# BUSINESS SITUS AS BASIS OF PROPERTY TAXATION OF INTANGIBLES[1]

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## I. INTRODUCTION

It has long been recognized that the rule that property is subject to taxation at its situs, while readily understood with respect to tangibles, is, in itself, meaningless when applied to intangible property. Because it is without physical characteristics, it can obviously have no location in space. The resort to a fiction by the attribution of a tax situs to an intangible is, therefore, only a means of symbolizing without fully revealing, those considerations which are persuasive grounds for deciding that a particular place is appropriate for the imposition of the tax. The reason that the old maxim of the civil law *mobilia sequuntur personam* (embodying the general principle of fixing the tax situs of intangible personalty at the owner's domicile[2]) had to admit an exception in favor of the *business* situs of intangibles,[3] as distinct from the creditor's domicile, was that

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[1] This article is based on research made by the author as an editor of the Lawyers' Cooperative Publishing Co.

[2] See, for instance, Anderson v. Durr, 100 Ohio St., 251, 126 N.E. 57, 17 A.L.R. 82 (1919); Commonwealth of Virginia v. Kernochan, 129 Va. 405, 106 S.E. 367, 30 A.L.R. 601 (1921).

[3] That intangible personal property may acquire a business situs for the purposes of property taxation in another state than the domicile of its owner is recognized, expressly or by implication, in all but one jurisdiction. Express statements to that effect have been found in the following decisions: Scottish Union & Nat. Ins. Co. v. Bowland, 196 U.S. 611, 25 Sup. Ct. 346, 49 L. ed. 619 (1905); Commonwealth of Virginia v. Imperial Coal Sales Co., 293 U.S. 15, 55 Sup. Ct. 12, 79 L. ed. 171 (1934); First Bank Stock Corporation v. Minnesota, 301 U.S. 234, 57 Sup. Ct. 677, 81 L. ed. 1061, 113 A.L.R. 223 (1937) (*affirming* 197 Minn. 544, 267 N.W. 519, 269 N.W. 37); Curry v. McCanless, 307 U.S. 357, 59 Sup. Ct. 900, 83 L. ed. 1339, 123 A.L.R. 162 (1939); Western Assur. Co. v. Halliday, 61 C.C.A. 271, 126 Fed. 257, *cert. denied* 193 U.S. 673, 24 Sup. Ct. 854, 48 L. ed. 841 (1904); Smith *et al.* v. Ajax Pipe Line Co., C.C.A. Mo., 87 F. (2d) 567 (1937), *cert. denied* 57 Sup. Ct. 670, 81 L. ed. 882; Tennessee Coal, Iron & R. Co. v. State, 239 Ala. 19, 193 So. 143 (1939); State Tax Commission et al. v. Shattuck *et al.*, 44 Ariz. 379, 38 P. (2d) 631 (1934); Oglesby v. Pacific Finance Corp. of California, 44 Ariz. 449, 38 P. (2d) 646 (1934); Maricopa County v. Trustees of Arizona Lodge, 52 Ariz. 329, 80 P. (2d) 955 (1938); Brophy *et al.* v. Powell, 58 Ariz. 543, 121 P. (2d) 647 (1942); People v. Home Ins. Co., 29 Cal. 533 (1866); Miller v. McColgan, 17 Cal. (2d) 432, 110 P. (2d) 419, 134 A.L.R. 1424 (1941); Holly Sugar Corp. v. McColgan, 18 Cal. (2d) 218, 115 P. (2d) 8 (1941); Manufacturers' Trust Co. v. Hackett, 118 Conn. 101, 170 A. 792 (1934); Starkey v. Carson, 138 Fla. 311. 189 So. 389 (1939); Wood v. Ford, 148 Fla. 66, 3 So. (2d) 490 (1941); Smith *et al.* v. Lummus *et al.*, 149 Fla. 660, 6 So. (2d) 625 (1942); Suttles v. Northwestern Mut. Life Ins. Co., 193 Ga. 495, 19 S.E. (2d) 396, 143

it gradually lost its economic foundation and found itself in conflict with the basic justifications for governmental taxing power.[4] One hundred years ago, the court declared in *Catlin v. Hull*[5] "we think it entirely just and equitable that, if persons residing abroad bring their property and invest it in this state for the purpose of deriving profit from its use and employment here, and thus avail themselves of the benefits and advantages of our laws for the protection of their property, their property should yield its due proportion towards the support of the government which thus protects it." Very similar language was used by the United States Supreme Court

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A.L.R. 343 (1942); W. R. Roach & Co. v. Harding (Hoopeston Canning Co. v. Same), 348 Ill. 454, 181 N.E. 331 (1932); People v. McGraw Electric Co., 375 Ill. 241, 30 N.E. (2d) 903 (1940); Commonwealth v. B. F. Avery & Sons, 163 Ky. 828, 174 S.W. 518 (1915); Standard Marine Ins. Co. v. Board of Assessors, 123 La. 717, 49 So. 483, 29 L.R.A. (N.S.) 59 (1909); State v. Northern Pacific R. Co., 95 Minn. 43, 103 N.W. 731 (1905); State v. Northern Pacific R. Co., 139 Minn. 473, 167 N.W. 294 (1918); Mecklenburg County *et al.* v. Sterchi Bros. Stores, Inc., 210 N.C. 79, 185 S.E. 454 (1936); Newark Fire Ins. Co. v. State Board of Tax Appeals, *et al.*, 118 N.J.L. 525, 193 A. 912 (1937), *aff'd.* 120 N.J.L. 224, 198 A. 837 (1938), *aff'd.* 307 U.S. 313, 59 Sup. Ct. 918, 83 L. ed. 1312; British Commercial Life Ins. Co. v. Commissioners of Taxes and Assessments, 31 N.Y. 32, 18 Abb. Pr. 118, 130 (1865); Grieves v. State *ex rel.* County Attorney *et al.*, 168 Okla. 642, 35 P. (2d) 454 (1934); State v. Atlantic Oil Producing Co., 174 Okla. 61, 49 P. (2d) 534 (1935); Ford Motor Co. v. State, 178 Okla. 193, 62 P. (2d) 48 (1936); Shidler v. Ross *et al.*, 189 Okla. 65, 113 P. (2d) 603 (1941); Commonwealth v. Stewart, 338 Pa. 9, 12 A. (2d) 444 (1940); Edwards v. Cardarelli *et al.*, 65 R.I. 236, 14 A. (2d) 693 (1940); State of Texas v. Fidelity and Deposit Co., 35 Tex. Civ. App. 214, 80 S.W. 544 (1904); Texas Land & Cattle Co. v. City of Fort Worth, ...... Tex. Civ. ......, 73 S.W. (2d) 860 (1934), *app. dismissed* 295 U.S. 716, 79 L. ed. 1672, *rehearing denied*, 295 U.S. 769, 79 L.ed. 1710; *In re* Wheeling Steel Corporation Assessment,115 W. Va. 553 177 S.E. 535, 104 A.L.R. 802 (1934), aff'd., Wheeling Steel Corporation v. Fox, 298 U.S. 193, 56 Sup. Ct. 773, 80 L. ed. 1143 (1936); *In re* Ingram (Ingram v. State), 236 Wis. 449, 295 N.W. 749 (1941).

Michigan is the only jurisdiction which still adheres to the common law principle of situs of the owner's domicile for intangibles without recognizing the exception of business situs where the latter is not expressly provided for by statute. See, *In re* Dodge Brothers, 241 Mich. 665, 217 N.W. 777 (1928), and Reliable Stores Corp. v. City of Detroit, 260 Mich. 2, 244 N.W. 208 (1932) where it was said that the court must presume that the Legislature, in amending the statute governing corporation privilege taxes by providing expressly a business situs for intangible property "irrespective of the domicile of the corporation" without making such a change in the general tax laws, intended that the common-law rule of domiciliary situs to continue to govern general taxation of property, and that, therefore, "it would be no less than usurpation of legislative power for this court to adopt and apply the doctrine of business situs to intangible property for the purpose of taxation." The court there concluded: "The situs of domicile, with reference to intangibles, is not at all affected by the mere place of business, for the law, short of statute to a different end, does not admit of a so-called business situs changing or interfering with the situs of domicile."

[4] Newark Fire Ins. Co. v. State Board of Tax Appeals *et al.*, 118 N.J. Law 525, 193 Atl. 912 (1937), *aff'd.* 120 N.J.L. 224, 198 Atl. 837 (1938), *aff'd.* 307 U.S. 313, 59 Sup. Ct. 918, 83 L. ed. 1312 (otherwise not in point).

[5] Catlin v. Hull, 21 Vt. 150, *152 (1849).

in the recent cases of *People v. Graves*[6] and *First Bank Stock Corp. v. State of Minnesota*[7] where it was pointed out that enjoyment by the resident of a state of the protection of its laws is inseparable from responsibility for sharing the costs of its government, and that a tax measured by the value of rights protected is but an equitable method of distributing the burdens of government among those who enjoy its benefits.

Another angle of more practical economic nature found in several decisions[8] is the consideration that a foreign corporation, by establishing a business situs in the state, enters into competition with local business and should not be in a more advantageous position in regard to taxation than it.

While the rule is settled that intangible property which has acquired a business situs in a state other than the domicile of the owner is taxable in such state,[9] no such unanimity of opinion exists

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[6] People v. Graves, 300 U.S. 308, 57 Sup. Ct. 466, 81 L. ed. 666, 108 A.L.R. 721 (1937).

[7] First Bank Stock Corporation v. Minnesota, 301 U.S. 234, 57 Sup. Ct. 677, 81 L. ed. 1061, 113 A.L.R. 278 (1937) (affirming, 197 Minn. 544, 267 N.W. 519, 269 N.W. 37).

An example for analogous language of state courts is Smith v. Lummus, *et al.*, 149 Fla. 660, 6 So. (2d) 625 (1942), where the court said: "The purpose of taxation being collection of money by the sovereign to meet the public needs and the cost of the maintenance of government itself it seems fundamental that there should be a corresponding privilege and protection for which taxation is imposed. Therefore, if one domiciled in one state is maintaining a business in another and receiving all the advantages that the government of the latter and its various branches afford in the protection and the maintenance of the business a resulting obligation arises on the part of the taxpayer to pay his proportionate share in taxes to the public exchequer.

"It seems to us from our study of the authorities that the exception to the rule that the tax on intangible personal property should be levied at the domicile of the owners arises in those cases where, because of activity in another state involving the property, they receive such benefits and protection under the laws of that state that they should make a contribution to its government."

[8] Manufacturers' Trust Co. v. Hackett, 118 Conn. 101, 170 Atl. 792 (1934); Mecklenburg County et al. v. Sterchi Bros. Stores, Inc., 210 N.C. 79, 185 S.E. 454 (1936).

[9] There is no question as to the power of the state to tax intangibles of a nonresident having a business situs in the state. Statutes specifically taxing intangibles of nonresidents in the state have generally been upheld. See: Wheeling Steel Corporation v. Fox, 298 U.S. 193, 56 Sup. Ct. 773, 80 L. ed. 1143 (1936), *affirming In re* Wheeling Steel Corp. Assessment, 114 W. Va. 553, 177 S.E. 535, 104 A.L.R. 802 (1934) which upheld the constitutionality of a state statute providing for the taxation of all intangible property by the state of "each incorporated company foreign or domestic having its chief place of business in this state" and declared that no violation of due process was involved in the taxation of intangible property of a corporation by the state in which it maintains its general business office, though it maintained a so-called "principal office" in the state under the law of which it was chartered. *See also* Bemis Bro. Bag Co. v. Louisiana Tax Commission, 158 La. 1, 103 So. 337 (1925) holding a statute which

in regard to the question as to just what constitutes a business situs, for the reason that the term, being adopted by the law from the business world, is not susceptible of precise definition. Depending on different combinations of facts, it is usually described by means of examples.[10] Thus it has been said, for instance, that credits have a business situs in the state where they are evidenced by notes or obligations, held in the hands of an agent of the owner for the purpose of collection or renewal, carrying on such transactions as a permanent business.[11] Another well known statement of the rule is to the effect that whenever a lender in one state intrusts his money to the control of an agent in another state for the purpose of being kept in the latter state and loaned out, collected, and reloaned, or habitually kept on deposit for safety merely, so that through a course of dealing, it remains continuously in the state as a part of the whole mass of personal property of this state, such money acquires a busi-

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made all bills receivable, obligations, or credits arising from business done in the state by nonresidents assessable within the state at the business domicile of the nonresident, his agent or representative, not to violate the state constitutional requirement of equal and uniform taxation, or the provision against denying to nonresident corporations equal protection of the law, nor contravene the interstate commerce clause, or the provision against denial of due process of law, in the Federal Constitution. And to the same effect, State Tax Commission *et al.* v. Shattuck *et al.*, 44 Ariz. 379, 38 P. (2d) 631 (1934); Suttles v. Northwestern Mut. Life Ins. Co., 193 Ga. 495, 19 S.E. (2d) 396, 143 A.L.R. 343 (1942); Hutchinson v. Board of Equalization, 66 Iowa 35, 23 N.W. 249 (1885); Bluefields Banana Co. v. Board of Assessors, 49 La. Ann. *43, 21 So. 627 (1897); State v. First Bank Stock Corporation, 197 Minn. 544, 267 N.W. 519 (1936), *rehearing denied*, 269 N.W. 37; Mecklenburg, County v. Sterchi Bros. Stores, Inc., 210 N.C. 79, 185 S.E. 454 (1936); Hubbard v. Brush, 61 Ohio St. 252, 55 N.E. 829 (1899); Redfield v. Fisher, 135 Or. 180, 292 Pac. 813, 73 A.L.R. 721 (1930), rearg. denied 135 Or. 205, 295 Pac. 461, 73 A.L.R. 734 (1931).

[10] *See* COOLEY, TAXATION, Vol. 2 (4th ed.) §4651, pp. 1031-1037: "This business situs means, it would seem, what the words indicate, i.e., a situs in another state where a nonresident is doing business through an agent, manager or the like, in which business and as part thereof business credits, such as open accounts, notes, mortgages, deposits in bank, etc. are used and come within the protection of the state. The question arises in connection with various business transactions conducted by a person or corporation, generally through an agent, in another state; but the most common application of the rule is where a resident of one state has an agent in another state who loans money of the nonresident, more or less as a regular business, and takes care of the collections and reinvestments, in which case the notes, mortgages, etc. taken by the agent are held to be subject to taxation although the owner is a nonresident. The rule of business situs has been applied also to credits arising from loans made by agents of foreign insurance; credits arising from premiums due in connection with the local business of an insurance company; credits arising from a business in the state as a branch of the business of a foreign corporation or partnership; a branch brokerage business conducted through a local agent; and the sale of lands through agents."

[11] State Assessors v. Comptoir National d'Escompte, 191 U.S. 388, 24 Sup. Ct. 109, 48 L. ed. 232 (1903).

ness situs there for the purpose of taxation.[12] But frequently only the limitations for the doctrine of business situs are shown in the decisions of the courts by excluding certain sets of facts as insufficient to support the existence of a taxable situs apart from the domicile of the owner. For instance, it was said in a recent case[13] that a Wisconsin life insurance company which made loans secured by Georgia real estate, without reference to policyholder relationship, and through a channel entirely separate from that through which it issued insurance policies to Georgia residents, making the loans merely as a part of its general plan of investment, did not have such insurance business in Georgia as to render credits arising therefrom taxable there.

In a great number of cases, the courts have used the business situs doctrine without any attempt to develop a more abstract formula applicable to the general problem,[14] and have simply held that such situs was given in the special case at bar.

Although it appears from the foregoing illustrative statements of the doctrine of business situs for taxation purposes, apart from the owner's domicile, that the courts have not succeeded in creating a more general rule; there exist certain factors, or combinations of factors, which are so typical of the cases involving the question of business situs that the courts have had to consider their importance and influence repeatedly. As a result, some courts have formed quite definite rules, although not committing themselves as to the indispensability of the individual fact for the creation of a taxable situs.

In the following, an attempt has been made to segregate those particular facts or circumstances and to evaluate their importance

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[12] Adams v. Colonial & U. S. Mortg. Co., 82 Miss. 263, 34 So. 482, 17 L.R.A. (N.S.) 138, 100 Am. St. Rep. 633 (1903). *See also* Crane Company v. City Council of Des Moines, 208 Iowa 164, 225 N.W. 344, 76 A.L.R. 801 (1929) where it was explained that the term "business situs" means a situs in a place other than the domicile of the owner, where such owner, through an agent, manager, or the like, is conducting a business out of which credits or open accounts grow and are used as a part of the business of the agency.

[13] Suttles *et al.* v. Northwestern Mut. Life Ins. Co., 193 La. 495, 19 S.E. (2d) 396, 143 A.L.R. 343 (1942). *See also*, Wheelock, Lovejoy & Co., Inc. v. Gill, 366 Ill. 378, 9 N.E. (2d) 58 (1937).

[14] *See for example*, Smith *et al.* v. Ajax Pipe Line Co., C.C.A. Mo., 87 F. (2d) 567 (1937), *cert. denied*, 57 Sup. Ct. 670, 81 L. ed. 882, (Manufacturers' Trust Co. v. Hackett, 118 Conn. 101, 170 Atl. 792 (1934); Wheelock Lovejoy & Co., Inc. v. Gill, 366 Ill. 378, 9 N.E. (2d) 58 (1937); People v. McGraw Electric Co., 375 Ill. 241, 30 N.E. (2d) 903 (1940); Mecklenburg County *et al.* v. Sterchi Bros. Stores, Inc., 210 N. C. 79, 185 S.E. 454 (1936); Chestnut Securities Co. v. Oklahoma Tax Commission *et al.*, 173 Okla. 369, 48 P. (2d) 817 (1935); State v. Atlantic Oil Producing Co., 174 Okla. 61, 49 P. (2d) 534 (1935); *In re* United Carbon Co. Assessment, 118 W.Va. 348, 190 S.E. 546 (1937).

for the existence of a business situs in the light of the decisions of the courts. In a later chapter, the influence on the concept of business situs of the "doctrine of integration" as developed by the decisions of the United States Supreme Court is shown and the practical differences are discussed which the use of this theory may have in future cases. In order to come as near as possible to the aim of exhaustively treating this problem by considering all the decisions in point, the scope of this article must necessarily be confined, as indicated by its title, to a limited field, that is, to the question of situs in the field of property taxation, to the exclusion of transfer, inheritance, or succession taxes, and all forms of income, franchise, or excise taxation.

## II. THE ANALYTIC METHOD

### A. Continuity or Permanence

The existence of a continuous or permanent business in the state, as distinct from a temporary business or isolated transaction, has been considered by the courts to be the most important single factor, and an indispensable condition, for the taxation by the state of intangibles of a nonresident on the theory of their having a business situs in such state. All the cases consider permanency of the business as an essential feature and a fundamental condition for the existence of a tax situs and emphasize the fact that a single isolated transaction will never suffice to give the state in which it occurred taxing power.[15] But what amounts to such a permanency of business to satisfy the requirement is, apart from extreme cases, a matter which depends on the circumstances in each particular case.

#### *1. Credits*

A business situs for credits is connected with the idea of more or less permanency of location of the credit, or with a purpose to

[15] Thus, it is stated in Hinckley v. County of San Diego, 49 Cal. App. 668, 194 Pac. 77 (1920) that all cases announcing the rule with reference to a business situs suggest, as an indispensable condition of such a situs, "the necessity of something like a general or more or less continuous course of business or series of transactions within the state, as distinguished from mere sporadic and isolated transactions." Similarly in Johnson County v. Hewitt, 76 Kan. 816, 93 Pac. 181, 14 L.R.A. (N.S.) 493 (1907) the statement was made that, to establish a business situs, the element of separation from the domicile of the owner, through permanent attachment to some foreign locality, should appear, a merely transitory presence in another state of a nonresident's intangibles being insufficient to subject them to taxation. *See also* Crane Company v. City Council of Des Moines, 208 Iowa 164, 225 N.W. 344, 76 A.L.R. 801 (1929).

incorporate them, when collected, into the mass of property of the state. Sufficient permanency of business to permit the taxation of credits of a nonresident exists therefore, where the latter are held within the state by the agent of the owner with a view to new loans and carrying on such transactions on a permanent basis.[16] Similarly, solvent accounts of a corporation domiciled in another state acquire a business situs in the state in which the foreign corporation has a place of business if the business from which such accounts are derived is permanently conducted in the state by a manager or agent of the foreign corporation.[17] The average daily balance of a bank deposit created by a local agent from the collection of premiums in the course of business carried on in the state by a foreign insurance company was held to be taxable in the state, although the collections were remitted weekly to the home office, except for a balance always retained to the credit of the account.[18] When a foreign corporation operated a branch office within the state, and accounts receivable grew out of the business transacted by the branch office with customers in its particular territory, such accounts receivable were said to have acquired a business situs so as to subject such property to an *ad valorem* tax.[19] Average credits, standing on open account of a foreign corporation engaged in a permanent business, will be equally taxable if they represent capital permanently invested in the business, regardless of the individual transactions of which they are comprised.[20] The general and continuing conduct of business through a branch office, in the course of which credits arise, will give those credits a business situs within the state even when the branch office is under supervision and control of the out-of-state main office.[21]

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[16] State Assessors v. Comptoir National d'Escompte, 191 U.S. 388, 24 Sup. Ct. 109, 48 L. ed. 232 (1903); Goldgart v. People *ex rel.* Goar, 106 Ill. 125 (1883); *In re* Jefferson, 35 Minn. 215, 28 N.W. 256 (1886).

[17] Armour Packing Co. v. Savannah *et al.*, 115 Ga. 140, 41 S.E. 237 (1902); Armour Packing Co. v. City Council of Augusta, 118 Ga. 552, 45 S.E. 424, 98 Am. St. Rep. 128 (1903).

[18] New England Mut. Life Ins. Co. v. Board of Assessors, 121 La. 1067, 47 So. 27, 26 L.R.A. (N.S.) 1120 (1908). To the same effect, Bertron, Griscom, & Jenks v. City of New Orleans, 131 La. 73, 59 So. 19 (1912), and Bemis Bro. Bag Co. v. Louisana Tax Commission, 158 La. 1, 103 So. 337 (1925)

[19] Ford Motor Co. v. State, 178 Okla. 193, 62 P. (2d) 48 (1936).

[20] National Fire Insurance Company v. Board of Assessors, 121 La. 108, 46 So. 117, 126 Am. St. Rep. 313 (1908).

[21] State v. Atlantic Oil Producing Co., 174 Okla. 61, 49 P. (2d) 534 (1935): "It is generally true that the mere transitory presence of intangibles in a state foreign to their ownership or temporary presence there or location there on isolated transactions, is not sufficient in fact to establish a business situs. There must be something like a general or more or less continuous course of business or series of transactions within the state, as distinguished from mere sporadic and isolated

It seems that the requirement of permanency in regard to credits is to be judged as of the time when the credits to be taxed came into existence. In at least one decision,[22] credits belonging to a foreign corporation, extensively engaged in making loans within the state at the time it became insolvent, were held to have a business situs within the state. This result was reached although the corporation was in the process of liquidation and the credits were held by receivers, appointed with the approval of the foreign court and given power to collect the company's obligations, but given no power to make any new loans except to protect investments already made.

There are also a number of cases which show that a single credit or a series of separate credits is not sufficient for the creation of a business situs but that the credits of the nonresident must be employed, through a resident agent, in carrying on a permanent business for the owner.[23] Thus, when a foreign corporation had a place of business in the state with a manager to whom it shipped goods to be sold on thirty days' time for cash, according to the custom of merchants in the city, and the money, when collected, was remitted daily to the home office of the corporation, and none of it was invested within the state, no business situs for the purpose of taxation of those credits was held to exist.[24] Similarly, when the nonresident owner had an agent in the state to receive applications for loans but came himself to the state at regular intervals, but only temporarily, for the purpose of transacting business in reference to the credits, no basis was given for taxation in the state.[25]

In modification of a decision previously discussed[26] involving open credits, it has been held, by implication, that, in the case of an assignment of credits, the decisive time for determining the requirement of permanency of location is not the moment of their creation but the time of their assignment: a foreign corporation made a loan to a furniture company in the state and received as security a note payable at its office which note was kept at the out-of-state office

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transactions. The mere presence of safe-keeping may not amount to the establishment of a business situs; neither the mere sending of an item to an agent or attorney for collection."

[22] State v. London & Northwest American Mortg. Co., 80 Minn. 277, 83 N.W. 339 (1900).

[23] Manufacturers' Trust Co. v. Hackett, 118 Conn. 101, 170 A. 792 (1934).

[24] Vicksburg v. Armour Packing Co., ...... Miss. ......, 24 So. 224 (1898). *See also* Adams v. Colonial & U. S. Mortgage Co., 82 Miss. 263, 34 So. 482, 17 L.R.A. (N.S.) 138, 100 Am. St. Rep. 633 (1903).

[25] Hayward v. Board of Review, 189 Ill. 234, 59 N.E. 601 (1901).

[26] State v. London & Northwest American Mortg. Co., 80 Minn. 277, 83 N.W. 339 (1900) *supra*.

together with the collateral—conditional sales contracts executed by purchasers of furniture from the debtor company. The latter, acting as collecting agent for the foreign corporation, collected the assigned collateral, making monthly remittance of its collections. When it was adjudicated a bankrupt, the foreign corporation opened an office in the state for the sole purpose of collecting the outstanding installment contracts. All collections were promptly remitted to the home office and were not reinvested in this state. The court held that the solvent credits did not have such business situs in the state as to render them taxable because of the lack of permanency of location of the credits, although at the time the credits came into existence they undoubtedly were part of a continuous business.[27]

An interesting problem as to business situs arises when accounts receivable come into existence in the course of business of a large concern with offices in many states but managed and directed from one central executive office. In *American Barge Line Co. v. Board of Supervisors*[28] a foreign corporation maintained offices in several states. All the business was cleared or accounted for through the office maintained within the state where the business was principally managed and which was regarded as the chief executive office of the corporation. Payments of bills due were received there but not kept. The other offices also had important functions to perform. The corporation's property consisted of boats, barges, and accounts receivable, arising from the services which originated from the territories where the various offices were maintained. There was no evidence as to where the credits had been earned. Holding that no taxable situs of the company's property away from its domicile had been fixed, the court declared in its frequently quoted opinion:

> "Taxation is an intensely practical affair, and when capital is utilized to establish and maintain a local business of a permanent, as distinguished from a transitory, character, which is managed and protected locally, it takes on the character of a local business, regardless of foreign ownership, and is treated as having a taxable situs in such locality. The credits extended to customers in the present instance constituted a mere incident of the main business of the corporation. They were uncollected charges for services rendered by the boats and barges in transporting freight. They acquired no separate situs for any purpose. No capital was invested or reinvested

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[27] Gully v. C. I. T. Corporation, 168 Miss. 268, 150 So. 367 (1933).

[28] American Barge Line Co. v. Board of Sup'rs. of Tax of Jefferson County *et al.*, 246 Ky. 573, 55 S.W. (2d) 416 (1932).

> in the accounts, or employed in the local jurisdiction. The accounts resulted from the major activity. The right of the creditor to collect from its debtors did not bring the debts within the state in any such form or substance as to give them a taxable situs."[29]

This decision clearly shows that the permanency of business required for the establishment of a taxable situs does not refer to the continuous maintenance of offices in the state or some other permanent organization but to the permanent use of the *credits* in the state which may or may not coincide with the former, a fact frequently overlooked in practice.

### 2. *Notes and Mortgages*

Non-negotiable notes, taken by an agent of a foreign corporation in the course of its regular, continuing business of investing and reinvesting moneys within the state, and kept by him until maturity, have a business situs in the state for taxation.[30] Similarly, when a person residing in one state has an agent in another who conducts the business of his principal, and who has notes in his hands for collection and renewal, with a view to keeping up a permanent business, the situs of the notes is in the latter state.[31] Notes and mortgages of a nonresident held by an investment company with power to record, release, collect, and reinvest the proceeds, only the profits to be remitted to the owner, acquire a business situs in the state of the investment company.[32] Finally, in a Nebraska case, credits of an Illinois partnership, evidenced by promissory notes executed by residents of Nebraska in transactions with a local agent, but payable at the principal place of business of the partnership in Illinois, were held to have acquired a business situs in Nebraska because of the maintenance there of an office in charge of an agent, where an extensive commission business was transacted.[33]

But again, lack of permanency of the business will hinder the creation of a business situs. Thus, bonds, secured by a mortgage on

[29] To the same effect *see* Suttles v. Northwestern Mut. Life Ins. Co., 193 Ga. 495, 19 S.E. (2d) 396, 143 A.L.R. 343 (1942) and Commonwealth v. Madden's Executor, 265 Ky. 684, 97 S.W. (2d) 561, 107 A.L.R. 1379 (1936).

[30] Comptoir National d'Escompte de Paris v. Board of Assessors, 52 La. Ann. *1319, 27 So. 801 (1900).

[31] Jesse French Piano & Organ Co. v. Dallas, Tex. Civ. App., 61 S.W. 942 (1901).

[32] Buck v. Miami County, 103 Kan. 270, 173 Pac. 344, L.R.A. 1918 F, 1140 (1918); Hathaway v. Edwards, 42 Ind. App. 22, 85 N.E. 28 (1908).

[33] Clay, Robinson & Co. v. Douglas County *et al.*, 88 Neb. 363, 129 N.W. 548, L.R.A. 1915 C. 922, Ann. Cas. 1912 B. 756 (1911).

local realty, purchased by and sent to a foreign corporation immediately, do not acquire a business situs if they represent one isolated loan and are not purchased with money obtained from business done in the state.[34] Tax sales certificates issued by a county treasurer, bought by a nonresident, and kept part of the time at the office of the nonresident's local agent, are not taxable in the state if the owner is merely an investor and not a dealer in such property.[35]

### *3. Bank Deposits*

Since the relation between a bank and its depositors is technically that of debtor-creditor, bank deposits are subject to the same rules in regard to business situs as other debts. They are accordingly taxable by the state in which they are kept if they are maintained as incidental to the carrying on of a business in that state.[36] This principle is equally applicable when the money is sent into the state to remain on deposit permanently, when it is the accumulation of income derived from business done within the state, and even when the deposits were made simply for convenience of transmission to the principal and are not drawn against for any purposes of the business within the state. Thus, the average daily balance of a bank deposit, created by a local agent from the collection of premiums in the course of a business carried on in the state by a foreign insurance company, is considered as having a taxable situs in the state although, except for a maintained balance, the collections were remitted weekly to the home office.[37] However, this principle does not apply to bank deposits of a foreign corporation, representing money sent by it into the state for the temporary purpose of defraying current expenses of its business in the state, for which the income from

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[34] Commonwealth v. Consolidated Casualty Co., 170 Ky. 103, 185 S.W. 508 (1916).

[35] Mecartney v. Caskey, 66 Kan. 412, 71 Pac. 832 (1903).

[36] New Orleans v. Stempel, 175 U.S. 309, 20 Sup. Ct. 110, 44 L. ed. 174 (1908); New England Mut. Life Ins. Co. v. Board of Assessors, 121 La. 1068, 47 So. 27, 26 L.R.A. (N.S.) 1120 (1908).

[37] In New England Mut. Life Ins. Co. v. Board of Assessors, *supra*, the court stated that the deposit could not be said to be transient, since the average amount was constantly there, and illustrated this holding by the example that the constantly flowing river is as permanent as the fixed mountain. And Commonwealth v. R. G. Dun & Co., 126 Ky. 109, 102 S.W. 859, 10 L.R.A. (N.S.) 920 (1907) where it was said that money in the bank and unpaid claims against customers incident to a business established by a nonresident in the state in charge of an agent were not temporarily in the state so as to escape taxation by the state, although the custom existed to forward monthly to the principal the surplus of accumulations over current expenses.

the local business was not sufficient.[38] Because of a lack of permanence, a bank deposit in a local bank, made by the branch office of a foreign insurance company, representing the proceeds of the business of the branch office, was held not to have a situs there for taxation when the manager of the branch office had no authority to check against such bank deposits, and the money on deposit was promptly transferred to the home office.[39]

### B. NECESSITY FOR A LOCAL AGENT AND THE EXTENT OF HIS AUTHORITY

In most of the cases in which intangibles of a nonresident have been held to have a business situs in the taxing state, the local business which has given rise to their existence has been conducted through a local agent; but, apart from the requirements of the local statutes, the existence of a local agent is not indispensable to a business situs.[40] As stated in one decision, the "physical location of the managing authority, or the place from which it may emanate in particular transactions," is not controlling on this question.[41]

Although the *existence* of a local agent does not appear to be a determining factor in the decisions of the courts dealing with business situs of intangibles, for the reason that in nearly all the cases arising such local agents are employed, *the extent of the authority* of such agent does seem to play a most important role in determining whether the intangibles have become localized in the state. It is apparently well settled that authority of a local agent, limited to mere clerical or ministerial functions without any discretion, is insufficient in any event to give the credits a business situs in the state

[38] Hillman Land & Iron Co. v. Commonwealth, 148 Ky. 331, 146 S.W. 776, L.R.A. 1915C, 929 (1912).

[39] Commonwealth v. Prudential Life Ins. Co., 149 Ky. 380, 149 S.W. 836 (1912).

[40] *See* Buck v. Miller, 147 Ind. 586, 45 N.E. 647, 37 L.R.A. 384, 62 Am. St. Rep. 436 (1896) where money and securities retained in the state in the business of buying and selling property by nonresidents and in making loans and investments were held to have a business situs in the state, notwithstanding the fact that the local business was conducted by the nonresident owner without an agent. *See also* Endicott, J. & Co. v. Multnomah County, 96 Or. 679, 190 Pac. 1109 (1920); Dorris v. Miller, 105 Iowa 564, 75 N.W. 482 (1898); Hawk County v. Dorris, 116 Iowa 446, 90 N.W. 89 (1902); Tazewell County v. Davenport, 40 Ill. 197, (1866); State v. Smith, 68 Miss. 79, 8 So. 294 (1890); State *ex rel.* Langer v. Packard, 40 N.D. 182, 168 N.W. 673 (1918); Garrison v. Commonwealth, 120 Va. 137, 90 S.E. 640 (1916).

[41] Suttles v. Northwestern Mut. Life Ins. Co., 193 Ga. 495, 19 S.E. (2d) 396, 143 A.L.R. 343 (1942). To the same effect: Suttles v. Associated Mortgage Companies, 193 Ga. 78, 17 S.E. (2d) 272 (1941).

of the agent's residence, even if the business conducted by him extends over a period of many years. The exercise of independent judgment and discretion by the agent in the conduct of the principal's affairs, his power to invest and reinvest, or loan and reloan, the proceeds of the credits, are the determining factors.[42] Thus, it may be said that the test is whether the agency constitutes a self-operating and independent business or is directed and managed exclusively from a place outside the state.[43]

### *1. Credits*

As said before, the general rule is that to make debts and credits taxable in a state other than that of the domicile of the owner they must be used in an established business with discretion in the manager as to its proceeds.[44] Thus, credits belonging to nonresidents in the hands of resident agents, and in actual control of such agents for renewal or collection, with the view of reloaning the money as a permanent business of the owner, constitute subject-matter having the nature of stock-in-trade in such business and therefore have a situs at the place of business of the agent.[45] Credits on sales of goods arising out of the business established in a state, subject to the control and direction of the local agent[46] who employs salesmen and controls extensions of credit, are held taxable there.

But where an agency does its business through and under the immediate control and management of its home office, leaving no discretion whatsoever in the agent, the credits arising from the sale of products within the state do not acquire a taxable business situs there.[47] It is submitted that that complete want of discretion on the part of the local agent to utilize any of the proceeds in the conduct of the local branch is a decisive factor in answering the question of business situs.[48]

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[42] *See* Lockwood v. Blodgett, 106 Conn. 525, 138 Atl. 520 (1927).

[43] Smith *et al.* v. Lummus, *et al.*, 149 Fla. 660, 6 So. (2d) 625 (1942)

[44] State *ex rel.* American Auto Ins. Co. v. Lehner, 320 Mo. 702, 8 S.W. (2d) 1057, 59 A.L.R. 1026 (1928).

[45] W. R. Roach & Co. *et al.* v. Harding, and Hoopeston Canning Co. *et al.* v. Same, 348 Ill. 454, 181 N.E. 331 (1932).

[46] State v. Pittsburgh Plate Glass Co., 147 Minn. 339, 180 N.W. 108 (1920).

[47] Westinghouse Electric & Mfg. Co., v. Los Angeles County, 188 Cal. 491, 205 Pac. 1076 (1922).

[48] Tax Commission v. Kelly-Springfield Tire Co., 38 Ohio App. 109, 175 N.E. 700 (1931). *See also* Micheliu Tire Co. v. Hurlburt, 121 Or. 110, 254 Pac. 196 (1927); National Metal Edge Box Co. v. Readsboro, 94 Vt. 405, 111 A. 386 (1920).

### 2. *Notes and Mortgages*

Similarly, notes and mortgages of a nonresident, in the possession and under the control of a local agent authorized to manage and reinvest the same, are subject to taxation by the state.[49] This is especially true if the agent performs all the steps leading to the giving of the notes and executing of the mortgages.[50] Therefore, when notes are placed in the hands of an agent for the purpose of collecting and reloaning the money, using and controlling it, without any special direction from his principal, they will be considered as having a business situs in the state.[51] Promissory notes held by a bank and renewed by it from time to time without consultation with the nonresident owner, the proceeds upon final payment being deposited to the nonresident's account in the bank, are subject to taxation by the state in which the bank is located.[52]

But there is an Indiana case in which loans were made to residents through a local attorney engaged in the business of loaning money, and the notes, given as security for the loans, were sent to the nonresident owner. They were kept by him until the loans became due, and then forwarded to a local bank for collection. Even though the proceeds were then deposited to the nonresident's account with the bank, and from time to time drawn upon by the attorney for the purpose of making new loans, no business situs was said to exist.[53]

## C. Custody for Safe-keeping

Mere custody of evidences of intangibles of a nonresident, in the state for safekeeping, or their custody in the state by one acting in a clerical capacity is never sufficient to give them a business situs for property taxation within the state.[54] There must be, in addition, some business use of the property, or some power of managing, controlling, or dealing with it in a business way.[55] This is true re-

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[49] Billinghurst v. Spink County, 5 S.D. 84, 58 N.W. 272 (1894).

[50] Commonwealth v. United Cigarette Machine Co., 119 Va. 447, 89 S.E. 935 (1916); *see also* Hubbard v. Brush, 61 Ohio 252, 55 N.E. 829 (1899).

[51] Finch v. York County, 19 Neb. 50, 26 N.W. 589, 56 Am. Rep. 741 (1886); Hutchinson v. Board of Equalization, 66 Iowa 35, 23 N.W. 249 (1885).

[52] Honest v. Gann, 120 Kan. 365, 244 Pac. 233 (1926).

[53] Theobald v. Clapp, 43 Ind. App. 191, 87 N.E. 100 (1909).

[54] Smith *et al.* v. Lummus, *et al.*, 149 Fla. 660, 6 So. (2d) 625 (1942); Crane Company v. City Council of Des Moines, 208 Iowa 164, 225 N.W. 344, 76 A.L.R. 801 (1929).

[55] Johnson County v. Hewitt, 76 Kan. 816, 93 Pac. 181, 14 L.R.A. (N.S.) 493 (1907).

gardless whether credits,[56] notes,[57] bonds,[58] securities,[59] or bank deposits[60] are involved. No case has been found where the mere presence of intangible property within the state for purposes of safe keeping has been held to constitute a business situs.

D. AUTHORITY TO COLLECT

The mere authority of a local agent to collect the credits of a nonresident and remit the proceeds to him does not, as a rule, give such credits a business situs in the agent's state, so as to render them subject to taxation there, even though the necessary element of continuity or permanence of the transactions in the state is present. This rule also applies equally to notes,[61] mortgages,[62] bonds,[63] and open credits.[64]

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[56] Rounds & Porter Lumber Co. v. Livesay *et al.*, (C.C.A. Okla.) 66 F. (2d) 298 (1933); Commonwealth v. Green, 150 Ky. 339, 150 S.W. 353 (1912); Grieves v. State *ex rel* County Attorney *et al.*, 168 Okla. 642, 35 P. (2d) 454 (1934); State v. Atlantic Oil Producing Co., 174 Okla. 61, 49 P. (2d) 534 (1935); Texas Land & Cattle Co. v. City of Fort Worth, ...... Tex. Civ. ......, 73 S.W. (2d) 860 (1934), *app. dismissed*, 295 U.S. 716, 79 L. ed. 1672 (1935); Colonial-American Nat. Bank v. Commonwealth, 161 Va. 487, 171 S.E. 596 (1933).

[57] Lockwood v. Blodgett, 106 Conn. 525, 138 Atl. 520 (1927); Connody v. Clayton, ...... Tex. Civ. App. ......, 154 S.W. 1067 (1913).

[58] State *ex rel.* Rankin v. Harrington, 68 Mont. 1, 217 Pac. 681 (1923) holding that where shares of stock are kept by their owner out of the state of his domicile, for the purpose of evading taxation therein, they are not within the rule as to a business situs in the other state, but are controlled by the maxim "mobilia sequuntur personam" and will be taxed at the domicile of the owner. *See also* Herron v. Keeran, 59 Ind. 472, 26 Am. Rep. 87 (1877). *See also* Colonial-American Nat. Bank v. Commonwealth, 161 Va. 487, 171 S.E. 596 (1933).

[59] Russell *et al.* v. Cogswell *et al.*, 151 Kan. 14, 98 P. (2d) 179 (1940), *supplemental opinion*, 151 Kan. 793, 101 P. (2d) 361 (1940).

[60] Ewa Plantation Co. v. Wilder, C.C.A. 9th, 289 Fed. 664 (1923).

[61] Hinckley v. County of San Diego, 49 Cal. App. 668, 194 Pac. 77 (1920); W. W. Kimball Co. v. Shawnee County, 99 Kan. 302, 161 Pac. 644, L.R.A. 1917 B, 1282 (1916). *See also*, Smith *et al.* Lummus, *et al.*, 149 Fla. 660, 6 So. (2d) 625 (1942).

[62] Reat v. People *ex rel*, Gannaway, 201 Ill. 469, 66 N.E. 242 (1903); Myers v. Seaberger, 45 Ohio St. 232, 12 N.E. 396 (1887); American Barge Line Co. v. Board of Sup'ers of Tax of Jefferson County *et al.*, 246 Ky. 573, 55 S.W. (2d) 416 (1932); Suttles v. Associated Mortgage Companies, 193 Ga. 78, 17 S.E. (2d) 272 (1941), the latter holding that notes of a resident secured by mortgages on real estate in the state but owned and held by a nonresident of the state did not acquire a business situs within the state where the holder of the notes maintained an office and an agency in the state "for the purpose merely of protecting the security and ultimate collection or liquidation of the indebtedness."

[63] Lockwood v. Blodgett, 106 Conn. 525, 138 Atl. 520 (1927). The fact that an agent acts as "custodian, bookkeeper and collector of income from specific securities" was held not enough to create a taxable business situs in the state of the agent's residence. Russell v. Cogswell, 151 Kan. 14, 98 Pac. (2d) 179, (1940), *supplemental opinion*, 151 Kan. 793, 101 P. (2d) 361 (1940). To the same effect, Gulley v. C. I. T. Corporation, 168 Miss. 268, 150 So. 367 (1933); State v. Atlantic Oil Producing Co., 174 Okla. 61, 49 P. (2d) 534 (1935); Grieves v. State *ex rel.* County Attorney et al., 168 Okla. 642, 35 P. (2d) 454 (1934).

[64] Herron v. Keeran, 59 Ind. 472, 26 Am. Rep. 87 (1877); Commonwealth

There is, however, one line of decisions going back to *New Orleans v. Stempel*[65] which holds that notes of a nonresident if kept in the state by an agent who has authority to collect interest and capital, have acquired such independent and concrete form as to warrant their taxation in the state of the agent's domicile.[66] Although not said so expressly by the courts, it seems that these decisions are based mainly on the ground that the notes represent the credits in such concrete form that they constitute independent *tangible* property to be taxed, if found, within the limits of the state.[67]

### E. Domicile of Debtor

Normally, a debt, being a species of intangible personal property, is taxable in the state in which the owner resides and nowhere else. Although it is generally held that a debt has a situs in the state of the debtor's domicile for purposes of attachment or garnishment because it can ordinarily be enforced only within such state, a debt has no situs for the purposes of property taxation in the state of the debtor's domicile. Debts due from the residents of one state to the residents of another cannot, therefore, be subjected to taxation in the state in which the debtor resides, merely on account of such residence. In many instances, however, the debtor is domiciled in the state where the intangibles of the nonresident owner have been given a business situs in their own right, and not by virtue of its being the debtor's domicile.[68] The underlying reason for the rule

*ex rel.* Auditor's Agent v. Northwestern Mutual Life Ins. Co., 32 Ky. L. Rep. 796, 107 S.W. 233 (1908).

[65] New Orleans v. Stempel, 175 U.S. 309, 20 Sup. Ct. 110, 44 L. ed. 174 (1899).

[66] Crane Company v. City Council of Des Moines, 208 Iowa 164, 225 N.W. 344, 76 A.L.R. 801 (1929); Monongahela River Consolidated Coal & Coke Co. v. Board of Assessors, 115 La. 564, 39 So. 601, 2 L.R.A. (N.S.) 637, 112 Am. St. Rep. 275 (1905); Hall v. Miller, 102 Tex. 280, 115 S.W. 1168 (1908), in which case the court quoting from the decision in the *Stempel* case, *supra*, declared that the actual physical location or situs of the notes were in the state where they were held by the local agent, since the notes were left there for the purpose of being enforced, and had the full benefit and protection of the laws of the state in every sense, in which property of that kind can be protected.

[67] *See* subdivision F (Necessity of presence of evidences of debt) *infra*.

[68] *But see* General Motors Acceptance Corporation v. Hulbert, 190 Okla. 568, 125 P. (2d) 975 (1942): "The legal fiction expressed in the maxim mobilia sequuntur personam yields to the fact of actual control elsewhere. And in the case of credits, through intangible, . . . The control adequate to confer jurisdiction may be found in the sovereignty of the debtor's domicile. The debt, of course, is not property in the hands of the debtor; but it is an obligation of the debtor, and is of value to the creditor, because he may be compelled to pay; and power over the debtor at his domicile is control of the ordinary means of enforcement."

is that the situs of a debt or credit, for the purpose of property taxation, cannot arbitrarily be made to depend solely upon the domicile of the debtor.[69]

Cases expressly declaring that the domicile of the debtor alone is not sufficient as a basis for the existence of a business situs in a state other than the domicile of the owner of the debt include instances of open accounts,[70] notes,[71] and securities.[72] Special tax statutes, however, may make the domicile of the debtor a determining factor[73] by an express provision.

### F. NECESSITY OF PRESENCE OF EVIDENCE OF DEBT

In a majority of the decisions holding that intangibles have a business situs for purposes of property taxation in a state other than the domicile of the owner, the intangibles involved had been reduced to concrete forms such as promissory notes, bonds or other instruments evincing the debt, and the evidences thereof were physically within the taxing state. In a number of cases, these facts were embodied in the general statements of the rule made by the courts in relation to a business situs and were emphasized as though they were a necessary and indispensable condition of such a situs. A partial explanation of this view is the notion that concrete instruments evidencing credit are in the nature of tangible property and are therefore susceptible of an independent situs for property taxation deter-

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[69] Endicott, J. & Co. v. Multnomah County, 96 Or. 679, 190 Pac. 1109 (1920).

[70] Marshall Wells Hardware Co. v. Multnomah County, 58 Or. 469, 115 Pac. 150 (1911) held that accounts arising from a branch business conducted by a nonresident concern, the only evidence concerning them being in the hands of the local manager, were taxable in the state, whether the debtors resided in or out of the state. *See further* Colonial-American Nat. Bank v. Commonwealth, 161 Va. 487, 171 S.E. 596 (1933).

[71] Buck v. Beach, 164 Ind. 37, 71 N.E. 963, 108 Am. St. Rep. 272 (1904) (*reversed on other grounds*, 206 U.S. 392, 27 Sup. Ct. 712, 51 L. ed. 1106, 11 Ann. Cas. 732 (1907); Commonwealth of Virginia v. Imperial Coal Sales Co., 293 U.S. 15, 55 Sup. Ct. 12, 79 L. ed. 171 (1934); Suttles v. Northwestern Mut. Life Ins. Co., 193 Ga. 495, 19 S.E. (2d) 396, 143 A.L.R. 343 (1942).

[72] Buck v. Miller, 148 Ind. 586, 45 N.E. 647, 37 L.R.A. 384, 62 Am. St. Rep. 436 (1896), declared that securities of a nonresident retained in another state in the business of buying and selling property, included bonds, stocks and mortgages, and in making loans and investments, collecting and reloaning from year to year had local situs there, irrespective of the debtor's domicile. *See also*, Maricopa County v. Trustees of Arizona Lodge, 52 Ariz. 329, 80 P. (2d) 955 (1938).

[73] *See* for instance, Southern Pine Association v. Board of Assessors, 155 La. 1085, 99 So. 884 (1924), and State *ex rel.* Langer v. Packard, 40 N.D. 182, 168 N.W. 673 (1918), where local statutes provided for the taxation of all bills receivable and obligations or credits of a nonresident arising from business done in the state provided that they were payable by persons domiciled within the state.

mined by their locality. The presence of the evidences of the credits within the taxing state, while it may aid other circumstances relied upon to establish a business situs there, and may even be an important point under some conditions, is not indispensable to such a situs, although it would seem to be from the language of some of the decisions. This is apparent from the large number of cases in which a business situs in the taxing state has been assigned to intangibles which have *not* been reduced to a concrete form, and, where situs has been granted to credits, the evidences of which were not within the taxing state, but were with the owner at his domicile.[74]

In cases in which the credits had not been reduced to a concrete form, statements as to the necessity of the presence of evidence of their existence are naturally lacking. In their place, the location of the owner's general books or accounting records is frequently mentioned as the place of the "legal existence"[75] of the credits.

The leading case for the rule that the mere presence in the state of the evidences of the credits is insufficient to give them a business situs there for the purposes of taxation is *Buck v. Beach*.[76] This case

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[74] *See* for instance, Bristol v. Washington County, 177 U.S. 133, 20 Sup. Ct. 585, 44 L. ed. 70 (1909) and General Electric Co. v. Board of Assessors, 121 La. 115, 46 So. 122 (1908), holding taxable the average amount of open accounts due a foreign corporation by reason of credits extended in connection with the business in the state. The court expressly repudiated the idea that the presence of the evidences of the debt within the taxing state was a condition of a business situs, stating: "We could understand that the manner in which the debt was evidenced would be significant, if the situs of the evidence of the debt was taken to be the situs of tbe debt, or even an indication of the situs of the debt. But this is not so."

[75] Wheeling Steel Corporation v. Fox, 298 U.S. 193, 56 Sup. Ct. 773, 80 L. ed. 1143 (1936), *rehearing denied*, 299 U.S. 619, 57 Sup. Ct. 4, 81 L. ed. 456 (1936); First Bank Stock Corp. v. Minnesota, 301 U.S. 234, 57 Sup. Ct. 677, 81 L. ed. 1061, 113 A.L.R. 228 (1936); Commonwealth v. Madden's Executor, 265 Ky. 684, 97 S.W. (2d) 561, 107 A.L.R. 1379 (1936); People v. McGraw Electric Co., 375 Ill. 241, 30 N.E. (2d) 903 (1940); Smith v. Ajax Pipe Line Co., C.C.A. Mo. 87 F. (2d) 567 (1937).

[76] Buck v. Beach, 206 U.S. 392, 27 Sup. Ct. 712, 51 L. ed. 1106, 11 Ann. Cas. 732 (1907). *See, to the same effect*: Metropolitan Life Ins. Co. v. New Orleans, 205 U.S. 395, 27 Sup. Ct. 499, 51 L. ed. 853 (1907) (affirming 115 La. 698, 39 S. 846, 9 L.R.A. (N.S.) 1240, 116 Am. St. Rep. 179 (1905) held that state taxation of credits arising out of loans made in the regular course of business by the local agent of a foreign insurance company to its policyholders is not forbidden by the 14th amendment to the Federal Constitution, where the loans were negotiated, the notes signed, security taken, the interest collected, and the debts paid within the state, because the promissory notes, which were the evidences of such credits, were kept at the home office at all times. And *see further* Liverpool & London & Globe Ins. Co. v. Board of Assessors, 221 U.S. 346, 31 Sup. Ct. 550, 55 L. ed. 762, L.R.A. 1915 C 903 (1911) where the court (in answer to the contention that the taxing state had no power to tax credits because of want of written instruments evidencing the indebtedness) declared that it had been clearly brought out in Buck v. Beach, *supra*, and Metropolitan Life Insurance Co. v. New Orleans,

held that the State of Indiana could not, consistently with due process of law, tax debts evidenced by notes given and payable in Ohio. The notes in question had been made in Ohio by residents of that state to a resident of New York for loans on Ohio lands. The court held that the notes were not taxable in Indiana merely because, in the attempt to escape property taxation in Ohio, such notes, together with mortgages securing their payment, were sent to an Indiana agent of the payee to be held by him until needed in Ohio, to have payments of interest indorsed, or to be delivered up if the principal were paid. Following this decision, the mere presence of a specialty or negotiable paper,[77] of securities,[78] promissory notes,[79] or other instruments of indebtedness[80] in a jurisdiction other than that of the owner was held not to be a factor in determining the right of that jurisdiction to tax them. Some of the state tax statutes, however, require the presence in the state of the evidences of debt of a non-resident to make them taxable.[81]

In some of the earlier cases, the presence of the evidences of the indebtedness in the state was held the "dominant factor" in the case for assuming the existence of a business situs.[82] It seems, however,

*supra*, that the jurisdiction rested upon considerations which were more fundamental than that notes had been given, or that the credits were evidenced in any particular manner. The court also mentioned that neither the fiction that personal property follows the domicile of the owner, nor the doctrine that credits evidenced by bonds or notes may have the situs of the latter, could be allowed to obscure the truth. To the same effect *see* Orient Ins. Co. v. Board of Assessors, 221 U.S. 358, 31 Sup. Ct. 554, 55 L. ed. 769 (1911).

[77] Lockwood v. Blodgett, 106 Conn. 525, 138 Atl. 520 (1927).

[78] State *ex rel.* Langer v. Packard, 40 N.D. 182, 168 N.W. 673 (1918); City of Clinton, Okl. *ex rel.* Schuetter v. First Nat. Bank in Clinton, Okl. *et al.*, D.C. Okl., 39 F. Supp. 909 (1941).

[79] Travelers' Ins. Co. v. Board of Assessors, 122 La. 129, 47 So. 439, 24 L.R.A. (N.S.) 388 (1908); Fidelity Mutual Life Ins. Co. v. Fitzpatrick, 125 La. 976, 52 So. 118, 136 Am. St. Rep. 359 (1910); Commercial Investment Co. v. Farve, 134 Okla. 133, 273 Pac. 226 (1929); O'Dell v. Industrial Acceptance Corp., 141 Okla. 174, 284 Pac. 1 (1929); Suttles v. Associated Mortgage Companies, Inc., 193 Ga. 78, 17 S.E. (2d) 1272 (1941); Columbus Mut. Life Ins. Co. v. Gullatt, and Guardian Life Ins. Co. of America v. Same, 189 Ga. 747, 8 S.E. (2d) 38 (1940).

[80] Bristol v. Washington County, 177 U.S. 133, 20 Sup. Ct. 585, 44 L. ed. 701 (1900) Senour v. Ruth, 140 Ind. 318, 39 N.E. 946 (1894); Commercial Investment Trust Co. v. Farve, 134 Okl. 133, 273 Pac. 226 (1929); O'Dell v. Industrial Acceptance Corp., 141 Okl. 174, 284 Pac. 1 (1930); Colonial-American Nat. Bank v. Commonwealth, 161 Va. 487, 171 S.E. 596 (1933).

[81] Indiana: Senuor v. Ruth, 140 Ind. 318, 39 N.E. 946 (1894); Oklahoma: Commercial Investment Trust Co. v. Farve, 134 Okla. 133, 273 Pac. 226 (1929); O'Dell v. Industrial Acceptance Corp., 141 Okla. 174, 284 Pac. 1 (1930).

[82] Walker v. Jack, 31 C.C.A. 462, 60 U.S. App. 124, 88 Fed. 576 (1898) (*reversing* (C.C.) 79 Fed. 138 (1897) ) ("important factor"); Hall v. Miller, 102 Tex. 289, 115 S.W. 1168 (1909) ("dominant factor"); People, for Use of Christian County v. Davis, 112 Ill. 272 (1884) (decisive factor).

that the value of these decisions as authority for the proposition (*i.e.* that the presence of notes and other instruments of indebtedness in the state is an important element in determining the business situs) has been greatly diminished by the later decisions;[83] and it may be stated, as a general rule, that instruments of indebtedness need not be in the state to give the debts they represent a taxable situs therein and that neither does their presence in the state suffice for the same purpose.

## III. Integration Theory

Recently, a new concept has been used by the courts with increasing frequency as a test to determine whether, in a particular case, a business situs of intangible property existed for the purposes of property taxation in a state other than the domicile of the owner. Localization of possession and control of the property right in some independent business or investment away from the owner's domicile and its integration with local business are the modern requirements for business situs. The courts, apparently, are no longer attempting to segregate a particular outstanding fact or circumstance as the indispensable condition or to hold other facts as immaterial under any circumstances. Under the "integration doctrine", as this new trend may appropriately be called, it is necessary to establish (1) that the intangibles have become an integral part of some out-of-state-business activity and (2) that their possession and control are localized in an independent business enterprise so that their substantial use and value primarily attach to, and become an asset of, the outside business. In other words, it must be established that the local independent business controls and utilizes the intangible property and its income in the operation and maintenance of its own business.

The difference between this new theory and the old method of determining the existence of business situs for intangibles is obvious, in principle at least. While the courts in the older cases clearly distinguished between certain indispensable factors (the lack of which made the existence of a business situs impossible regardless of the

[83] In Suttles v. Northwestern Mut. Life Ins. Co., 193 Ga. 495, 19 S.E. (2d) 396 (1942) a distinction was made between the debt and the note evincing it, and it was held that the fact alone that notes which were executed by resident borrowers as evidence of loans made by a non-resident corporation were at all times kept without the state, did not prevent taxation of the credits in the state, since the assessments were not made upon the notes themselves or the security taken therefor, but were founded on the credits arising from the loans, in favor of the creditor.

other circumstances in the case) and those factors which were held immaterial (although helpful in deciding whether intangibles had acquired a taxable situs) such division can not be upheld any longer under the doctrine of integration. Here each and every factor is of importance and must be considered and weighed in the light of all the surrounding circumstances in order to come to a final conclusion as to whether or not the intangibles are so interwoven in the economic life of a jurisdiction other than the domicile of the owner so as to warrant their taxation at such location.[84] Although, occasionally, language may be found in previous decisions[85] expressing the same idea, the doctrine of integration as a legal concept goes back to two decisions of the United States Supreme Court which are cited and quoted with increasing frequency in the decisions of the state courts. The leading cases are *Wheeling Steel Corporation v. Fox*[86] and *First Bank Stock Corporation v. Minnesota.*[87] In the *Wheeling*

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[84] The decision of the court in regard to business situs for purposes of property taxation of intangible property was expressly predicated upon the concept of integration in the following cases: Wheeling Steel Corporation v. Fox, 298 U.S. 193, 56 Sup. Ct. 773, 80 L. ed. 1143 (1936), *rehearing denied* 299 U.S. 619, 57 Sup. Ct. 4, 81 L. ed. 456 (1936); First Bank Stock Corp. v. Minnesota, 301 U.S. 234, 57, 81 L. ed. 1061, Sup. Ct. 677, 113 A.L.R. 228 (1936) (*affirming* 197 Minn. 544, 267 N.W. 519, 269 N.W. 37 (1936); Newark Fire Ins. Co. v. State Board of Tax Appeals, 307 U.S. 313, 59 Sup. Ct. 918, 83 L. ed. 1312 (1939) (*affirming* 118 N.J.L. 525, 193 A 912, 120 N.J.L. 224, 198 Atl. 837 (1937); Rounds & Porter Lumber Co. v. Livesay *et al.*, C.C.A. Okla., 66 F. (2d) 298 (1933); Smith *et al.* v. Ajax Pipe Line Co., C.C.A. Mo. 87 F. (2d) 567 (1937), *cert. denied* 57 Sup. Ct. 670, 81 L. ed. 882; Holly Sugar Corporation v. McColgan, 18 Cal. (2d) 218, 115 P. (2d) 8 (1941); People v. McGraw Electric Co., 375 Ill. 241, 30 N.E. (2d) 903 (1940); Russell *et al.* v. Cogswell *et al.*, 151 Kan. 14, 98 P, (2d) 179 (1940); American Barge Line Co. v. Board of Sup'rs. of Tax of Jefferson County *et al.*, 246 Ky. 573, 55 S.W. (2d) 416 (1932); Commonwealth v. Madden's Executor, 265 Ky. 684, 97 S.W. (2d) 561, 107 A.L.R. 1379 (1936); Household Finance Corporation v. State Board of Tax Appeals *et al.*, 119 N.J.L. 230, 196 Atl. 219 (1937); Mecklenburg County *et al.* v. Sterchi Bros. Stores, Inc., 210 N.C. 79, 185 S.E. 454 (1936); Kansas City Life Ins. Co. v. Duvall *et ux.*, 129 Tex. 287, 104 S.W. (2d) 11 (1937); Texas Land & Cattle Co. v. City of Fort Worth, ...... Tex. Civ. ......, 73 S. W. (2d) 860 (1934), *app. dismissed*, 295 U.S. 716, 79 L. ed. 1672, *rehearing denied*, 79 L. ed. 1710; *In re* United Carbon Co. Assessment, 118 W.Va. 348, 190 S.E. 546 (1937).

[85] *See* for instance: Westinghouse Electric & Mfg. Co. v. Los Angeles County, 188 Cal. 491, 205 Pac. 1076 (1922); Carter v. Hill, 31 Haw. 264 (1930); Baker v. State, 186 Minn. 160, 242 N.W. 697 (1932); *In re* Frank's Estate, 192 Minn. 151, 257 N.W. 330, 96 A.L.R. 667 (1934); Gully v. C.I.T. Corporation, 168 Miss. 268, 150 So. 367 (1933); Grieves v. State *ex rel.* County Attorney *et al.*, 168 Okla. 642, 35 P. (2d) 454 (1934).

[86] Wheeling Steel Corporation v. Fox, 298 U.S. 193, 80 L. ed. 1143, 56 Sup. Ct. 773 (1936), *rehearing denied* in 299 U.S. 619, 81 L. ed. 456, 57 Sup. Ct. 4 (1936), *affirming*: *In re* Wheeling Steel Corporation Assessment, 115 W.Va. 553, 177 S.E. 535, 104 A.L.R. 802 (1934).

[87] First Bank Stock Corp. v. Minnesota, 301 U.S. 234, 57 Sup. Ct. 677, 81 L. ed. 1061, 113 A.L.R. 228 (1936) (*affirming* 197 Minn. 544, 267 N.W. 519, 269 N.W. 37 (1936) ).

*Steel* case, a foreign corporation maintained a nominal office at its place of incorporation in Delaware but had its general business office in the state where all its managing officers resided and where its general books and accounting records were kept. The corporation had manufacturing plants and sales offices in other states, but all orders for goods taken elsewhere were subject to acceptance by the general office. All invoices were payable there and all moneys were controlled and the expenditures directed by it. Bank deposits outside of the state were made by sending the original checks or drafts, received by the corporation from its customers, from the general office to the various banks. The deposits outside the state were not segregated for the purpose of keeping the receipts from sales of products manufactured in the state separately. Holding that there had been such a localization of the corporation's business at Wheeling that its entire intangible property had acquired a situs for taxation at that place, the Supreme Court, after mentioning as important factors for its conclusion the maintenance of a general office, the keeping of books and records, the holding of meetings of the directors and the conducting of the corporate affairs within the state, summarized their effect in the phrase that a commercial domicile for intangibles is established at the place "where the management functions", that is "the actual seat of the corporate government."[88]

In the second leading case, *First Bank Stock Corporation v. Minnesota*[89] a foreign corporation transacted corporate business and fiscal affairs at its principal office in a state other than that in which it was organized. It kept there the certificaes of stock of a large number of financial institution in which it owned the controlling interest; and there it received the dividends declared by its subsidiaries

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[88] While the conception of business situs of intangibles as justifying their taxation at such situs was strongly emphasized in the decision, it seems doubtful whether the business situs of the property itself was the *ratio decidendi*, since the bank deposits and accounts receivable sought to be taxed were in banks in other states and were owing from customers in other states for goods manufactured principally in other states. The "localization of the property" in the state was not so much a localization directly springing from use of the property in the state in the conduct of a business there prosecuted but more an indirect one derived from the owner's "commercial domicile" in the state. These are two different concepts and are not necessarily interdependent, the basis of the claim to tax being in the one case jurisdiction over the *res* itself, while in the other it is jurisdiction over the corporation analogous to the jurisdiction of the state of its legal domicile. Later decisions however quoting the *Wheeling Steel Corp.* case made it clear that localization of the property in the state is sufficient to give intangible property a business-situs there, regardless of the commercial domicile of the owner.

[89] *Supra*

and declared and disbursed dividends on its own stock. It also maintained there a compensated service for the banks it controlled, consisting in the giving of advice as to their accounting practices and recommendations concerning loans, interest rates, the purchase and sale of securities, and the planning of advertising campaigns. All stockholders' and directors' meetings were held at the principal office. The Supreme Court, affirming the decision of the state Supreme Court,[90] held that the shares in the subsidiary banking corporations had a business situs within the state for the purpose of taxation. After citing the earlier decisions of the Court[91] to the effect that intangibles might be taxed at their business situs as distinguished from the legal domicile of their owner, and after stating that, as a rule, this doctrine had been applied only to obligations to pay money acquired in the course of a localized business, the Court went on to declare that the doctrine was equally applicable to shares of corporate stock which, because of their use in a business of the owner, might be treated as localized, for purposes of taxation, at the place of the business. Ownership of shares of stock and their use as instruments of corporate control, the Court pointed out, could make them as much integral parts of the local business as accounts receivable in a merchandising business, or bank accounts in which the proceeds of the accounts receivable are deposited upon collection.[92]

These two cases are quoted as authority in many of the cases decided by state courts.[93] The cases following the integration theory hold that a business situs of intangible property exists where the owner employs the wealth represented by it as an integral portion of the business activity of the particular place, so that it becomes identified with the economic structure of that place and loses its identity with the owner's domicile.

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[90] 197 Minn. 544, 267 N.W. 519 (1936), *rehearing denied* 269 N.W. 37 (1936).

[91] Especially Wheeling Steel Corp. v. Fox, 298 U.S. 193, 56 Sup. Ct. 773, 80 L. ed. 1143 (1936), *rehearing denied* 299 U.S. 619, 57 Sup. Ct. 4, 81 L. ed. 456 (1936).

[92] The state Supreme Court emphasized the existence of a business situs for the shares even more emphatically: "If stocks can ever have an actual or business situs in a state other than that of the corporation itself, there is such a situs of defendant's shares in Minnesota. It is difficult to conceive how property could be more completely localized" and it compared the case with DeGanay v. Lederer, 250 U.S. 376, 39 Sup. Ct. 524, 63 L. ed. 1042, where the "localized" securities were in the possession and management of an agent in the United States for a nonresident alien owner. Throughout the whole decision the court stressed as the decisive fact the unitary use of the bank stocks "in a new integer of business" in the state.

[93] *See* cases in note 84.

This language, although it proves that the courts have at last decided to use an economic yardstock to measure economic phenomena, still makes advisable a tracing of certain of the factors which have been present in all the cases so far that have professed to follow the integration doctrine. It is too early to say whether these factors are essential conditions to subsantiate the assumption of a business situs or whether the courts subconsciously followed the old analytic method. It may be noted, however, that continuity and permanency in the conduct of the business in the state can be shown in each decision declaring a business situs existent under the test of the integration doctrine.[94] It is also of interest to see that a certain amount of authority and discretion in dealing with the intangible property was present in all of the decisions which established situs by applying the integration rule,[96] although the authority of the local officers in respect to the corporate business need not be so complete as it was in the *Wheeling Steel Corporation* case.[95] One court has observed: "If any semblence of consistency and order is to be deduced from the decisions which now point to the present state of law on the subject,[97] it is necessary, at the outset, to distinguish between two types of cases. Otherwise, the task of harmonizing a seeming conflict is rather hopeless." One class is described as consisting of those cases where the agent is little more than a "custodian, bookkeeper and collector of income from specific securities" while the other class comprises those cases where the agent also exercises "powers of control and management, of investment and

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[94] Very properly a word of caution in the use of the integration doctrine has been voiced in Newark Fire Ins. Co. v. State Board of Tax Appeals, 307 U.S. 313, 59 Sup. Ct. 918, 83 L. ed. 1312 (1939), *affirming* 118 N.J.L. 525, 193 Atl. 913, 120 N.J.L. 224, 198 Atl. 837 (1937), where it is said that such conception should not become the substitution of a new fiction as to the mass of choses in action for the established fiction of tax situs. *See also* Texas Land & Cattle Co. v. City of Fort Worth, ...... Tex. Civ. ......, 73 S.W. (2d) 860 (1934), *app. dismissed* 295 N.S. 716, 79 L. ed. 1672, *rehearing denied* 295 U.S. 769, 79 L. ed. 1710.

[96] *See*, for example, Smith *et al.* v. Ajax Pipe Line Co., C.C.A. Mo., 87 F. (2d) 567 (1937), *cert. denied*, 57 Sup. Ct. 670, 81 L. ed. 882 where a foreign corporation doing an interstate oil pipe line business across the state, had its corporate officials, its only general office and its business books and records in one state. From this general office all active operations were conducted, except the making of contracts for transportation of oil and the collection and deposit of money therefore which was done outside the state but not in the state of the domicile of the corporation.

[95] Wheeling Steel Corporation v. Fox, 298 U.S. 193, 80 L. ed. 1143, 56 Sup. Ct. 773, (1936), *rehearing denied*, 299 U.S. 619, 57 Sup. Ct. 4, 81 L. ed. 456 (1936), *affirming In re* Wheeling Steel Corp. Assessment, 115 W.Va. 553, 177 S.E. 535, 104 A.L.R. 804 (1934) *supra*.

[97] Russell v. Cogswell, 151 Kan. 14, 98 P. (2d) 179 (1940), *supplemental opinion* in 151 Kan. 793, 101 P. (2d) 361 (1940).

reinvestment." Where, as a result of such activities of the agent, the intangibles become localized and tied into the economic life of the state where the agent operates, they acquire a business situs. But, under the integration theory, one real innovation in the concept of the older decisions is apparent; namely, a simple limitation of the local agent's authority will not have the effect of evading the establishment of a business situs of intangibles which become integral parts of the local economy through the efforts of the agent.[98] The mere quantum of the latter's authority is no longer a controlling factor. This has been made very clear in a recent case[99] which, because of the importance of its holding, is set out at some length. A nonresident life-insurance company employed a loan agent in Georgia for the purpose of soliciting and submitting applications for loans and making reports concerning applicants and the proffered security. The agent was employed on a salary basis and had a fixed office leased in his own name, but its rent was paid by the company, through reimbursement to him on an expense account. In all negotiations in reference to loans, the company dealt with applicants by communications passing through the agent. The notes and security deeds, though prepared in the home office, were sent to him for execution by the resident applicants and, after their return to the home office and approval there, the checks were mailed to him for delivery to the applicants. The agent also accepted insurance policies upon mortgaged buildings, without previous submission to the company, and arranged "some little things" regarding clearance of title on his own initiative. All management and control was vested in the officials of the company at its home office, and the authority of the agent was limited to specific instructions as to each separate loan. No money was kept by the company in the state, in the hands of its agent or elsewhere, for the purpose of making the loans; and the notes and security deeds were kept outside the state. No new loans had been made by the company for several years, nor had the agent solicited an application for a loan. However, a few of the existing loans were renewed or extended, and a number of leases were assigned by borrowers as additional security during this time. The court, considering all these facts, held that the company was conducting a loan business within the state and came within its taxing power, as to property derived from or used in such business. It

[98] Suttles *et al.* v. Northwestern Mut. Life Ins. Co., 193 Ga. 495, 19 S.E. (2d) 396, 143 A.L.R. 343 (1942), *supra.*

[99] Suttles *et al.* v. Northwestern Mut. Life Ins. Co. (1942) *supra.*

pointed out that the place where the management resided and from which it was projected, did not control the question of situs because

> ". . . it would seem to follow [if the situs of the home office were controling] that in practically no case would credits arising from business transacted through a branch office or place of business so treated in a different jurisdiction be subject to tax by the local authorities, because in all such cases the resident or local agent would still be subject to control by his principal, whether a special or a general agent. It is not believed that the great organic principles invoked would make the mere quantum of the agent's authority a controlling factor. We think they would declare that where a nonresident does in any manner actually conduct business in this state through a local agent, he cannot deprive the state of its authority to tax by limiting the authority of such agent."

The present state of law in respect to the taxability of intangibles at a place other than the owner's domicile is not too satisfactory. There are still too many cases which belong in the "twilight zone"[100] between taxable and non-taxable situs where it may well be that a slight difference in the showing would impel the courts to the opposite decision. The task of the attorney in protecting his client from an undue tax burden is a delicate and difficult one. The new doctrine of integration may not serve to make the court's determination in a particular case more foreseeable but it must be conceded that it is more in accord with the practical view of the business man than the mechanical test used in the older decisions. That it tends, incidentally, to allow taxation of intangibles in cases where a tax situs was not given under the older doctrine is a development not confined to taxation of intangible property.

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[100] *In re* United Carbon Co. Assessment, 118 W.Va. 348, 190 S.E. 546 (1937) where the court said: "We fully realize that at this time judicial determination of the question of the situs of intangible property for the purpose of taxation cannot be said to have reached the point where any settled and controlling rule can be laid down. Between those cases where the matter of situs renders such property clearly taxable and those cases where the lack of situs renders such property clearly not taxable, there is a 'twilight zone' into which, naturally, most of the controverted cases fall,"