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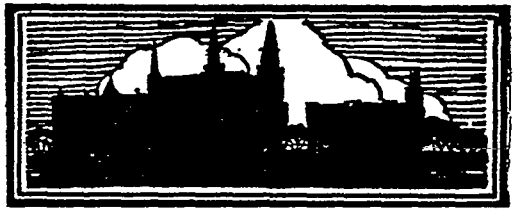

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LIMITS ON STATE POWER TO TAX INCOMES OF FOREIGN CORPORATIONS

EDMUND B. SHEA

THIS article is devoted to a brief survey of the extent to which foreign corporations may be subjected to state income taxes, with particular reference to the validity of the clause in the Wisconsin statute which declares that a foreign corporation carrying on its principal business in that state shall be taxed as if it were organized under the laws of Wisconsin.[1] The discussion is based on specific provisions of the Wisconsin statute. But the problems considered are of general interest because they pertain to the underlying principles upon which jurisdiction to levy income taxes depends.

The Wisconsin income tax law as originally adopted applied to nonresident individuals and foreign corporations, in respect of all income "derived from sources within the state or within its jurisdiction."[2]

[1] Section 71.02 (3) (e), Wis. Stats., 1931: "A foreign corporation whose principal business is carried on or transacted in Wisconsin shall be deemed a resident of this state for income tax purposes, and its income shall be determined and assessed as if it were incorporated under the laws of Wisconsin notwithstanding its domicile is elsewhere."

[2] Section 1087m-2, subd. 3, Wis. Stats., 1911: "The tax shall be assessed, levied and collected upon all income, not hereinafter exempted, received by every person residing within the state, and by every nonresident of the state upon such income as is derived from sources within the state or within its jurisdiction. So much of the income of any person residing within the state as is derived from rentals, stocks, bonds, securities or evidences of indebtedness shall be assessed and taxed, whether such income is derived from sources within or without the state; provided that any person engaged in business within and without the state shall, with respect to income other than that derived from rentals, stocks, bonds, securities or evidences of indebtedness, be taxed only

The generality of these terms implies a justifiable feeling of uncertainty on the part of the framers of the law as to the precise location of the line of constitutional power to which they were attempting to hew. The language also evidences a determination to go to the full limit of the state's authority over incomes of non-residents and foreign corporations, and to spare no such income which by any legal theory could be subjected to tax.

By later amendments the subject-matter included within the general phrase "derived from sources within the state or within its jurisdiction" became defined in concrete form.[3] The rules contained in the statute now in force define with precision the incidence of the income tax on foreign corporations whose principal business is *not* carried on in Wisconsin, and provide in effect that such persons shall be taxed only upon income:

Derived from the use or sale of realty or tangible personalty located in Wisconsin; or, derived from mercantile or manufacturing business carried on (1) exclusively in Wisconsin, or (2) in Wisconsin and elsewhere, being subject to apportionment in the latter case in the manner hereafter explained.

Corporations organized under the laws of Wisconsin are taxed not only on income falling within the classes mentioned above but also on income:

Derived from patent royalties, interest, dividends, or gains on the sale of intangible personal property; this class of income being commonly known as "income from investments."[4]

In other words the distinction between domestic corporations and foreign corporations, as regards liability for Wisconsin income tax, is that Wisconsin corporations are taxable on income from investments as above defined, while such income is exempt from tax if received by a foreign corporation having its principal business *outside* Wisconsin. The latter distinction, however, does not apply in the case of a foreign corporation transacting its principal business *in* Wisconsin, such a tax-

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upon that proportion of such income as is derived from business transacted and property located within state, which shall be determined in the manner specified in subdivision (e) of section 1770b, as far as applicable."

[3] Section 71.02 (3) (c), Wis. Stats., 1931: "For the purposes of taxation income from mercantile or manufacturing business, not requiring apportionment under paragraph 71.02 (3) (d) shall follow the situs of the business from which derived. Income derived from rentals and royalties from real estate or tangible personal property, or from the operation of any farm, mine or quarry, or from the sale of real property or tangible personal property shall follow the situs of the property from which derived. All other income, including royalties from patents, income derived from personal services, professions and vocations and from land contracts, mortgages, stocks, bonds and securities or from the sale of similar intangible personal property, shall follow the residence of the recipient . . . "

[4] The statute provides that such income follows the residence of the recipient.

payer being taxed in all respects as if it were a Wisconsin corporation, by virtue of sec. 71.02 (3) (e).[5] The effect of the latter provisions may be illustrated by a simple example:

Corporation "A", organized in Delaware, operates manufacturing plants in Wisconsin and Illinois. The company derives income from *patent royalties* paid by a licensee in Germany, interest from *mortgages* on Iowa farms, interest from *bank accounts* carried in Chicago banks, interest from *Canadian Government bonds,* dividends on Chicago *bank stock,* profits from the *sale of securities* on the New York stock exchange. None of such income pertains to the recipient's manufacturing business. The principal business of the company is located in Chicago. None of the income above specified would be taxable in Wisconsin.

Corporation "B" receives like income, and its situation is similar to that of "A" in all respects, except that the principal business of Corporation "B" happens to be located in Wisconsin. All of the income referred to would be taxable in Wisconsin under the terms of sec. 71.02 (3) (e).

Has Wisconsin power to thus tax a foreign corporation upon income derived from intangible investment securities as mentioned in the foregoing example? If so, what is the basis of jurisdiction over this class of subjects? Does the exercise of power attempted under the enactment last cited violate any guarantees in the Federal Constitution? What are the limits of state jurisdiction to tax incomes of foreign corporations and upon what principles are such limitations established? To deal with these questions it is necessary to examine the premises of state jurisdiction to levy income taxes.

Jurisdiction to impose taxes depends upon the presence of the subject of the tax within the territorial limits of the taxing power. Persons and property are subjects of taxation.[6] Taxes on real estate are based

[5] Quoted in Note 1, supra.

[6] In *City of St. Louis* v. *The Wiggins Ferry Co.,* 11 Wall. 423, 20 L.Ed. 192 (1871), on the question of state power to tax, the court said: "The authority extends over all persons and property within the sphere of its territorial jurisdiction. * * * Where there is jurisdiction neither as to person nor property, the imposition of a tax would be ultra vires and void. If the legislature of a state should enact that the citizens or property of another state or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislation as to valid judicial action."

Union Refrigerator Transit Company v. *Kentucky,* 199 U.S. 194, 26 Sup. Ct. 36, 50 L.Ed. 150 (1905). In this case the court used the following language: "It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of state laws limited to persons and property within the boundaries of the state, but property which is wholly and exclusively within the jurisdiction of another state receives none of the protection for which the tax is supposed to be the compensation."

on jurisdiction over property. A capitation tax is based on jurisdiction over persons. An inheritance tax on the transfer of real estate is based on jurisdiction over property,[7] while an inheritance tax on the transfer of intangible securities, excluding the question of "business situs," depends upon personal jurisdiction.[8]

Business is sometimes spoken of as constituting an independent subject of taxation.[9] But this is an inaccurate and confusing use of terms, and it is preferable to consider a tax laid upon business as such, as relating essentially to the services of persons or to the employment of capital, or to a combination of these factors, and therefore dependent on power over the persons and/or property generating the business activity referred to in the taxing law.

To what extent does the right of a state to tax the income of a foreign corporation depend on jurisdiction over the *person* of the taxpayer? As to individuals domiciled within the state, the fact of domicile unquestionably confers jurisdiction to impose a tax upon income derived by such persons from sources outside as well as within the taxing state. Thus in *Lawrence* v. *State Tax Commission of Mississippi,*[10] a citizen of Mississippi challenged the power of that state to tax him upon income derived from his business of building roads in Tennessee. In upholding the validity of the statute under which the assessment was made the supreme court said:

"The obligation of one domiciled within a State to pay taxes there, arises from the unilateral action of the State Government in the exercise of the most plenary of sovereign powers, that to raise revenue to defray the expenses of government and to distribute its burdens equably among those who enjoy its benefits. Hence, domicile in itself establishes a basis for taxation. Enjoyment of the privileges of residence within the State, and the attendant right to invoke the protection of its laws are inseparable from the responsibility for sharing the costs of government. * * *

"It is enough, so far as the constitutional power of the State to levy it is concerned, that the tax is imposed by Mississippi on its own citizens with reference to the receipt and enjoyment of income derived from the conduct of business, regardless of the place where it is car-

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[7] There is an interesting discussion on this point in Stimson, "Jurisdiction and Power of Taxation," (1933) pp. 73 et seq.

[8] *Farmers Loan & Trust Company* v. *Minnesota,* 280 U.S. 204, 50 Sup. Ct. 98, 74 L.Ed. 371 (1930).

[9] In *The Cleveland, Painesville & Ashtabula R. R. Co.* v. *Commonwealth of Pennsylvania,* 15 Wall. 300, 21 L.Ed. 179 (1873), where a state tax was levied on foreign held bonds, the court said: "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property and business. Whatever form taxation may assume, whether as duties, imposts, excises or licenses, it must relate to one of these subjects."

[10] 286 U.S. 276, 52 Sup. Ct. 556, 76 L.Ed. 1102 (1932).

ried on. The tax, which is apportioned to the ability of the taxpayer to bear it, is founded upon the protection afforded to the recipient of the income by the State, in his person, in his right to receive the income, and in his enjoyment of it when received."

A similar exercise of jurisdiction was involved in a Wisconsin case in which the court sustained an assessment of income tax upon royalties received by a Wisconsin corporation from the operation of iron mines located in Michigan.[11] The validity of such taxing power over domestic corporations has been expressly recognized by the United States Supreme Court in upholding a franchise tax under a North Dakota statute computed upon the entire value of the stock of a domestic corporation which had no business or tangible property whatever within the taxing state.[12] In the last cited case the court said:

"The company was confessedly domiciled in North Dakota for it was incorporated under the laws of that state. * * * The fact that its property and business were entirely in another state did not make it any the less subject to taxation in the state of its domicile."

By virtue of sovereignty over the person of its citizens the United States government taxes the income of domestic corporations derived from foreign sources.[13] The decisions holding the whole income of residents, regardless of the sources whence derived, to be a taxable subject within the domiciliary state's power, may be explained by considering the tax as an excise on the receipt of income or on the privilege of receiving it, and by treating all such income as received in the state of domicile or the privilege exercised therein with respect to all income received.[14]

Jurisdiction which is based on the domicile of the taxpayer obviously cannot support an income tax imposed upon foreign corporations nor upon individuals domiciled outside the taxing state. Even the federal government does not claim the power to tax non-resident aliens or foreign corporations upon income earned abroad. As to such persons only income derived from sources within the United States is subjected to tax,[15] the reason for the restriction being that the tax is proper only to the extent of income "earned under the protection of Amer-

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[11] *Pfister Land Co.* v. *Milwaukee,* 166 Wis. 223, 165 N.W. 23 (1917).

[12] *Cream of Wheat Company* v. *Grand Forks County,* 253 U.S. 325, 40 Sup. Ct. 558, 64 L.Ed. 931 (1920).

[13] *William E. Peck & Co., Inc.* v. *Lowe,* 247 U.S. 165, 38 Sup. Ct. 432, 62 L. Ed. 1049 (1917); *National Paper & Type Company* v. *Bowers,* 266 U.S. 373, 45 Sup. Ct. 133, 69 L.Ed. 331 (1924); *Barclay & Co.* v. *Edwards,* 267 U.S. 442, 45 Sup. Ct. 348, 69 L.Ed. 703 (1925).

[14] See Henry Rottschaefer, "State of Jurisdiction of Income for Tax Purposes," 44 Har. Law Rev. 1075 (1931).

[15] Revenue Act of 1932, sec. 211; sec. 231.

ican laws."[16] The principle that taxation is justified only by an equivalent rendered to the taxpayer by the government has been expressed by the United States Supreme Court in the following language:[17]

"The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares,—such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another state, to which it may be said to owe an allegiance, and to which it looks for protection, the taxation of such property within the domicile of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the legislature, and a taking of property without due process of law."

If income taxes be thus regarded as the price of governmental protection and services rendered to the property and person of the taxpayer, there is a logical basis for a difference of treatment as between residents and non-residents, for the law of the state of domicile confers upon its individual and corporate citizens a considerable number and variety of rights and privileges which are not conferred by any other law.[18] In return for these special rights and privileges the domiciliary state may tax the whole income of its citizens. But the non-resident of a state receives from its laws a lesser measure of rights, protection and privileges, and it is but just and appropriate that his burden of income tax should be reduced accordingly. Likewise in the case of foreign corporations.

Upon the basis of this reasoning has developed the principle that the power of a state to levy income taxes upon non-resident individuals and foreign corporations extends only to income derived from sources within the taxing state. The United States Supreme Court has adopted the conclusion that any income tax which violates the principle referred to is repugnant to the due process clause of the Fourteenth Amendment. The power of taxation is based upon the assumption of an equivalent rendered to the taxpayer. In the case of a foreign corporation the taxing state renders no such equivalent save as regards income earned under the protection of its laws, and to impose a tax on other income takes the taxpayer's property without due process of law, i. e., without

[16] *National Paper & Type Co.* v. *Bowers*, 266 U.S. 373, 45 Sup. Ct. 133, 69 L.Ed. 331 (1924).

[17] *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U.S. 194, 26 Sup. Ct. 36, 50 L.Ed. 150 (1905).

[18] For the purposes of this discussion every corporation is regarded as domiciled in the state of its origin and as a nonresident elsewhere.

rendering any equivalent for the burden. This conclusion, while implied in earlier decisions, was first declared in positive terms in *Hans Rees Sons, Inc.* v. *North Carolina.*[19] In that case the taxpayer, a New York corporation which operated a leather tannery in North Carolina. challenged the validity of an income tax assessment based on an apportionment formula under the North Carolina statute, on the ground that the effect of the law was to tax a greater proportion of the taxpayer's income than was actually derived from sources within that state. This contention was sustained by the court and the assessment was declared beyond the authority of the taxing state and therefore void under the due process clause of the Fourteenth Amendment.

When a state lays an income tax upon a foreign corporation by reason of business transacted or property located within the taxing state, is such legislative act based on jurisdiction over the taxpayer's *person* or on jurisdiction over *property?* This is a controverted question. It has been stated by eminent authority that only the state of domicile has jurisdiction to impose a personal tax.[20] If so, then the income tax on a foreign corporation is not a personal tax. This view is supported by the following language of the Supreme Court used in upholding an Oklahoma tax on income of a non-resident derived from the production and sale of oil in that state:

" * * * the very fact that a citizen of one state has the right to hold property or carry on an occupation or business in another is a very reasonable ground for subjecting such non-resident, although not personally, yet to the extent of his property held, or his occupation or business carried on therein, to a duty to pay taxes not more onerous in effect than those imposed under like circumstances upon citizens of the latter state. * * *

"The entire jurisdiction of the state over appellant's property and business and the income that he derived from them—the only jurisdiction that it has sought to assert—is a jurisdiction in rem; and we are clear that the state acted within its lawful power in treating his property interests and business as having both unity and continuity."[21]

Similar language was used by the circuit court of appeals in deciding the *Shaffer* case.[22]

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[19] 283 U.S. 123, 51 Sup. Ct. 385, 75 L.Ed. 879 (1930). See also the annotation to this case in 75 L. Ed. 879 dealing with many of the questions discussed above.

[20] Joseph H. Beale, "Jurisdiction To Tax": 32 Har. Law Rev. 587, 589 et seq. (1919).

[21] *Shaffer* v. *Carter,* 252 U.S. 37, 40 Sup. Ct. 221, 64 L.Ed. 445 (1920).

[22] *Shaffer* v. *Howard,* 250 Fed. 873 (E. D. Okla., 1918). In upholding the assessment the court said: "Unless the state has given protection or benefit to this income, it has no reason or right to ask contribution therefrom. * * * It does not necessarily follow from this definition that the plaintiff is subject to income tax only in the state of his residence. It means, rather, that he is subject to income taxation only in those jurisdictions which protect him in the produc-

To describe as "jurisdiction *in rem*," the power exercised by a state in levying income taxes on non-residents by reason of business activties within the taxing state, does not clarify the discussion.[23] The suggested definition is inconsistent with the commonly accepted idea that income taxes are not levied upon, or in respect of, property, but in every case upon the person of the recipient of the income. As stated by the supreme court of Wisconsin:

"It is the recipient of the income that is taxed—not his property—and the vital question in each case is, has the person sought to be taxed received an income during the tax year? * * * If the person sought to be taxed is the recipient during the tax year of such specific property as income in its ordinary significance, then the person is taxed. But the tax is upon the right or ability to produce, create, receive, and enjoy, and not upon specific property. Hence, the amount of the tax is measured by the amount of the income irrespective of the amount of specific property or ability necessary to produce or create it."[24]

The income tax, according to the Wisconsin court, "is laid upon the individual in proportion to his ability to pay, such ability being measured by his income."[25] It is "not levied upon property, funds, or profits, but upon the right of an individual or corporation to receive in-

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tion, creation, receipt, and enjoyment of his income. If he lives in Illinois, and has in Oklahoma the property or the business from which his income flows, does not the latter state truly protect him in the privilege of producing, creating, receiving, and enjoying that income when it permits and protects his business from which the income flows? * * * Both the property in Oklahoma and the intelligence in Illinois contributed to this income. Each was necessary to the result. Each had protection from the state in which it was. It is impossible to separate the two elements for taxation purposes. It is impossible, if material, to determine which was most potent in the result. Can either state be told it cannot be compensated for its protection of a necessary component element of this income, or that it cannot measure such compensation by that income? * * * It may be true that the state which protects the person of the one who creates, receives or enjoys an income may require of him therefor a tax measured by his ability to pay from his entire income. That is no reason why the state which protects the business which contributes to his income may not also demand demand as pay for that protection a tax measured by that part of his income which came from that business. * * *

"A tax upon an income of the instant character is directed at neither the person who receives nor the property from which the income arises, but at the privilege of making, producing, creating, receiving, and enjoying the income itself. The right to lay such tax depends upon the protection of the person who receives or of the business which helps create that income."

[23] The power of government to enforce payment of personal income taxes out of property of the taxpayer within the jurisdiction might warrant the use of the phrase "jurisdiction in rem" in those cases where such property is actually present, but the expression cannot aptly be applied to the jurisdiction to lay income taxes on persons who transact business and earn income in a state but own no property therein.

[24] *State ex rel. Sallie F. Moon Co.* v. *Wisconsin Tax Commission,* 166 Wis. 287, 163 N.W. 639 (1917).

[25] *State ex rel. Stern Milling Company* v. *Wisconsin Tax Commission,* 170 Wis. 506, 175 N.W. 931 (1920).

come or profits."[26] "In the ordinary acceptation of the term, this may be said to be tax upon income as the statute denominates it."[27] If it be necessary to classify the income tax within one of the recognized classifications of taxes, it is probably an excise tax. However, in popular understanding, it is a personal tax, measured by one's ability to pay. This is also the economic view. It is an annual tax."[28]

It may be that the court resorted to the expression "jurisdiction *in rem*" in *Shaffer* v. *Carter*[29] in order to avoid classifying the tax as a *personal* tax, in deference to the assumption that a personal tax may not be levied outside the state of the taxpayer's domicile. This question of terminology and classification may be disposed of for practical purposes by regarding the personal presence of the foreign corporation in the taxing state as a sufficient warrant for the latter's authority to impose an income tax, such authority being limited, however, to income from property located or business carried on in that state.

In assessing the income of a foreign corporation engaged in manufacturing or mercantile business both within and without the boundaries of a given state, the latter is permitted to apportion the total net income derived by the taxpayer from such business on the basis of any formula which operates to allocate to the taxing state no more than its fair share of the income.[30] The Wisconsin statute employs a rather complex ratio based upon three factors involving the amount of the taxpayer's sales, the value of its tangible property and the total costs of its manufacturing operations.[31]

Allocation formulae are permissible, however, only to the extent that the taxpayer's business carried on within the taxing state is in fact "unitary" with operations carried on outside that state; and lines of productive activity outside the taxing jurisdiction which are distinct from activities within that state must be excluded from apportionment calculations. Thus the Standard Oil Company of Indiana which was

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[26] *Paine* v. *City of Oshkosh*, 190 Wis. 69, 208 N.W. 790 (1926).
[27] *State ex rel. Sallie F. Moon Company* v. *Wisconsin Tax Commission*, supra.
[28] *Fitch* v. *Wisconsin Tax Commission*, 201 Wis. 283, 230 N.W. 37 (1930).
[29] Cited in Note 21, supra.
[30] In *Underwood Typewriter Company* v. *Chamberlain*, 254 U.S. 113, 41 Sup. Ct. 45, 65 L.Ed. 165 (1920), the court sustained a Connecticut income tax on a foreign corporation whose manufacturing operations were wholly within the state and whose selling operations were outside the state, computed on the ratio between the value of the taxpayer's tangible property within Connecticut and the total value of the company's tangible property everywhere. It was held that such method of apportionment was reasonably appropriate, there being no evidence to the contrary. While the tax here involved was a franchise tax measured by net income, the court treated it as if it were a tax directly on income and said the distinction was not material.
[31] Section 71.02 (3) (d), Wis. Stats., 1931. A careful analysis of the operation of the Wisconsin apportionment formula is contained in an article by Frederic Sammond. "Three Common Constitutional Misconceptions of Income Tax Law," 8 Wis. Law Rev. 199 (1933).

engaged in North Dakota in selling petroleum products which were extracted and refined outside that state was held entitled to exclude all operations pertaining to its extraction and refining business from the calculation of income on which it was taxable in North Dakota.[32] A similar result was reached in Wisconsin. In other words, income from foreign sources which is capable of segregation must be segregated and excluded from apportionment formulae.[33]

It has long been settled that a state is not restricted by the commerce clause in the federal constitution in applying its income tax to persons carrying on business subject to its laws, by reason of the fact that the incomes of such persons may be derived in part from interstate commerce. Such a tax, correctly apportioned as explained above, does not constitute an undue burden on interstate commerce.[34]

The holding of the supreme court in the *Hans Rees Sons, Inc.* case[35] to the effect that the only income on which a foreign corporation may be taxed by any state is income earned within that state, is based on the Supreme Court's conviction that multiple taxation is unfair. By multiple taxation is meant the imposition of a tax upon the identical subject-matter by more than one state. Thus multiple taxation results if the owner of an automobile is required to pay a property tax thereon in the state of his residence and also in another state where the car is habitually kept. Undesirable results which are inevitably produced by such multiple taxation led the supreme court to adopt the rule that multiple taxation is contrary to the due process clause of the Fourteenth Amendment.

The principle referred to was first developed in relation to property taxes in *Union Refrigerator Transit Company* v. *Kentucky.*[36] In that case the question was whether or not the state of Kentucky had power to impose a tax on refrigerator cars owned by a domestic corporation but located permanently outside the state of Kentucky. The assessment was held illegal upon the ground that the state had no jurisdiction to tax personal property permanently located outside its borders. A simi-

[32] *Standard Oil Company* v. *Thoresen,* 29 F. (2d) 708 (C.C.A. 8th. 1929).
[33] *Standard Oil Company* v. *Tax Commission,* 197 Wis. 630, 223 N.W. 85 (1929).
[34] *United States Glue Company* v. *Town of Oak Creek,* 247 U.S. 321, 38 Sup. Ct. 499, 62 L.Ed. 1135 (1918). But a foreign corporation whose intrastate activities consist merely in the solicitation of orders for merchandise subject to acceptance at the corporation's office in another state and filled by shipments in interstate commerce cannot be subjected to a local franchise tax. *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U.S. 203, 45 Sup. Ct. 477, 69 L.Ed. 916 (1925). A state may not impose a franchise tax on a foreign corporation whose intrastate activities consist in selling merchandise contained in original packages imported from abroad. *Anglo Chilean Nitrate Sales Corp.* v. *Alabama,* 288 U.S. 218, 53 Sup. Ct. 373, 77 L.Ed. 710 (1933). See also the treatment of the subject of interstate commerce in Frederic Sammond's article, cited in Note 31, supra.
[35] Cited in Note 19, supra.
[36] Cited in Note 17, supra.

lar result was reached recently in *Johnson Oil Refining Company* v. *State of Oklahoma.*[37] The latter case involved the validity of an assessment of property taxes on a fleet of railroad tank cars owned by a foreign corporation and used to transport oil from a refinery in Oklahoma to delivery points in other states. The state undertook to tax the entire value of the fleet notwithstanding the fact that each car was physically outside Oklahoma the greater part of the tax year. In holding that the tax exceeded the constitutional power of the state, the court said that "the jurisdiction of Oklahoma to tax property of this description must be determined on a basis which is consistent with the like jurisdiction of other states" and concluded that the amount of the taxpayer's property habitually employed in the taxing state might be fairly determined by taking the average number of cars physically present therein.

The idea that the Fourteenth Amendment prohibits multiple taxation has been recently extended to limit the power of the states with respect to inheritance taxes. In *Frick* v. *Pennsylvania*[38] the question was whether or not the transfer of tangible personal property located in New York and Massachusetts owned by a decedent whose domicile was in Pennsylvania could be subjected to the Pennsylvania inheritance tax. The court answered this question in the negative.[39]

In a line of cases beginning with *Farmers Loan & Trust Company* v. *Minnesota*[40] the supreme court has taken the position that the Four-

[37] 54 Sup. Ct. 152, 78 L.Ed. 130 (1933).

[38] 268 U.S. 473, 45 Sup. Ct. 603, 69 L.Ed. 1058 (1925).

[39] In discussing the question of jurisdiction the court said: "This precise question has not been presented to this court before, but there are many decisions dealing with cognate questions which point the way to its solution. These decisions show, first, that the exaction by a state of a tax which it is without power to impose is a taking of property without due process of law in violation of the Fourteenth Amendment; secondly, that while a state may so shape its tax laws as to reach every object which is under its jurisdiction it cannot give them any extraterritorial operation; and, thirdly, that as respects tangible personal property having an actual situs in a particular state, the power to subject it to state taxation rests exclusively in that state, regardless of the domicile of the owner."

[40] 280 U.S. 204, 50 Sup. Ct. 98 (1930). This decision was followed by *Baldwin* v. *Missouri,* 281 U.S. 586, 50 Sup. Ct. 436, 74 L.Ed. 1056 (1930); *Beidler* v. *South Carolina Tax Commission,* 282 U.S. 1, 51 Sup. Ct. 54, 75 L.Ed. 131 (1930); *First National Bank of Boston* v. *Maine,* 284 U.S. 312, 52 Sup. Ct. 174, 76 L.Ed. 313 (1932). In this case was involved the validity of an inheritance tax assessed by the state of Maine upon the transfer of stock in a Maine corporation owned by a decedent who was domiciled in Massachusetts at the time of his death. The assessment was held invalid upon the ground that Maine had no jurisdiction in the premises. Summing up the effect of the decisions last cited the court said: "The rule of immunity from taxation by more than one state, deducible from the decisions in respect of these various and distinct kinds of property, is broader than the applications thus far made of it. In its application to death taxes, the rule rests for its justification upon the fundamental conception that the transmission from the dead to the living of a particular thing, whether corporeal or incorporeal, is an event which cannot take place in two or more states at one and the same time. In respect of tangible property, the opposite view must be rejected as connoting a physical im-

teenth Amendment prohibits multiple inheritance taxes upon the transfer of intangible personal property, and that the state of the owner's domicile at the time of death is the only state wherein such property has a *situs* for the purpose of death transfer taxes.[41] While this conclusion was arrived at over the vigorous and repeated dissent of several members of the court, and while the reasoning of the majority may not be invulnerable, there is scarcely any question that the practical result of the rule as announced is desirable and beneficial.[42]

It remains to test the validity of the Wisconsin enactment[43] which taxes the investment income of foreign corporations having their principal business in Wisconsin, in the light of the principles of jurisdiction referred to in the foregoing discussion.[44] The power of the domiciliary state to tax its own residents as well as all corporations organized under its laws upon the whole net income of such taxpayers from whatever sources derived, can hardly be questioned. It is true that double taxation would result in case a Delaware corporation should be taxed by the latter state upon all of its income including that derived from sources in other states, provided the latter states also should tax their proportionate share of such income determined by proper rules of apportionment. It might be logical and desirable to place a limit upon the power of the domiciliary state as regards taxes upon income earned from business carried on in other states, in accordance with the restriction imposed upon non-domiciliary states in that respect; and conceivably the supreme court may hereafter develop such a restriction, but for the purpose of the present discussion it is enough to say that no such limitation now exists. It may therefore be stated without reservation that the state wherein a corporation is organized may tax it upon its whole income including interest, dividends, royalties and profits

possibility; in the case of intangible property, it must be rejected as involving an inherent and logical self contradiction. Due regard for the processes of correct thinking compels the conclusion that a determination fixing the local situs of a thing for the purpose of transferring it in one state carries with it an implicit denial that there is a local situs in another state for the purpose of transferring the same thing there. The contrary conclusion as to intangible property has led to nothing but confusion and injustice by bringing about the anomalous and grossly unfair result that one kind of personal property cannot, for the purpose of imposing a transfer tax, be within the jurisdiction of more than one state at the same time, while another kind, quite as much within the protecting reach of the Fourteenth Amendment, may be, at the same moment, within the taxable jurisdiction of as many as four states, and by each subjected to a tax upon its transfer by death, an event which takes place, and in the nature of things can take place, in one of the states only."

[41] The court reserved the right to apply a different rule in the case of property having a "business situs" outside the state of the owner's domicile.

[42] See, Charles F. B. Lowndes, "The Passing of Situs—Jurisdiction to Tax Shares of Corporate Stock," 45 Har. Law Rev. 777 (1932).

[43] Section 71.02 (3) (e), Wis. Stats., 1931.

[44] See, Thomas G. Frost, "The Power of the States to Domesticate Foreign Corporations for Income Tax Purposes," American Law Review, January-February, 1925.

from the sale of intangible capital assets, as well as income derived from manufacturing or commercial activities. This is true regardless of the location of the principal business of such taxpayer.

It follows from this that a Delaware corporation engaged in manufacturing in Wisconsin and carrying on in that state its "principal business"[45] would be taxable upon its income from intangible personalty in the state of its domicile as well as in the state of Wisconsin. It follows further that if Wisconsin could tax such income, so could any other state wherein the corporation happened to be carrying on any local manufacturing business, for the location of the taxpayer's "principal business" is a fact without significance so far as jurisdiction to levy income taxes is concerned, and a state, wherein a foreign corporation carried on any local business whatever, would have, as regards the taxation of income from investments, the same measure of constitutional power as the state containing the location of the taxpayer's "principal business."

The statutory provision in question therefore would permit multiple taxation, and to uphold its validity would be wholly inconsistent with the thought of the supreme court expressed in its most recent declarations on that subject.[46] The clause represents a frank attempt to tax non-residents upon income earned beyond the protection of the laws of the taxing sovereignty and respecting which the latter renders no equivalent to the taxpayer. In the ordinary case a foreign corporation's income from investments would be entirely dissociated from its local manufacturing or commercial activities, as in the example suggested on page 69 *ante,* and would have no taxable situs except at the domicile of the recipient. Consequently a tax on such receipts would not be compensated by any equivalent rendered to the taxpayer by the state of Wisconsin and would fall squarely within the condemnation of the rule applied in *Hans Rees Sons, Inc.* v. *North Carolina,*[47] requiring such a compensatory equivalent.

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[45] The meaning of this vague term presents an interesting field of inquiry which has not been touched upon in this discussion. It may be that the authors of the law intended to imitate the provisions of the English statute under which corporations and individuals are subject to income tax at their place of residence and a corporation is deemed to reside at the place where it is managed. Stimson, op. cit., p. 88.

[46] Could the provision be sustained as a condition attached by the laws of Wisconsin to the right of a foreign corporation to enter the state to carry on local business? This question must be answered in the negative because a state has no power to condition the right of a foreign corporation to do local business upon the corporation's consent to an illegal exaction in the form of a tax contravening constitutional guarantees. *People ex rel. Alpha Portland Cement Co.* v *Knapp,* 230 N.Y. 48, 129 N.E. 202 (1920); *State of Washington* v. *Superior Court,* 289 U.S. 361, 53 Sup. Ct. 624, 77 L.Ed. 1256 (1933).

[47] Cited in Note 19, supra.