18 Wall. 5, 21 L. ed. 787 (1873); Farrington v. Tennessee et al., 5 Otto 679, 24 L. ed. 558 (1878).

<sup>4</sup> McCulloch v. Maryland, 4 Wheat. 316, 429, 4 L. ed. 579, 607 (1819); see also similar statements in City of St. Louis v. Wiggins Ferry Co., 11 Wall. 423, 20 L. ed. 192 (1871); State Tax on Foreign-Held Bonds, 15 Wall. 300, 21 L. ed. 179 (1873); Delaware Railroad Tax, 18 Wall. 206, 21 L. ed. 888 (1874).

<sup>5</sup> Town of Coe v. Errol, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. ed. 715 (1886).

<sup>6</sup> Rhode Island H. T. Co. v. Doughton, 270 U. S. 69, 46 Sup. Ct. 256, 70 L. ed. 475 (1926).

<sup>7</sup> 4 Kent, Com. 513.

plicable to personal property for all purposes, including taxation.<sup>8</sup> Being a mere fiction, nevertheless, it might be disregarded whenever justice or the policy of the state where personalty was actually located was thought to require it;<sup>9</sup> and the federal courts have permitted the state of the actual situs of property of a non-resident to take jurisdiction in cases involving attachments,<sup>10</sup> transfers and secret liens,<sup>11</sup> and garnishment.<sup>12</sup> For the purpose of taxation, likewise, it has long been taken for granted that the state where personal property is actually situated has jurisdiction, regardless of the domicile of the owner.<sup>13</sup> But that does not settle the question of taxable situs. In many cases it is difficult to determine the actual situs of personalty; and in all cases where the actual situs and the domicile of the owner do not coincide, there still remains the problem of whether taxation at the actual situs is to be exclusive or the state of the owner's domicile may have concurrent jurisdiction. The solution of these problems by the United States Supreme Court and the subordinate federal courts with reference to various types of personal property will be outlined herein.

#### I. TANGIBLE PERSONAL PROPERTY.

Ordinary tangible property having a relatively permanent situs presents little difficulty, once it is conceded that it may be taxed elsewhere than at the owner's domicile. The federal courts have uniformly held such property to be taxable where situated,<sup>14</sup> the only doubtful question being whether it is also taxable at the owner's domicile when that is in a different state. It has been repeatedly held that double taxation is not in itself unconstitutional,<sup>15</sup> especially when imposed by different states; hence it was possible for the courts to hold that property having

<sup>8</sup> 32 Cyc. 675 and cases cited.

<sup>9</sup> State Railroad Tax Cases, 2 Otto 575, 23 L. ed. 663 (1876); Walworth et al. v. Harris et al., 129 U. S. 355, 9 Sup. Ct. 340, 32 L. ed. 712 (1889); State Board of Assessors v. Comptoir National, 191 U. S. 388, 24 Sup. Ct. 109, 48 L. ed. 232 (1903).

<sup>10</sup> Green v. Van Buskirk et al., 7 Wall. 139, 19 L. ed. 109 (1869).

<sup>11</sup> Hervey et al. v. Rhode Is. Locomotive Works, 3 Otto 664, 23 L. ed. 1003 (1877); Walworth et al. v. Harris et al., 129 U. S. 355, 9 Sup. Ct. 340, 32 L. ed. 712 (1889).

<sup>12</sup> Pennington v. Fourth Nat'l Bank, 243 U. S. 269, 37 Sup. Ct. 282, 61 L. ed. 713 (1917).

<sup>13</sup> City of St. Louis v. Wiggins Ferry Co., 11 Wall. 423, 20 L. ed. 192 (1871) (dictum); M'Cutcheon v. Rice County, 7 F. 558 (1881); Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. ed. 613 (1891); Carstairs et al. v. Cochran, 193 U. S. 10, 24 Sup. Ct. 318, 48 L. ed. 596 (1904); Old Dominion S. Co. v. Virginia, 198 U. S. 299, 25 Sup. Ct. 686, 49 L. ed. 1059 (1905); Rockefeller v. O'Brien, 224 F. 541 (1915).

<sup>14</sup> M'Cutcheon v. Rice County, 7 F. 558 (1881); Carstairs et al. v. Cochran, 193 U. S. 10, 24 Sup. Ct. 318, 48 L. ed. 596 (1904); Rockefeller v. O'Brien, 224 F. 541 (1915).

<sup>15</sup> Blackstone v. Miller, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. ed. 439 (1903); Kidd v. Alabama, 188 U. S. 730, 23 Sup. Ct. 277, 47 L. ed. 669 (1903); Wright v. L. & N. R. Co. et al., 195 U. S. 219, 25 Sup. Ct. 16, 49 L. ed. 167 (1904); St. Louis Southwestern R. Co. v. Arkansas, 235 U. S. 350, 35 Sup. Ct. 99, 59 L. ed. 265 (1914); Cream of Wheat Co. v. Grand Forks, 253 U. S. 325, 47 Sup. Ct.

an actual situs elsewhere might also have a constructive situs at the owner's domicile. The question was not definitely raised in the federal courts, as to property having a permanent situs apart from the owner's domicile, until 1905, when it was held that such property is taxable only at its actual situs.<sup>16</sup>

A. *Goods in Transit*.—But to property not permanently located in any one place a situs may not so easily be assigned. A tax on goods in transit between two states is unconstitutional, not only as a burden on interstate commerce,<sup>17</sup> but equally because such goods have no situs in a state in which they are not permanently located.<sup>18</sup> It is equally well settled that the mere fact that goods are intended for shipment in interstate commerce, or have been so shipped, does not prevent their taxation as property in the state of their origin before the transit begins,<sup>19</sup> in the state of their destination after the transit ends,<sup>20</sup> or in a state where they remain for a considerable time between two stages of their transit, becoming part of the general mass of goods in the state.<sup>21</sup> The chief difficulty in such cases is in determining just when a transit begins or ends, or when a stop at an intermediate point is such as to allow taxation there.<sup>22</sup> Logs floating on a river, to be sent out of the state, but not actually started on their journey, have been held not to have begun their transit, but corn belonging to a non-resident, deposited at a railroad station for immediate shipment out of the state has been held to be in transit and withdrawn from the taxable goods of the state.<sup>23</sup> Goods unloaded at a distributing point to be forwarded later to their final destination may be taxed at that point,<sup>24</sup> even though the goods are trans-shipped in the original packages.<sup>25</sup> But a flock of sheep being driven across a state in a continuous journey between two other states is not taxable in the first state.<sup>26</sup>

B. *Vessels*.—That vessels sailing between two states cannot lawfully be taxed at a port where they stop only transiently was early de-

---

395, 64 L. ed. 931 (1920); *Citizen's Nat'l Bank v. Durr et al.*, 257 U. S. 99, 47 Sup. Ct. 395, 66 L. ed. 149 (1921).

<sup>16</sup> *Delaware L. & W. R. Co. v. Pennsylvania*, 198 U. S. 341, 25 Sup. Ct. 669, 49 L. ed. 1077 (1905). Accord: *Union Refrig. Trans. Co. v. Kentucky*, 199 U. S. 194, 26 Sup. Ct. 36, 50 L. ed. 150 (1905); *Selliger v. Kentucky*, 213 U. S. 200, 29 Sup. Ct. 449; 53 L. ed. 761 (1909).

<sup>17</sup> Cases cited in notes 19, 20, 23, 24, 25, 26.

<sup>18</sup> Cases in notes 23, 26.

<sup>19</sup> *C. N. Nelson Lumber Co. v. Town of Loraine*, 22 F. 54 (1884); case in note 5; *State Trust Co. v. Chehalis County et al.*, 79 F. 282 (1879); *Diamond Match Co. v. Ontonagon et al.*, 188 U. S. 82, 23 Sup. Ct. 266; 47 L. ed. 394 (1903).

<sup>20</sup> *Brown v. Houston et al.*, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. ed. 257 (1885); *Pittsburg & S. Coal Co. v. Bates*, 156 U. S. 577, 15 Sup. Ct. 415, 39 L. ed. 538 (1895).

<sup>21</sup> Cases in notes 24, 25.

<sup>22</sup> Cases in note 19.

<sup>23</sup> *Ogilvie v. Crawford County*, 7 F. 745 (1881).

<sup>24</sup> *General Oil Co. v. Crain*, 209 U. S. 211, 28 Sup. Ct. 475, 52 L. ed. 755 (1908).

<sup>25</sup> *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 24 Sup. Ct. 365, 48 L. ed. 538 (1904).

<sup>26</sup> *Kelley v. Rhoads*, 188 U. S. 1, 23 Sup. Ct. 259, 47 L. ed. 359 (1903).

cided<sup>27</sup> and consistently followed,<sup>28</sup> but the earlier dicta to the effect that the proper place for their taxation is the port where they are enrolled under federal statutes,<sup>29</sup> were disapproved by later decisions, on the ground that the statutes were not intended to allow the owner to select the place for the taxation of his ships among several places where they might be enrolled.<sup>30</sup> These cases held that the only place vessels may be taxed is at the domicile of the owner, even if it is an inland point where the vessels could never actually be,<sup>31</sup> since they have no actual (permanent) situs. But if a vessel is used wholly within one state, it has an actual situs, and may be taxed there.<sup>32</sup> These rules have been applied to ferry boats.<sup>33</sup>

*C. Rolling Stock.*—Greater difficulty was experienced by the courts in deciding whether a state might lawfully tax railroad cars belonging to a foreign corporation, coming into the state and departing intermittently. Applying the rule that prevails in the cases of vessels and merchandise transiently in a state, the earlier cases held that the rolling stock of a foreign corporation passing into and out of a state in interstate commerce has no permanent situs in that state, hence is taxable only at the corporation's domicile.<sup>34</sup> But it was soon recognized that where recurrent excursions into a state by cars of a non-resident owner are so continuous and regular that substantially the same number of cars, though not identical ones, are in the state at all times, the average number of cars in the state may well be considered as permanently there located for taxing purposes, and that to hold otherwise would deprive the state of the right to tax property really within its jurisdiction. Accordingly, the rule was announced that the average number of cars regularly used by a foreign corporation in a state may be taxed by that state, though any particular cars are there only transiently.<sup>35</sup> The

<sup>27</sup> *Hays v. Pacific Mail S. Co.*, 17 How. 596, 15 L. ed. 254 (1855); *City of St. Louis v. Wiggins Ferry Co.*, 11 Wall. 423, 20 L. ed. 192 (1871); *Morgan v. Parham*, 16 Wall. 471, 21 L. ed. 303 (1873).

<sup>28</sup> *Yost v. Lake Erie Transp. Co.*, 112 F. 746 (1901).

<sup>29</sup> *Hays v. Pacific Mail S. Co.*, 17 How. 596, 15 L. ed. 254 (1855); *Morgan v. Parham*, 16 Wall. 471, 21 L. ed. 303 (1873); *Moran v. New Orleans*, 112 U. S. 69, 5 Sup. Ct. 38, 28 L. ed. 653 (1884); case in note 28.

<sup>30</sup> *Ayer & Lord Tie Co. v. Kentucky*, 202 U. S. 409, 26 Sup. Ct. 679, 50 L. ed. 1082 (1906); case in note 31.

<sup>31</sup> *Southern Pac. Co. v. Kentucky ex rel. Alexander et al.*, 222 U. S. 63, 32 Sup. Ct. 13, 56 L. ed. 96 (1911).

<sup>32</sup> *Old Dominion S. Co. v. Virginia*, 198 U. S. 299, 25 Sup. Ct. 686, 49 L. ed. 1059 (1905).

<sup>33</sup> *City of St. Louis v. Wiggins Ferry Co.*, 11 Wall. 423, 20 L. ed. 192 (1871); *Wiggins Ferry Co. v. E. St. Louis*, 17 Otto 365, 27 L. ed. 419 (1883).

<sup>34</sup> *Pickard v. Pullman S. Car Co.*, 117 U. S. 34, 6 Sup. Ct. 635, 29 L. ed. 785 (1886); *Pullman's S. Car Co. v. Nolan*, 22 F. 276 (1884), aff'd 117 U. S. 51, 6 Sup. Ct. 643, 29 L. ed. 791 (1886); *Baltimore & Ohio R. Co. v. Allen et al.*, 22 F. 376 (1884), aff'd 127 U. S. 117, 8 Sup. Ct. 1037, 32 L. ed. 94 (1888).

<sup>35</sup> *Pullman's Palace Car Co. v. Twombly et al.*, 29 F. 658 (1887); *Marye v. B. & O. R. Co.*, 127 U. S. 117, 8 Sup. Ct. 1037, 32 L. ed. 94 (1888) (dictum); *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. ed. 613 (1891); cases in note 39; *Amer. Refrig. Trans. Co. v. Hall*, 174 U. S.

state of the domicil loses the right to tax rolling stock permanently outside the state;<sup>36</sup> but if only "occasional excursions" into other states are made, and no regular number of cars is constantly absent, the full value of the cars may be taxed at the domicil.<sup>37</sup>

The leading case on rolling stock, *Pullman's Palace Car Co. v. Commonwealth of Pennsylvania*,<sup>38</sup> presented a further question of valuation for taxing purposes, involving situs also. It would obviously be unfair—so unfair as to amount to a denial of due process of law—for rolling stock passing through several states to be assessed in each state at its full value, since only a portion of its value can be regarded as situated in any given state during the whole taxing period. Each state should be permitted to tax only such proportion of the value of the property as may figuratively be said to have its situs in the state; and the courts have had to decide, not what would be the most accurate way of determining such proportion, but whether the method used by the taxing authorities of the state in particular instances was proper. In the Pullman case the tax was levied on the proportion of the entire capital stock of the corporation which the number of miles over which its cars were run within the state bore to the whole number of miles, within and without the state. Though based on capital stock, the tax was held to be in substance, on the property of the company in the state, the stock being merely the measure of its value. The method of apportioning the value, while not supposed to be mathematically exact, was upheld by the court as just and fair, because, if adopted by all the states in which the company had property, it would result in the assessment of the whole of its capital stock and no more, and a more exact rule would be impracticable.<sup>39</sup> This method of valuation, by apportioning the value of the capital stock according to mileage, has been criticized on the ground that the value of the capital stock includes the value of intangible assets, such as franchises, good will, etc., which are not localized, hence should be taxed only by the state of the domicil.<sup>40</sup> Such objections were answered most clearly in the analogous cases of *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Backus*<sup>41</sup> and *Adams Express Co. v. Ohio State Auditor*,<sup>42</sup> with this reasoning: property derives most of its value from the use to which it is put,

70, 19 Sup. Ct. 599, 43 L. ed. 899 (1899); *Union Refrig. Trans. Co. v. Lynch*, 177 U. S. 149, 20 Sup. Ct. 631, 44 L. ed. 708 (1900).

<sup>36</sup> *Union Refrig. Trans. Co. v. Kentucky*, 199 U. S. 194, 26 Sup. Ct. 36, 50 L. ed. 150 (1905).

<sup>37</sup> *People of N. Y. ex rel. N. Y. C. & H. R. Co. v. Miller*, 202 U. S. 584, 26 Sup. Ct. 714, 50 L. ed. 1155 (1906).

<sup>38</sup> 141 U. S. 18, 11 Sup. Ct. 876, 35 L. ed. 613 (1891).

<sup>39</sup> Accord: *Pullman's Pal. Car Co. v. Hayward et al.*, 141 U. S. 36, 11 Sup. Ct. 883, 35 L. ed. 621 (1891); *Board of Assessors v. Pullman's P. C. Co.*, 60 F. 37 (1894), aff'g 55 F. 206.

<sup>40</sup> *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. ed. 613 (1891), dissenting opinion; *W. U. Tel. Co. v. Taggart*, 163 U. S. 1, 16 Sup. Ct. 1054, 41 L. ed. 49 (1896) plaintiff's brief.

<sup>41</sup> 154 U. S. 439, 14 Sup. Ct. 1122, 38 L. ed. 1041 (1894).

<sup>42</sup> 166 U. S. 185, 17 Sup. Ct. 604, 41 L. ed. 965 (1897).

property used as part of a huge system operating in several states as a business unit has a value from such use above its value as isolated property, and it would be absurd to deny for taxing purposes the added value which exists in fact. Stated differently, the value of such a system consists not only of the separate value of its parts, but includes a value flowing from the connected operation of the whole, to which each part of the tangible property contributes its share, and from which each part of the property derives a benefit. This is an intangible value, accruing from the privilege of doing business; so before considering the further developments of the principle of the Pullman case, it will be well to examine the general rules which have been applied to intangible property in the nature of privileges.

## II. INTANGIBLE PERSONAL PROPERTY.

*A. Franchises and Privileges.*—Privileges such as corporate franchises, licenses, etc., have generally been held taxable where they are exercised. The franchise to *be* a corporation may be taxed by the state granting it,<sup>43</sup> but each state in which a corporation has the privilege of doing business may tax that privilege.<sup>44</sup> Since a corporation does business in a state only by the state's permission, it has been held that a tax on the entire capital stock of a foreign corporation may be imposed as a condition of its admission to do business;<sup>45</sup> but later cases have held such a condition void as an attempt to tax property partly outside the jurisdiction of the state.<sup>46</sup> On the other hand, to deny to a state the right to tax a *portion* of the capital stock of a foreign corporation doing business in the state would prohibit its taxation of intangible property which should be regarded as distributed wherever the corporation does business.<sup>47</sup> For this reason, a tax on the capital stock,<sup>48</sup> or on the gross receipts<sup>49</sup> (either being really on the

<sup>43</sup> *Kansas City, Ft. S. & M. R. Co. v. Botkin*, 240 U. S. 227, 36 Sup. Ct. 261, 60 L. ed. 617 (1916).

<sup>44</sup> *State of Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, 12 Sup. Ct. 121, 35 L. ed. 994 (1891); *Adams Express Co. v. Ohio St. Auditor*, 166 U. S. 185, 17 Sup. Ct. 604, 41 L. ed. 965 (1897); *Baltic Mining Co. v. Mass.*, 231 U. S. 68, 34 Sup. Ct. 15, 58 L. ed. 127 (1913).

<sup>45</sup> *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 12 Sup. Ct. 403, 36 L. ed. 164 (1892).

<sup>46</sup> *W. U. Tel. Co. v. Kansas ex rel. Coleman*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. ed. 355 (1910); *Ludwig v. W. U. Tel. Co.*, 216 U. S. 146, 30 Sup. Ct. 280, 54 L. ed. 613 (1891); same *v. Hayward et al.*, 141 U. S. 36, 11 Sup. Ct. 883, 35 L. ed. 230 (1917); *International Paper Co. v. Mass.*, 246 U. S. 135, 38 Sup. Ct. 292, 62 L. ed. 624 (1918).

<sup>47</sup> *Cleveland, C. C. & St. L. Ry. Co. v. Backus*, 154 U. S. 439, 14 Sup. Ct. 1122, 38 L. ed. 1041 (1894); *Adams Exp. Co. v. Ohio St. Auditor*, 166 U. S. 185, 17 Sup. Ct. 604, 41 L. ed. 965 (1897), *aff'g* 165 U. S. 194.

<sup>48</sup> *Pullman's Pal. Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. ed. 613 (1891); same *v. Hayward et al.*, 141 U. S. 36, 11 Sup. Ct. 883, 35 L. ed. 621 (1891); *Atty. Gen. of Mass. v. W. U. Tel. Co.*, 141 U. S. 40, 11 Sup. Ct. 889, 35 L. ed. 628 (1891); *People of N. Y. v. Roberts*, 171 U. S. 658, 19 Sup. Ct. 58, 43 L. ed. 323 (1898).

<sup>49</sup> *Erie R. Co. v. Pennsylvania*, 21 Wall. 492, 22 L. ed. 595 (1875); *Charlotte*,

commercial value of the property) of a foreign corporation doing business partly but not wholly within the taxing state, is valid, provided only such proportion of the stock or receipts is assessed as the property or business in the state may be said to bear to the total within and without the state. This rule has been applied not only to companies owning rolling stock,<sup>50</sup> but to telegraph companies,<sup>51</sup> express companies,<sup>52</sup> and even to ordinary manufacturing or business companies.<sup>53</sup> The mileage basis of apportionment approved in the Pullman case, *supra*, is not to be taken as absolutely accurate, but is a mere approximation to an exact apportionment, which will be upheld by the courts if not obviously unfair in its operation in a particular case.<sup>54</sup> It has not been deemed applicable when particular circumstances would make its effect arbitrary, unreasonable, and unjust,<sup>55</sup> as where a disproportionate share of the total value is contributed by terminal facilities outside the taxing state,<sup>56</sup> or where it is clear that the portion of the system within the state is operated at a loss while other parts are profitable;<sup>57</sup> and the rule has been modified to exclude from the valuation taken as the basis of the apportionment property held merely as an investment outside the taxing state, which does not increase the value of the property within the state.<sup>58</sup> The burden is on the party objecting to an assessment to show that there are special circumstances making the application of the rule unfair, for which the taxing authorities have not made allowance.<sup>59</sup> Though the language of the court in *Union*

---

C. & A. R. Co. v. Gibbes, 142 U. S. 386, 12 Sup. Ct. 255, 35 L. ed. 1051 (1892); Wisconsin & M. Ry. Co. v. Powers, 191 U. S. 379, 24 Sup. Ct. 107, 48 L. ed. 229 (1903); Cudahy Packing Co. v. Minnesota, 246 U. S. 450, 38 Sup. Ct. 373, 62 L. ed. 827 (1918); Pullman Co. v. Richardson, 261 U. S. 330, 43 Sup. Ct. 366, 67 L. ed. 682 (1923). An early case *contra*; State of Ind. ex rel. Wolf v. Pullman P. C. Co., 16 F. 193 (1883).

<sup>50</sup> Cases in note 35.

<sup>51</sup> W. U. Tel. Co. v. Atty. Gen. of Mass., 125 U. S. 530, 8 Sup. Ct. 961, 31 L. ed. 790 (1888); Atty. Gen. of Mass. v. W. U. Tel. Co., 141 U. S. 40, 11 Sup. Ct. 889, 35 L. ed. 628 (1891); Postal Tel. Cable Co. v. Adams, 155 U. S. 688, 15 Sup. Ct. 268, 39 L. ed. 311 (1895); W. U. Tel. Co. v. Taggart et al., 163 U. S. 1, 16 Sup. Ct. 1054, 41 L. ed. 49 (1896).

<sup>52</sup> Adams Exp. Co. v. Ohio St. Auditor, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. ed. 683, *aff'd* 166 U. S. 185, 17 Sup. Ct. 604, 41 L. ed. 965 (1897); same v. Kentucky, 166 U. S. 171, 17 Sup. Ct. 527, 41 L. ed. 960 (1891); Fargo v. Hart, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. ed. 761 (1904).

<sup>53</sup> Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 41 Sup. Ct. 45, 65 L. ed. 165 (1920).

<sup>54</sup> State Railroad Tax Cases, 2 Otto 575, 23 L. ed. 663 (1876); W. U. Tel. Co. v. Atty. Gen. of Mass., 125 U. S. 530, 8 Sup. Ct. 961, 31 L. ed. 790 (1888).

<sup>55</sup> Delaware Railroad Tax, 18 Wall. 206, 21 L. ed. 888 (1874) (*dictum*); Pittsburgh, C., C. & St. L. Ry. Co. v. Backus, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. ed. 1031 (1894) (*semble*); Ill. Cent. R. Co. v. Greene et al., 244 U. S. 555, 37 Sup. Ct. 694, 61 L. ed. 1309 (1917); Union Tank Line Co. v. Wright, 249 U. S. 275, 39 Sup. Ct. 276, 63 L. ed. 602 (1919); cases in notes 56, 57.

<sup>56</sup> Wallace et al. v. Hines et al., 253 U. S. 66, 40 Sup. Ct. 435, 64 L. ed. 782 (1920).

<sup>57</sup> Southern Ry. Co. v. Kentucky, Adv. Ops. U. S. Sup. Ct. May 2, 1927, p. 574.

<sup>58</sup> Fargo v. Hart, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. ed. 761 (1904).

<sup>59</sup> W. U. Tel. Co. v. Taggart et al., 163 U. S. 1, 16 Sup. Ct. 1054, 41 L. ed. 49

*Tank Line Co. v. Wright*<sup>60</sup> would indicate that the authority of the Pullman case has been broken down so far as it sanctions the mileage basis of apportionment, the application of that basis was subsequently allowed,<sup>61</sup> and the result of all the decisions is that a rule should be adopted which distributes the property as nearly as reasonably practicable according to the actual distribution of values, a mileage basis being acceptable in many cases,<sup>62</sup> but other rules being permissible, such as apportionment according to the tangible property<sup>63</sup> or according to gross receipts, when they are easily localized.<sup>64</sup>

Other than corporate privileges may also be taxed where they are exercised; for example, a non-resident's privilege of doing business in a state,<sup>65</sup> provided he is not discriminated against in favor of residents,<sup>66</sup> and a membership in a grain or stock exchange,<sup>67</sup> though the latter may also be taxed at the owner's domicile, because it has a distinct value in his business there.<sup>68</sup>

B. *Choses in Action*.—As to the situs for the taxation of debts, or choses in action in general, a number of rules are logically possible: (1) they may be said to have no actual situs at all, hence to require a constructive situs at the owner's domicile; (2) they may be regarded as rights attaching to the person of the creditor, and therefore having an actual situs at his domicile; (3) they may be assigned a situs at the domicile of the debtor, on the ground that the debt derives its value from its enforceability, which depends on the law of the state having jurisdiction of the debtor; (4) they may be held to be situated where the notes, bonds, or other evidences of debts are located, regarding such instruments as property; (5) when the debts are connected with a particular business of the creditor they may be deemed localized where the business is carried on; (6) when the debts are secured, they may be considered to have their situs where the securities are situated. No one of these rules has been followed exclusively by the federal courts.

---

(1896); *Adams Exp. Co. v. Ohio St. Auditor*, 166 U. S. 185, 17 Sup. Ct. 604, 41 L. ed. 965, aff'g 165 U. S. 194, 41 L. ed. 683 (1897); *Union Refrig. Trans. Co. v. Lynch*, 177 U. S. 149, 20 Sup. Ct. 631, 44 L. ed. 708 (1900); *Atchinson T. & S. F. Ry. Co. v. Sullivan et al.*, 173 F. 456 (1909).

<sup>60</sup> 249 U. S. 275, 39 Sup. Ct. 276, 63 L. ed. 602 (1919).

<sup>61</sup> *Pullman Co. v. Richardson*, 261 U. S. 330, 43 Sup. Ct. 366, 67 L. ed. 692 (1923).

<sup>62</sup> *Delaware Railroad Tax*, 18 Wall. 206, 21 L. ed. 888 (1874); *Cleveland, C., C. & St. L. Ry. Co. v. Backus*, 154 U. S. 439, 14 Sup. Ct. 1122, 38 L. ed. 1041 (1894); *Adams Exp. Co. v. Kentucky*, 166 U. S. 171, 17 Sup. Ct. 527, 41 L. ed. 960 (1897); cases in notes 48, 51, 54, 61.

<sup>63</sup> *St. Louis & S. F. R. Co. v. Middlekamp et al.*, 256 U. S. 226, 41 Sup. Ct. 489, 65 L. ed. 905 (1921).

<sup>64</sup> Case in note 53.

<sup>65</sup> *Shaffer v. Carter et al.*, 252 U. S. 37, 40 Sup. Ct. 221, 64 L. ed. 446 (1920).

<sup>66</sup> *Travis v. Yale & T. Mfg. Co.*, 252 U. S. 60, 40 Sup. Ct. 228, 64 L. ed. 460 (1920).

<sup>67</sup> *Rogers et al. v. County of Hennepin et al.*, 240 U. S. 184, 36 Sup. Ct. 265, 60 L. ed. 594 (1916).

<sup>68</sup> *Citizen's Nat'l Bank v. Durr et al.*, 257 U. S. 99, 66 L. ed. 149 (1921).

The sixth rule seems to have been applied in an early case<sup>69</sup> which held a state tax on a debt due to a non-resident alien from a railroad invalid on the ground that the debt was secured by property in part outside the state. But this case was criticized in the case of *State Tax on Foreign-Held Bonds*,<sup>70</sup> which reached a similar result on a different theory. It decided that a debt is not taxable at the domicile of the debtor, because it is not property of the debtor, but of the creditor, and has no situs other than the latter's domicile,<sup>71</sup> and that if the debt were secured by a mortgage the case would be no different.<sup>72</sup> But a later case held that a state may treat mortgages, even though regarded in that state as mere liens, either as personal property taxable like other choses in action, or as interests in real estate taxable at the situs of the land.<sup>73</sup> The rule that personalty is taxable at the owner's domicile has not been departed from in the case of debts and other intangible property,<sup>74</sup> even when special circumstances make them taxable elsewhere,<sup>75</sup> the distinction between tangible and intangible property in this respect being justified on the ground that the existence and ownership of the latter cannot be readily ascertained by the state of its actual situs.<sup>76</sup> A single case<sup>77</sup> has upheld a transfer tax (to which, according to other decisions,<sup>78</sup> the same rules of jurisdiction apply as to property taxes) on debts, by the state of the debtor's domicile, on the theory that a debt, derives its validity wholly from the fact that that state will make the debtor pay. But on this theory, since a debtor may be sued in any jurisdiction where he may be found even temporarily, it might just as logically be held that any state in which a debtor might be for the briefest time might tax the debt—a palpably absurd result. A dictum in *State Tax on Foreign-Held Bonds*, *supra*, stated that state and municipal bonds, and bank notes passing as currency are so far treated as actual property as to be taxable where situated, regardless of the owner's domicile; and, though other documents evidencing debts

<sup>69</sup> *Northern Cent. Ry. Co. v. Jackson*, 7 Wall. 262, 19 L. ed. 88 (1869).

<sup>70</sup> 15 Wall. 300, 21 L. ed. 179 (1873).

<sup>71</sup> Accord: *Kirtland v. Hotchkiss*, 10 Otto 491, 25 L. ed. 558 (1879); *DeVignier v. New Orleans*, 16 F. 11 (1883); *City & County of San Francisco v. Mackay*, 22 F. 602 (1884); *Pyle v. Brenneman*, 122 F. 787 (1903); *N. Y. Life Ins. Co. v. Board of Assessors et al.*, 158 F. 462 (1908).

<sup>72</sup> Accord: *Kirtland v. Hotchkiss*, 10 Otto 491, 25 L. ed. 558 (1879); *Jack v. Walker et al.*, 79 F. 138 (1897).

<sup>73</sup> *Savings & L. Soc. v. Multnomah County*, 169 U. S. 421, 18 Sup. Ct. 392, 42 L. ed. 803 (1898).

<sup>74</sup> *Bonaparte v. Appeal Tax Court*, 14 Otto 592, 26 L. ed. 845 (1882); *Fidelity & Columbia Trust Co. v. Louisville*, 245 U. S. 54, 38 Sup. Ct. 40, 62 L. ed. 845 (1882).

<sup>75</sup> *Cream of Wheat Co. v. Grand Forks*, 253 U. S. 325, 40 Sup. Ct. 558, 64 L. ed. 931 (1920); case in note 82.

<sup>76</sup> *Union Refrig. Trans. Co. v. Kentucky*, 199 U. S. 194, 26 Sup. Ct. 36, 50 L. ed. 150 (1905).

<sup>77</sup> *Blackstone v. Miller*, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. ed. 439 (1903).

<sup>78</sup> *Frick v. Pennsylvania*, 268 U. S. 473, 45 Sup. Ct. 603, 69 L. ed. 1058 (1925); *Rhode Is. Hospital Trust Co. v. Doughton*, 270 U. S. 69, 46 Sup. Ct. 256, 70 L. ed. 475 (1926).

were formerly treated as mere representatives of the obligations, without separate situs, the courts finally came to look on negotiable bonds<sup>79</sup> and promissory notes,<sup>80</sup> in accord with the understanding of business men, as actual property capable of being given a taxable situs apart from the domicile of their owner, distinguishing the case of *Buck v. Beach*,<sup>81</sup> in which notes were held not taxable where situated, on the ground that the notes had not acquired a *permanent* situs in the taxing state. Stock certificates<sup>82</sup> and warehouse receipts<sup>83</sup> have not been treated as property having a separate situs.

But debts,<sup>84</sup> even when not evidenced by written instruments,<sup>85</sup> as well as money and other forms of capital,<sup>86</sup> may be given what it called a "business situs"<sup>87</sup> in another state than the domicile of the creditor or owner, by being held in such other state as investments in connection with a business continuously transacted there; for example, where an agent collects the money due and reinvests it within the state, or deposits it in banks there, only the net proceeds being sent to the non-resident owner,<sup>88</sup> or where the debts are for premium due a foreign insurance company or policies issued in a state where it does a regular business.<sup>89</sup> No business situs, however, is acquired in a state by money collected there and deposited in a local bank, but not reinvested in local business, and subject to withdrawal only by the non-resident owner;<sup>90</sup> nor by bonds deposited in another state as security for the performance of a lease of property in the taxing state;<sup>91</sup> nor by so-called "loans" which really create no liability.<sup>92</sup> The reasons for the adoption of the doctrine of "business situs" are best stated in some of the state decisions

<sup>79</sup> *Western Assur. Co. v. Halliday et al.*, 110 F. 259 (1901).

<sup>80</sup> *Wheeler et al. v. Sohmer*, 233 U. S. 434, 34 Sup. Ct. 607, 58 L. ed. 1030 (1914).

<sup>81</sup> *Buck v. Beach*, 206 U. S. 392, 27 Sup. Ct. 712, 51 L. ed. 1106 (1907).

<sup>82</sup> *Tyler v. Dane County et al.*, 289 F. 843 (1923).

<sup>83</sup> *Selliger v. Kentucky*, 213 U. S. 200, 29 Sup. Ct. 449, 53 L. ed. 761 (1909).

<sup>84</sup> Cases in notes 88, 90; *Singer Sewing Machine Co. v. Cooper*, 261 F. 635 (1919).

<sup>85</sup> *Liverpool & L. & G. Ins. Co. v. Board of Assessors et al.*, 221 U. S. 346, 31 Sup. Ct. 559, 55 L. ed. 762 (1911); *Orient Ins. Co. et al. v. Board of Assessors et al.*, 221 U. S. 358, 31 Sup. Ct. 554, 55 L. ed. 769 (1911).

<sup>86</sup> *Nevada Bank v. Sedgwick*, 14 Otto 111, 26 L. ed. 703 (1881); *People of N. Y. v. Roberts*, 171 U. S. 658, 19 Sup. Ct. 58, 43 L. ed. 323 (1898); *City of New Orleans v. Stempel et al.*, 175 U. S. 309, 20 Sup. Ct. 110, 44 L. ed. 174 (1899); *Bristol v. Washington County*, 177 U. S. 133, 20 Sup. Ct. 585, 44 L. ed. 701 (1900).

<sup>87</sup> *In re Estate of Jefferson*, 35 Minn. 215, 28 N. W. 256 (1886).

<sup>88</sup> *City of New Orleans v. Stempel et al.*, 175 U. S. 309, 20 Sup. Ct. 110, 44 L. ed. 174 (1899); *Bristol v. Washington County*, 177 U. S. 133, 20 Sup. Ct. 585, 44 L. ed. 701 (1900); *State Board of Assessors v. Comptoir National*, 191 U. S. 388, 24 Sup. Ct. 109, 48 L. ed. 232 (1903); *Metropolitan Life Ins. Co. v. New Orleans*, 205 U. S. 395, 27 Sup. Ct. 499, 51 L. ed. 853 (1907).

<sup>89</sup> Cases in note 85.

<sup>90</sup> *New York Life Ins. Co. v. Board of Assessors et al.*, 158 F. 462 (1908).

<sup>91</sup> *Louisville & N. R. Co. et al. v. Wright*, 236 F. 148 (1916).

<sup>92</sup> *Board of Assessors v. N. Y. Life Ins. Co.*, 216 U. S. 517, 30 Sup. Ct. 385, 54 L. ed. 597 (1910).

quoted in federal cases.<sup>93</sup> They may be summarized thus: the debts or other property have acquired an actual situs there so far as they are capable of having an actual situs, are protected and made enforceable by the law of the state, and should therefore not be excused by a mere fiction from contributing to the support of the state. It may be assumed that by analogy to the cases of "business situs" the situs of partnership property, which has never been determined by the federal courts, would be fixed by them at the place where the partnership carried on business, as the state courts have done.<sup>94</sup>

While shares of corporate stock, like other choses in action, have frequently been held taxable at the domicil of their owner,<sup>95</sup> they are in some respects peculiar. Stock in a corporation created by the United States may be given a taxable situs by the statute creating the corporation,<sup>96</sup> and likewise stock in a company incorporated by a state may have its situs fixed by the act of incorporation or a prior statute, as an incident to the ownership of the stock, in effect part of the shareholder's contract with the corporation.<sup>97</sup> Stocks in the hands of an agent may have a business situs apart from the owner's domicil,<sup>98</sup> but where a pledge of stock has the effect of vesting the legal title in the pledges, but the equitable title, including the right to vote and receive dividends, remains in the pledgor, the stock remains taxable at the owner's domicil, though not there held.<sup>99</sup> As a share of stock is not a share in the corporation's property, a state may not tax non-residents on stock in a foreign corporation merely because the corporation has property in the state, even though the stock is assessed at no greater proportion of its value than the value of the property in the state bears to the total assets.<sup>100</sup>

*C. Trust Property.*—Property held by a trustee may be taxed at his domicil, because he has the legal title,<sup>101</sup> and at the domicil of the beneficiary, because he is protected there in his rights of enjoyment,<sup>102</sup> but

<sup>93</sup> *Catlin v. Hull*, 21 Vt. 152 (1849); *Wilcox v. Ellis*, 14 Kan. 588, 19 Am. Rep. 107 (1875); and *People ex rel. Westbrook et al. v. Ogdensburg*, 48 N. Y. 390 (1872), quoted in *City of New Orleans v. Stempel et al.*, 175 U. S. 309, 20 Sup. Ct. 110, 44 L. ed. 174 (1899); *In re Estate of Jefferson*, 35 Minn. 215, 28 N. W. 256 (1886), quoted in *Bristol v. Washington County*, 177 U. S. 133, 20 Sup. Ct. 585, 44 L. ed. 701 (1900).

<sup>94</sup> 2 Cooley, *Taxation*, 4th ed., 1060, and cases cited.

<sup>95</sup> *Sturges v. Carter*, 114 U. S. 511, 5 Sup. Ct. 1014, 29 L. ed. 240 (1885); *Kidd v. Alabama*, 188 U. S. 730, 47 L. ed. 669 (1903); *Wright v. L. & N. R. Co. et al.*, 195 U. S. 219, 25 Sup. Ct. 16, 49 L. ed. 167 (1904); *Hawley v. City of Malden*, 232 U. S. 1, 34 Sup. Ct. 201, 58 L. ed. 477 (1914).

<sup>96</sup> *Tappan v. Merchants' Nat'l Bank*, 19 Wall. 490, 22 L. ed. 189 (1874).

<sup>97</sup> *Corry v. Baltimore et al.*, 196 U. S. 466, 25 Sup. Ct. 297, 49 L. ed. 556 (1905).

<sup>98</sup> *DeGanay v. Lederer*, 250 U. S. 376, 39 Sup. Ct. 534, 63 L. ed. 1042 (1919).

<sup>99</sup> *Central of Georgia Ry. Co. v. Wright et al.*, 166 F. 153 (1908); appeal dismissed 215 U. S. 617.

<sup>100</sup> *R. I. Hospital Trust Co. v. Doughton*, 270 U. S. 69, 46 Sup. Ct. 256, 70 L. ed. 475 (1926).

<sup>101</sup> *Price et ux. v. Hunter et al.*, 34 F. 355 (1888); *Western Assur. Co. v. Halliday et al.*, 110 F. 259 (1901).

<sup>102</sup> *Maguire v. Trefry*, 253 U. S. 12, 40 Sup. Ct. 417, 64 L. ed. 739 (1920).

a transfer tax may not be levied by a state having jurisdiction only of the person exercising a power of appointment, but not of the property, its trustee, or the person or instrument creating the power.<sup>103</sup> A trustee is not taxable by the state of his domicil on trust property outside the state, if he does not act as trustee within the state.<sup>103a</sup>

#### QUESTIONS NOT BETWEEN STATES.

As between taxing districts within a state the legislature may fix the situs of property for tax purposes at its discretion;<sup>104</sup> so cases involving that problem solely need not be specifically considered.

Whether the same rules as to situs which are applicable to state taxes apply also to federal taxation of property not in the United States, or belonging to non-resident aliens, the few decisions involving the question do not answer conclusively. An early case indicating that they do apply<sup>105</sup> was reversed on a ground which did not involve that question.<sup>106</sup> In *United States v. Bennett*<sup>107</sup> the court said that the restriction of the taxing power of the states to subjects within their jurisdiction does not apply to the United States, and sustained a federal tax on the use by a resident citizen of a yacht never in the United States. But this result could have been reached on the rule of taxation of vessels at the owner's domicil as applied to state taxation,<sup>108</sup> and in a later case<sup>109</sup> the court gave as a ground for upholding a federal tax on the income of an alien from stocks, bonds, etc., that the property was localized in the United States,—indicating that some ground of jurisdiction was thought necessary. Probably the most that *United States v. Bennett*, *supra*, should be taken as establishing, is that the doctrine of constructive situs is applicable to federal taxation.

F. WARNER FISCHER.

## SURETYSHIP DEFENSES BY CO-MAKERS IN MISSOURI SINCE THE NEGOTIABLE INSTRUMENTS LAW

### I.

Before the adoption of the uniform Negotiable Instruments Law by the Missouri Legislature in 1905, it had become unquestionably estab-

<sup>103</sup> *Wachovia Bank & Trust Co. et al. v. Doughton*, Adv. Ops. U. S. Sup. Ct. Dec. 15, 1926, p. 250.

<sup>103a</sup> *Goodsite v. Lane et al.*, 139 F. 593 (1905).

<sup>104</sup> *State Railroad Tax Cases*, 2 Otto 575, 23 L. ed. 663 (1876); *Columbus Southern R. Co. v. Wright*, 151 U. S. 470, 14 Sup. Ct. 396, 38 L. ed. 238 (1894); *Adams Exp. Co. v. Ohio St. Auditor*, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. ed. 633 (1897); *Diamond Match Co. v. Village of Ontonagon et al.*, 188 U. S. 82, 23 Sup. Ct. 266, 47 L. ed. 394 (1903).

<sup>105</sup> *U. S. v. Erie R. Co.*, 9 Ben. 67, Fed. Cas. No. 15,056 (1877).

<sup>106</sup> 16 Otto 327, 27 L. ed. 151 (1882).

<sup>107</sup> 232 U. S. 299, 34 Sup. Ct. 433, 28 L. ed. 612 (1914).

<sup>108</sup> See *supra*, page 4.

<sup>109</sup> *DeGanay v. Lederer*, 250 U. S. 376, 39 Sup. Ct. 534, 63 L. ed. 1042 (1919).