

STATE GIFT TAX JURISDICTION

EDMOND N. CAHN †

I

The gift inter vivos is an ancient device. To the classical Greeks it often connoted an ingenious way to destroy one's enemies or gain one's ends. The Hebrews used it with equal shrewdness to circumvent the strict rules of the law.¹ Only in our times, however, has it become an implement for the avoidance of inheritance taxes. The resultant generosity is sufficient to charm an optimist or to entertain a cynic. "God hath made men upright but they have sought out many inventions."

Excises upon the privilege of giving have thus become one of the necessary incidents of a sound tax program. The federal gift tax laws of 1924 and 1932 were enacted expressly to complement and effectuate the estate tax legislation.² Estate tax rates being what they are, the inducement to resort to inter vivos transfers as an avenue of avoidance is cogent indeed. This has been sufficiently illustrated by increasing federal revenue from gift taxes.³ But as the devolution of property from generation to generation is thus forced into the channels of inter vivos transactions, the several states are annually deprived of prospective revenue under their inheritance tax laws. The perception of this loss has resulted in the enactment since 1933 of gift tax laws in six of our states,⁴ and in the legislative consideration of similar stat-

† A. B., 1925, J. D., 1927, Tulane University; member of the New York Bar; author, *Restraints on Disinheritance* (1936) 85 U. OF PA. L. REV. 139, *Estate Corporations* (1937) 86 U. OF PA. L. REV. 136, and other articles in legal periodicals.

1. The prospective rights of the first-born could be avoided by gift in much the same manner as those of the surviving spouse under our modern statutes. See 12 JEWISH ENCYCLOPEDIA 523, discussing BABYLONIAN TALMUD, *Baba Bathra*, c. VIII, Mishna V, VI.

2. *Hearings before Committee on Ways and Means on H. R. 10236*, 72d Cong., 1st Sess. (1932) 18, 57, 77, 141, 643; 75 CONG. REC. 480 (1931); 75 CONG. REC. 7239 (1932); *Burnet v. Guggenheim*, 288 U. S. 280 (1933). So too as to gifts in contemplation of death: *Milliken v. United States*, 283 U. S. 15 (1931); *United States v. Wells*, 283 U. S. 102 (1931).

3. Gift tax revenue has increased from \$4,000,000 for the fiscal year ended June 30, 1933 to \$34,000,000 for that ended June 30, 1938. The receipts for the year ended June 30, 1936 reached the remarkable total of \$160,000,000. TAX SYSTEMS OF THE WORLD (5th ed. 1934) 173; *id.* (6th ed. 1935) 356; *id.* (7th ed. 1938) 393; N. Y. Times, July 27, 1938, p. 29, col. 4. Fluctuating revenue from this source is probably attributable to increase in gifts in anticipation of the effective date of higher rates of tax. These factors are often disguised by the practice of combining gift tax revenue with that from estate taxes, thus creating a false impression of uniformity in the annual receipts.

4. Colo. Laws 1937, c. 161; 3 MINN. STAT. (Mason, Supp. 1938) § 2394-71; N. C. REV. CODE (Supp. 1937) c. 127, § 600; ORE. CODE ANN. (Supp. 1935) § 69, 1601-28; amended, Ore. Laws 1937, c. 250; VA. CODE ANN. (Michie, 1936) Tax Code § 120,

utes in most of the others.⁵ The expansion of this movement cannot but result in jurisdictional problems of prime importance.

The existing state statutes are relatively uniform as to the extent of jurisdiction claimed. The tax is levied upon gifts of all personal property of residents and upon all property, whether of residents or non-residents, which is within the jurisdiction of the state.⁶ This formula has two clear implications: first, that the draftsmen of the respective statutes have assumed for jurisdictional purposes to assimilate gift taxes to estate taxes; and second, that the theory of jurisdiction is power over the property which is given, not power over the act of giving. In the customary words of art, the jurisdiction is predicated upon the situs of the res.

At first blush the formulation of the state statutes along these lines appears somewhat anomalous. It is elementary that a gift tax is an excise, a tax upon the exercise of a specific privilege.⁷ It would seem to follow that the tax should be levied where the privilege is exercised.⁸ The draftsmen of the state statutes have accorded no homage to this line of reasoning but have rested upon a syllogism of their own. The syllogism is that, because gift taxes are enacted for the purpose of safeguarding estate tax revenue, the measures of jurisdiction for the two types of excise are necessarily coextensive. The validity of this syllogism will be tested in either of the following predictable eventualities: (1) property having its situs within a state will constitute the subject matter of a gift beyond the borders of the state, and the donor will decline to pay the tax levied by his domicile; or (2) other states will adopt gift tax legislation predicated upon jurisdiction over the gift as distinguished from jurisdiction over the res. The resolution of these difficulties, involving as they do complex problems under the 14th Amendment, will, of course, ultimately rest with the Supreme Court.

In disposing of litigation arising out of state gift tax statutes, the Court will find itself burdened with a series of collateral considerations.

1-15, amended, Va. Laws 1936, c. 119; Wis. Laws 1933, c. 363, § 4, amended, Wis. Laws 1935, c. 15, § 7; Wis. Laws 1937, cc. 32, 265, 302, 306-8.

5. 1 Prentice-Hall 1938 Fed. Inher. and Trans. Tax Serv. ¶ 2203.

6. E. g., the Minnesota Act, 3 MINN. STAT. (Mason, Supp. 1938) § 2394-71C, provides: "The tax in the case of a person who is a resident of this state at the date of the transfer shall be on all such transfers if the property transferred has its situs within this state, and for this purpose intangible property shall be conclusively deemed to have its situs therein. The tax in the case of a person who is a non-resident of this state at the date of such transfer shall be on all such transfers if the property transferred has its situs within this state." The Oregon Act, ORE. CODE ANN. (Supp. 1935) tit. 69, § 1601b, reads: ". . . as to residents of this state, the tax shall apply to the transfer by gift of any property whatsoever, excepting only property, real or personal, permanently located outside this state; but, in the case of a non-resident, shall apply to a transfer only if the property is situated within the state of Oregon. . . ."

7. Bromley v. McCaughn, 280 U. S. 124 (1929).

8. Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204, 214 (1930).

The intercalated prohibition of double taxation of estates⁹ will rise to haunt it. So too, will its reliance upon the theory of situs, a theory which has already been ripped and rived in brilliant dissenting opinions¹⁰ and commentaries.¹¹

Some consideration will subsequently be given to the probable life expectancy of the line of cases on double taxation beginning with *Safe Deposit & Trust Co. v. Virginia*.¹² At this point the unimpaired continuance of their authority is hypothetically assumed. However, as was shrewdly suggested by one of the series of dissents in this line of cases, merely forbidding double taxation does not solve all problems.¹³ The Court may simply have cut off one of the heads of the hydra. It may have taken a path to which it cannot adhere without an ever increasing usurpation of power over the states. The state gift tax litigation will surely force this dilemma upon the Court. Drafting of the state statutes in blind acceptance of the doctrine of situs has only served to intensify the difficulties which the former Supreme Court majority have created.

Swallowing all these considerations whole, we shall assume that double taxation is repugnant to the 14th Amendment and that only a single state may tax a gift inter vivos. In order to complete this assumption, we must add to it at least two more suppositions: first, that a second state will have no right to bring about double taxation by enacting an excise upon the right to receive the gift; and second, that the gift itself must in all instances be regarded as an indivisible economic integer though on its face the practical benefits of the transfer pass partly within one state and partly within another.¹⁴ Begging these questions for the time being, and bowing to the prohibition of double taxation, we move to the next problem: Which is the single state having jurisdiction to tax the gift?

II

There is an old saying to the effect that words are the daughters of men, but that things are the sons of God. *Genesis* tells us that the

9. *Safe Deposit & Trust Co. v. Virginia*, 280 U. S. 83 (1930); *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204 (1930); *Baldwin v. Missouri*, 281 U. S. 586 (1930); *Beidler v. South Carolina Tax Comm.*, 282 U. S. 1 (1930); *First National Bank of Boston v. Maine*, 284 U. S. 312 (1932).

10. *Ibid.* Some of Holmes' most famous phrases and aphorisms were inspired by this controversy. Perhaps he was keenest when he said: "I cannot believe that the Fourteenth Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions." *Baldwin v. Missouri*, 281 U. S. 586, 595 (1930).

11. Among the most forceful are Lowndes, *Spurious Conceptions of Constitutional Law of Taxation* (1934) 47 HARV. L. REV. 628; and Stimson, *Jurisdiction to Tax Intangibles* (1937) 23 CORN. L. Q. 142. See (1930) 30 COL. L. REV. 404, 405.

12. 280 U. S. 83 (1930).

13. *First National Bank of Boston v. Maine*, 284 U. S. 312, 334 (1932).

14. See *Safe Deposit & Trust Co. v. Virginia*, 280 U. S. 83, 95 (1930).

proper union of the two may result in giants and heroes of truth.¹⁵ But there are words whose reference-power to things is vague, indirect and remote. "Jurisdiction" is such a word. Little of value can be added to the mass of recent writings on the meaning of jurisdiction to tax. A few comments may help to tidy up the prevailing theories and perhaps to tighten the nexus between abstraction and reality.

At the risk of immediate association with the school of Hobbes,¹⁶ we can safely postulate that jurisdiction is essentially power. How far-reaching the tentacles of that power can become has been demonstrated by the fantastic tax laws of certain European countries.¹⁷ Jurisdiction can operate like a whirling cone, one moving point of economic control sufficing to bear the entire burden of tax imposition.

This is not to contradict the protection theory of jurisdiction which Mr. Justice Stone treats as the obverse side of the coin.¹⁸ Taxes are paid because benefits are received. Contributions to the cost of government are exacted from those who obtain the benefit of government. Mr. Justice Holmes rightly points out that taxes are essentially levies upon persons for that purpose, and that the measurement of taxes by property or by the income from property is only a convenient means of ascertaining the ultimate incidence of the cost of protection.¹⁹ The consensual element in taxation is so important that no effective system would be possible without it. Even under a dictatorship, government cannot live by dread alone but must derive its support from some popular sense of quid pro quo. Self-assessment in income taxation rests only in part upon the fear of being caught. At least in the sense that taxes are regarded as a necessary element of civilized life, people may be said to pay them because they actually want to. This element in the operation of tax jurisdiction must be considered later in relation to the operations of our federal system.

We are a due-process-clause-minded people. We are unable to worship the State or to believe that the acts of sovereignty are ipso facto right. If the exercise of admitted power seems unfair and unreasonable, we are unlikely to exercise it. For that reason considerations of due process have worked their way into our conceptions of federal tax jurisdiction.²⁰ How long these considerations will remain in opera-

15. GENESIS, 6, I-IV.

16. See HARDING, DOUBLE TAXATION OF PROPERTY AND INCOME (1933) c. 3.

17. Wurzel, *Foreign Investment and Extraterritorial Taxation* (1938) 38 COL. L. REV. 809.

18. See *Baldwin v. Missouri*, 281 U. S. 586, 597 (1930); *First Nat. Bank of Boston v. Maine*, 284 U. S. 312, 333 (1932); *Senior v. Braden*, 295 U. S. 422, 434 (1935); *New York ex rel. Cohn v. Graves*, 300 U. S. 308, 313 (1937); *First Bank Stock Corp. v. Minnesota*, 301 U. S. 234, 241 (1937).

19. *Safe Deposit & Trust Co. v. Virginia*, 280 U. S. 83 (1929).

20. See Wurzel, *supra* note 17, at 822.

tion depends upon such elements as our future needs for revenue, our relations to other nations and our general attitude toward income and wealth. The residuum of power is yet untapped.

The several states too are sovereigns, but sovereigns forming part of a federal system.²¹ Just how far the federal system requires prohibition of double or multiple taxation is a question which we shall explore hereinafter. At this point we think of these forty-eight sovereignties as though they were forty-eight mutually exclusive baskets. If destiny tosses out a taxable event, that event must fall into a single one of the baskets. The fact that it has fallen into one basket is of itself sufficient to prevent any overflow into the next basket.

When the Supreme Court came to pass upon jurisdiction over intangibles for estate tax purposes, the majority relied upon the conception of situs. Situs played the Hercules to jurisdiction's Antaeus. It kept jurisdiction up in the air and away from mother earth long enough to strangle it. The jurisdiction to levy an estate tax was limited to the situs of the property passing from the dead to the living.

If these principles are to be applied with any intelligence to the new problems of gift taxes, they must first be understood. An estate tax, the Court has always insisted, is an excise upon the privilege of passing or receiving property upon death.²² When the Supreme Court handed down the series of double taxation decisions,²³ a number of commentators drew the natural inference that estate taxes had been assimilated to property taxes;²⁴ and it has recently been suggested that that assimilation will extend to gift taxes.²⁵ If we concede that an estate or gift tax is a type of property tax (a tax upon one of the elements of owning property),²⁶ then jurisdiction over the property is fairly equivalent to jurisdiction over the devolution or the gift.

Unfortunately this conclusion violates not only the Court's insistence that estate and gift taxes are not property taxes; it also flies in the face of several established doctrines which can hardly be reconciled with the proposed assimilation. One of these doctrines is that estate and gift taxes may constitutionally be imposed upon securities of the United States and of the several states.²⁷ In view of the various ex-

21. *Burnet v. Brooks*, 288 U. S. 378 (1933).

22. *Knowlton v. Moore*, 178 U. S. 41 (1900); *Keeney v. New York*, 222 U. S. 525 (1912); *First Nat. Bank of Boston v. Maine*, 284 U. S. 312 (1932); *Helvering v. St. Louis Union Trust Co.*, 296 U. S. 39 (1935).

23. See *supra* note 9.

24. HARDING, *loc. cit. supra* note 16; Note (1930) 40 YALE L. J. 99; (1937) 51 HARV. L. REV. 174.

25. Note (1938) 51 HARV. L. REV. 533, 541 *et seq.*; see Opinion of Attorney General of Oregon, April 30, 1936.

26. Cf. *Bromley v. McCaughn*, 280 U. S. 124 (1929).

27. The history of these distinctions, "worth a volume of logic", is exhaustively presented in *Knowlton v. Moore*, 178 U. S. 41 (1900). See also *New York Trust Co.*

press and implied constitutional inhibitions upon property taxes which are inapplicable to excise taxes, it is hard to find any justification for regarding them as governed by similar limitations. To say that a specific levy is an excise tax and in the same breath to determine its jurisdiction in terms of property taxation, is essentially to delete and expunge distinctions which have become fundamental in our system of government.

A resident of the State of New York takes certain shares of stock and gives them to his son in the State of New Jersey. If the shares of stock had already obtained a business or trust situs in New Jersey, it is fair to assume that only that state could levy an excise tax upon the gift.²⁸ If, however, no localized situs had been obtained, the Supreme Court would say that up to the time of the gift the situs of the shares was in New York; and if assimilation to estate tax cases is to be its rule, then New York may tax the gift. But in such event in order to deny jurisdiction to New Jersey, the Supreme Court must hold that New Jersey has no taxing power over a transfer which takes place within its borders, the validity of which, including the capacity of donor and donee and the formalities incident to the gift, is determined by its laws.²⁹ Of course, it can thus be caught in the tangled web it has woven for itself, but it is bound to be conscious of some sense of logical absurdity. It is bound to have difficulty with the thought that it is denying jurisdiction to tax the exercise of a privilege in the very state in which the privilege is exercised.

Perhaps this dilemma can be avoided by resorting to history where common sense seems to have failed. The word "gift" in early English law was the broadest term descriptive of any conveyance of title and included all sorts of transfers, sales, exchanges, gages and leases.³⁰ It was a broader term than "feoffment". A gift in our sense was regarded as only one type of conveyance *inter vivos*, and at least in early Norman times a nominal consideration was customary. At one stage in the law the baby child of the donor or vendor, as expectant heir, was brought upon the land and given a penny or toy. Historically, therefore, a gift bears much closer affinity to a sale than to devolution by death. It is only the use of gifts to avoid inheritance taxation that has obfuscated that genetic classification. The Court may thus be enabled to save the structure of the double taxation rules by assimilating

v. Eisner, 256 U. S. 345 (1921); *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495 (1937); (1937) 50 HARV. L. REV. 840.

28. *Matter of Brown*, 274 N. Y. 10, 8 N. E. (2d) 42 (1937), *cert. denied*, 302 U. S. 731 (1937).

29. 2 BEALE, CONFLICT OF LAWS (1935) 980, 984, 1253, 1255; THORNTON, GIFTS AND ADVANCEMENTS (1893).

30. 2 POLLOCK & MATTLAND, HISTORY OF ENGLISH LAW (1895) 12, 82, 211.

gifts to sales and, by like token, assimilating gift taxes to sales taxes. Gift taxes have already been the subject of judicial analogy to stamp taxes upon the transfer of securities and to taxes upon sales of grain upon an exchange.³¹ That analogy may be extended to place gifts in the category of taxable inter vivos transfers, and thus to make the place of the gift the proper jurisdiction for taxing it. On its face this suggestion has the merit of simplicity and historical support.

But taxation (as has been often said by those on both sides of every jurisdictional controversy) is an intensely practical matter. So far as sales are concerned, there is relatively little opportunity for choice of jurisdiction. In the ordinary course of business, sales taxes are collected because it is not easy or cheap to order the transaction so as to avoid the jurisdiction. If the rates of sales taxes were sufficiently increased, a law of diminishing returns would undoubtedly become operative. Under existing rates it is rarely profitable to lay the jurisdictional basis for evasion. These considerations are inapplicable to gifts. The Court will not fail to recognize that, by assimilating gift tax jurisdiction to sales tax jurisdiction, it may extend an invitation to ready evasion.³² It is so easy where a substantial gift is involved to cross the state line.

The solution of this problem may arise in a peculiarly accidental manner. The United States Treasury has been advocating the adoption of an integrated system of gift and estate taxes, and it is probable that one element of that system will be the granting of a credit against the federal transfer tax for gift taxes paid to the several states.³³ If such a credit is granted, the difficulty will be largely removed, for then the donor must pay to the Federal Government whatever he evades paying to the state. In such eventuality the Court will be able as a practical matter to assimilate gift taxes to sales taxes without inviting evasion and without disturbing the rules against double taxation. It is submitted that such assimilation would be a far happier result than the manifold inconsistencies arising out of assimilation to estate taxes. It would eliminate the much mangled fiction of situs and would determine jurisdiction on a strictly realistic basis. Jurisdiction would be found in that state where all the powers of sovereignty are applied to the act of giving.

We might add that a decision of the Court in accordance with these principles would almost inevitably induce the enactment of a

31. *Bromley v. McCaughn*, 280 U. S. 124 (1929).

32. *Cf. Helvering v. City Bank Farmers Trust Co.*, 296 U. S. 85 (1935).

33. *FACING THE TAX PROBLEM* (20th Cent. Fund, Inc. 1937) 433; *N. Y. Times*, Aug. 21, 1938, § 1, p. 1, col. 7; *Hearings before Committee on Ways and Means on Tax Revision, Subcommittee Recommendations*, 75th Cong., 2d Sess. (1938) 55-59.

federal credit for state gift taxes if one had not already been granted by Congress.

One further comment is necessary as to the operation of the double taxation cases. When these decisions were first handed down, it was argued that they favored the creditor states in which the owners of securities resided as distinguished from the poorer states in which capital investments have their fruits.³⁴ The domiciliary state was permitted to levy a tax while the state whose natural resources were employed in building up the underlying wealth was not. Various answers have been given to this argument, but its weakness is most manifest in regard to shares of stock. It is thoroughly unrealistic to assume that the state of corporate operation is usually the state of incorporation. A resident of New York, who dies owning stock in a corporation which derives its income from Texas sulphur, will usually die possessed of stock in a Delaware company. The state of incorporation furnishes certain local conveniences to this economic arrangement, but is not the scene of creation of natural wealth. Moreover, compensation for the use of local resources should in all fairness be sought from the corporation employing them as distinguished from the stockholder. It is sufficient that the stockholder's capital investment and income are subject to the assessments which the corporation must pay. No new economic benefit is conferred by the state of corporate operation when shares of stock pass from one absentee owner to another.

We have pointed out here a technique by which the Supreme Court may avoid the difficulties attendant upon assimilating gift tax jurisdiction to estate tax jurisdiction, to wit: by regarding a gift as a type of gratuitous sale. If the Court does not accept this or some other escape of its own invention, it must choose either to arrogate a further power over the several states, or to reconsider the entire line of cases beginning with *Safe Deposit & Trust Co. v. Virginia*. In the third section hereof we shall attempt to anticipate that reconsideration.

III

Our Supreme Court being the perpetual constitutional convention that it is, decisions with all the force of gospel must often pass into the limbo of forgotten things. Snatched out of Hornbook and Restatement by the slow lingering disease of "distinguished", or the sudden casualty of "overruled", they eventually find their way to the judicial obituary

34. Rottschaefer, *State Jurisdiction to Impose Taxes* (1933) 42 YALE L. J. 305; Notes (1930) 43 HARV. L. REV. 792, (1930) 40 YALE L. J. 99.

page. The difficulty is, as Mr. Justice Holmes somewhat plaintively remarked, that "we need an authoritative list".³⁵

*Frick v. Pennsylvania*³⁶ was handed down in June, 1925. At that time the unanimous Court was quite sanguine as to the jurisdiction of states of incorporation to levy estate taxes:

"As those States had created the corporations issuing the stocks, they had power to impose the tax and to enforce it by such means, irrespective of the decedent's domicile and the actual situs of the stock certificates. Pennsylvania's jurisdiction over the stocks necessarily was subordinate to that power. Therefore, to bring them into the administration in that State it was essential that the tax be paid."³⁷

The process of judicially annihilating these principles was as brief as it was unexpected. *Safe Deposit & Trust Co. v. Virginia* was the first blow in November, 1929. The patient was interred by *First National Bank of Boston v. Maine*³⁸ in January, 1932. Within six years after *Frick v. Pennsylvania*, the 14th Amendment had been found to be pregnant with a rule against double taxation undiscovered in the previous sixty years since its adoption. The dissents of liberals on the bench were brilliant, vehement and entirely unheeded. The logic of the majority in dealing with the question of double taxation was somewhat reminiscent of Alexander's: If you cannot unravel the Gordian knot, then raise your sword and cut it. Briefly stated, it ran as follows: Each specific article of property has its own situs, the situs of intangibles being presumptively at the domicile of their owner. When the owner dies, the devolution of his property takes place in only one state, to wit: the state of the situs. Ergo, only that state may impose an inheritance tax upon such devolution. In the case of tangible property, the transmission of the thing from the dead to the living in more than one state is "a physical impossibility". In the case of intangibles it is a "logical self-contradiction".³⁹ These principles have been accepted in accordance with the well-known maxim: "What I tell you three times is true."

Now the point at which the question was begged was obviously the attribution of a specific situs to each article of property. The conclusion

35. *Baldwin v. Missouri*, 281 U. S. 586, 596 (1930).

36. 268 U. S. 473 (1925).

37. *Id.* at 497.

38. 284 U. S. 312 (1932).

39. *First National Bank of Boston v. Maine*, 284 U. S. 312, 326 (1932). The Court majority, uncertain of the possible extent of multiple taxation, was obviously impelled by its dread of the unknown—much like geographers who, Plutarch remarked, "crowd into the edges of their maps parts of the world which they do not know about, adding notes in the margin to the effect that beyond this lies nothing but sandy deserts full of wild beasts, and unapproachable bogs".

of single taxation is implicit in that assumption. The minority of the Court kept insisting that situs was a mere fiction and that the resolution of the question of constitutional power did not require the interposition of any such "phantasm".⁴⁰ If state jurisdiction to impose inheritance taxes is to be determined by the existence *vel non* of some reasonable relation between the power and protection of the state on the one hand, and the article of property on the other hand, the fiction of situs could serve only to obscure the existence of any such relation—something like a billboard between the Court and the landscape. The relation had to be reasonable because the states were part of a federal system, but a reasonable relation could be found to exist in more than one state if the decedent's activities had brought his capital beyond the borders of a single jurisdiction. Of course, when the majority went on to argue that "death duties rest upon the power of the State imposing them to control the privilege of succession",⁴¹ it ignored its own contradiction of that doctrine in *Knowlton v. Moore*.⁴² There would be no federal estate tax if the right to regulate the privilege of succession were the exclusive gravamen of death duties.

Then came the practical considerations which swayed the majority. To tax intangibles in more than one state was unjust, inconvenient and impractical. Friction might arise among the various states, and the purposes of the constitutional compact thus be frustrated. These considerations were found to be "greatly fortified by the fact that a large majority of the states have adopted that rule by their reciprocal inheritance tax statutes".⁴³ Interestingly enough, the minority insisted that the adoption of the reciprocal statutes proved just the contrary. Approximately three-fourths of the states had passed reciprocal exemption statutes by 1930 although there were only four such statutes in effect as late as 1925.⁴⁴ Where then was the great danger of friction among the several states? By the time that double taxation of corporate stock was forbidden in *First National Bank of Boston v. Maine*, the problem had become largely academic. The circumscription of the constitutional powers of the states seemed therefore all the more gratuitous.

The change in the complexion of the Court since 1932 has not as yet cancelled the authority of the double taxation cases. However, some storm signals have been hoisted.

As recently as *Senior v. Braden*,⁴⁵ the Court denied to the State of Ohio the power to levy a tax measured by the income from beneficial

40. *Id.* at 331. See Stimson, *supra* note 11.

41. *First National Bank of Boston v. Maine*, 284 U. S. 312, 329 (1932).

42. 178 U. S. 41, 59 (1900).

43. *First National Bank of Boston v. Maine*, 284 U. S. 312, 331 (1932); see *Farmer's Loan and Trust Co. v. Minnesota*, 280 U. S. 204, 209 (1930), 30 COL. L. REV. 404.

44. See Note (1930) 40 YALE L. J. 99, 102.

45. 295 U. S. 422 (1935).

interests evidenced by transferable certificates entitling the holder to certain portions of the rents from specified parcels of land, including land both within and without that state. The trust certificate was disregarded and the tax viewed as an imposition upon foreign real estate. Only Justices Stone, Brandeis and Cardozo dissented. Expressing their aversion to the "newly discovered efficacy"⁴⁶ of the 14th Amendment to forbid double taxation, they insisted that the trust certificates within the State of Ohio were a separate legal and economic interest, not to be regarded as identical with the land, and that the protection afforded by that state to the certificates was a sufficient basis for the validity of the tax.

Two years later Mr. Justice Stone was writing the majority opinion in *New York ex rel. Cohn v. Graves*,⁴⁷ holding that a state may constitutionally tax a resident upon income received from rents of land located without the state and from interest on bonds physically without the state and secured by mortgages upon land similarly situated. He was able to find as between the different taxes imposed by the different states "distinct and separable taxable interests".⁴⁸

Subsequently when he came to write the opinion in *First Bank Stock Corporation v. Minnesota*,⁴⁹ his distaste for the rule against double taxation appeared explicitly. He insisted upon leaving open the question whether taxation of shares of stock at the business situs would preclude their taxation elsewhere. The mine has been set under the double taxation cases and may soon be ready to explode. If property is protected within two jurisdictions, it may find itself subject to contribution toward the cost of government in each. *Maxwell v. Bugbee*⁵⁰ meanwhile lurks suspiciously in the background, reinforced by the Louisiana chain store tax decision.⁵¹

No flat position has yet been taken. The *Cohn* case clearly rests upon the distinction between the two types of tax and the two types of beneficial interest involved. This leaves an exceedingly thin line of demarcation between licit and unconstitutional levies. If ingenuity can discover a plausible distinction, however fine, the resultant taxation will not be stigmatized as double. Eventually, however, the entire territory outlined in *First National Bank of Boston v. Maine* may thus be partitioned away. Perhaps this is a convenient method of reversal through erosion. The majority of the Court, following Mr. Justice Stone and

46. *Id.* at 434.

47. 300 U. S. 308 (1937).

48. *Id.* at 314.

49. 301 U. S. 234 (1937).

50. 250 U. S. 525 (1919); Lowndes, *Rate and Measure in Jurisdiction to Tax* (1936) 49 HARV. L. REV. 756.

51. *Great Atlantic and Pacific Tea Co. v. Grosjean*, 301 U. S. 412 (1937).

Mr. Justice Brandeis, seem to look with disfavor upon the "newly discovered efficacy" of the 14th Amendment.⁵²

If, on the other hand, the double taxation cases are still good law, then in the light of these recent decisions it will become increasingly difficult to maintain any analogy between estate taxation and property taxation. Such analogy is on principle untenable and in all probability estate taxation will be consistently viewed as the excise which it is. That much at least is fairly predictable.

A lawyer once said to Samuel Johnson: "You, Sir, are a philosopher. I too have often tried to become a philosopher, but somehow cheerfulness was always breaking in." In the case of the Supreme Court, the thing that is "always breaking in" is the necessity of applying established principles to novel situations. It has hypostasized the conception of situs and has invested a word with the flesh and blood of objective reality. But how will that figment of judicial ingenuity bear up when state gift tax cases come before the Court? If situs is to prevail as the criterion of gift tax jurisdiction, conclusions far more offensive than those involving estate taxes must be swallowed. Much has been done to whittle away the accepted constitutional powers of the states. As to gift taxes, the Court will have to use an axe. If it insists upon the analogy to estate taxes, it will be confronted with its own proposition that the power to regulate the succession is the gravamen of death duties. Then who can deny that the jurisdiction in which the gift takes place has power to regulate the gift? For if that power be subject to controls and qualifications, it is nonetheless primary, direct and territorial.

Under these circumstances it is not improbable that state gift tax legislation may reopen the entire question of double taxation. If the principles enunciated in *Frick v. Pennsylvania* could, like Polonius, be so unseemingly interred, an exhumation and inquest into the cause of their death may yet be undertaken. These principles were once said to have "ceased to have other than historic interest".⁵³ But generalizations of this sort invite contest. What was so long accepted (without any discernible disruption of the federal union) cannot be summarily consigned to oblivion.

52. At the last term of the Court, no important new light was thrown on the subject. *Schuylkill Trust Co. v. Pennsylvania*, 302 U. S. 506 (1938), shows no hesitation to validate state taxes upon non-resident shareholders. *Connecticut General Life Ins. Co. v. Johnson*, 303 U. S. 77 (1938), confines the state's jurisdiction "by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state". Control over the objects of the tax is a fair pragmatic criterion. The trend continues at the present term. *Guaranty Trust Co. v. Virginia*, 59 Sup. Ct. 1 (1938).

53. *First National Bank of Boston v. Maine*, 284 U. S. 312, 322 (1932).

If these propositions are reexamined, it is to be hoped that the approach will be boldly realistic. The power and correlative protection implied in the term "jurisdiction" should be interpreted in terms of simple economic phenomena. Whether a state proffers sufficient protection to a specific res simply because its laws or the machinery of its courts may be invoked to realize upon the res, is a highly debatable question.⁵⁴ If there is to be a retreat from the inhibition of multiple taxation, that retreat should not be converted into a rout.

The Court has at hand a convenient formula as to gift taxes: the analogue of local excises on sales. It must, in any case, undertake to plot the complex graph of jurisdiction, power and federalization. Its success will depend upon the selection of variable coordinates, functions of a shifting economy. If the present graph seems incoherent and disjointed, that is only because the mathematician has been lured by "nice sharp quilllets of the law" to a belief in constants. Judges must not fear the impact of change, for much comfort may be found in the use of old names.

54. *Farmer's Loan and Trust Co. v. Minnesota*, 301 U. S. 234 (1937).