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William M. Simmons

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Conflict of Laws and Constitutional Law in Respect to Intangibles

The type of personal property known to the law as intangible has long been a source of confusion and uncertainty as reflected by the judicial decisions and opinions of commentators and text book writers. Since the beginning of the present century this confusion seems to have become even worse confounded, and now has reached the point where almost any theory can find some support in judicial decision or legal comment. So much has been written on the subject that few, and certainly not the writer, would care to claim originality of treatment. It is not the purpose of this article to attempt to bring order out of chaos or to suggest any panacea which will eradicate this legal disorder from our jurisprudence. An endeavor will be made, however, to point out what are thought to be certain required differences of treatment which depend upon whether the problem encounters the general field of Conflict of Laws or that of the limitations imposed by the Constitution of the United States.

The subject matter of Conflict of Laws, or as it is sometimes called, Private International Law, consists of that part of the law of any sovereign state which determines the extent to which the law of another sovereign state shall be given effect in dealing with a legal situation. The principles of Conflict of Laws are a part of the positive law of any sovereign state and as such are subject to modification or change by that state.

"It follows from the principle that Conflict of Laws is a part of the law of each state, that it is subject to the same development in each state as any other branch of the law. While the general principles of the common law as developed by the states . . . are like the principles of the common law in force in every common-law state, yet, like any principles of the common law, they are subject to change either by legislation, by judicial decision or by any other forces that change the particular law of a state."

There is no common law of the United States as an independent sovereign. The various states of the United States have the powers of an independent sovereign save as these powers are limited by the Consti-

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1 Wharton, Conflict of Laws (3d ed. 1905) § 1; Dicey, Conflict of Laws (4th ed. 1927) 12.
2 Conflict of Laws Restatement (Am. L. Inst. 1931) § 1.
4 Beale, Conflict of Laws (1935) § 5.3.
tution of the United States. The principles of Conflict of Laws are a part of the law of each state, and any state, subject to the limitations imposed by the Constitution of the United States, may by legislation or other lawful means, change its law in reference to its principles of Conflict of Laws, including those affecting intangibles.

Conflict of Laws in Reference to Intangibles. The manner in which intangibles have been treated under the principles of Conflict of Laws will now be considered, and the extent to which that treatment has encountered limitations imposed by the Constitution of the United States will be noted. Intangible property falls readily into two general classes.\(^6\) One class consists of an exclusive right or privilege with no correlative obligation save perhaps the negative obligation not to interfere with the right or privilege. This class includes such rights as patents, copyrights and trade marks. The other class consists of those rights which for their utilization depend upon the performance of a correlative affirmative obligation such as choses in action and contract debts. As to members of the first class it has been held that they have no situs or substance anywhere, and so long as they exist, they can be reached only by acquiring jurisdiction over the person of the owner.\(^7\) This discussion is confined primarily to members of the second class, such as choses in action and contract obligations.

How May Intangible Property Such as Choses in Action and Contract Obligations be Reached and Dealt With, so that Such Dealing Will be Recognized by Other States under the General Principles of Conflict of Laws? When dealing with legal interests in land it is universally the rule that the law of the state where the land is located, lex rei sitae, will prevail. This would seem inevitable since the land cannot be moved from state to state and ultimately any claimant to an interest therein must resort to the law of the state where the land is located in order to enforce or protect any interest therein. Tangible movable property also has a physical location in space, and it would seem consistent and logical that the law of the state of its location or situs should prevail. Such is the

\(^6\) Beale, op. cit. supra note 4, § 51.1.

\(^7\) Patent Rights. Ager v. Murray (1881) 105 U. S. 126. “The right of the patentee is granted by the Federal Government and is as broad as its jurisdiction. It exists in California and Alaska as well as in New Jersey, and has no situs in any particular state.” Elmendorf v. American Combustion Co. (1912) 80 N. J. Eq. 461, 85 Atl. 199. Copyrights, see Stevens v. Gladding et al. (1854) 58 U. S. (17 How.) 447. Trademarks present a somewhat different problem from that presented by patents and copyrights since in this country and in England the former are generally given extraterritorial recognition, which is not true of the latter. Derringer v. Plate (1865) 29 Cal. 292; I Weart on, op. cit. supra note 1, §§ 325, 326. It would seem, however, that as with patents and copyrights, trademarks have no situs or location and can be reached only if at all by acquiring jurisdiction over the person of the owner.
present prevailing view. Such was not always the prevailing view however, and formerly the maxim *mobilia personam sequuntur*, to the effect that movable property follows the owner, was accepted in determining the legal effect of attempted dealings with tangible personal property. Illustrating the tenacity with which the law clings to its maxims, and the willingness to resort if need be to fictions in order to make the facts fit the maxim, we find an English Jurist of the 18th century stating the law governing personal property as follows:

"...it is a clear proposition, not only of the law of England, but of every other country in the world where the law has the semblance of science, that personal property has no locality...but that it is subject to the law which governs the person of the owner."  

Perhaps to make certain that the legal situation thus presented would be unintelligible to the layman and understood only by those learned in the law, the "law which governs the person of the owner" in respect to dealings with his personal property was held not necessarily that of the state in which he actually was at the time of the dealing, but of the state assigned to him by law as his domicile. When it came to dealing with intangibles, which were regarded as personal property, it was sought to apply the established maxims of *mobilia personam sequuntur* and *lex rei sitae*. Here additional practical difficulties were encountered. For, since an intangible right such as a chose in action or contract obligation did not in fact occupy space, how could it be said to have a location or situs? Such property consists of a right recognized by law as existing in one individual to have another individual perform an obligation, and the only way in which the property or right can ultimately be realized upon is by the performance of the obligation. Such performance can be brought about judicially only by obtaining control or jurisdiction of the obligor or, if the obligation be monetary in form, by control or jurisdiction of some property of the obligor which can be appropriated and sold and the proceeds applied for the purpose of discharging the obligation. Confronted with this factual situation there is some authority which would discard, and, it is submitted, wisely, the employment of the idea of situs in reference to property of this nature. By the definite weight of authority, however, the law governing intangibles is still held to be the law of the situs, wherever that may be deemed to be. The courts in their decisions pay at least lip service to the idea that every kind of property must have a legal situs somewhere. In determining the situs


9 *Sill v. Worswick* (1791) 1 H. Bl. 665, 690.

10 *Minor, Conflict of Laws* (1901) § 120.

11 Beale, *op. cit. supra* note 4, § 104.2.
of a chose in action or contract obligation and realizing that in truth each involves merely a legal relation between two parties who may in fact be in different states, the courts are guided by the purpose for which control over these intangibles is sought. Hence they are said to have a situs for the purpose of: First: Administration as an asset of the former owner's estate; Second: Garnishment; Third: Assignment or transfer inter vivos; Fourth: Taxation; Fifth: Succession or testamentary disposition.

Situs for the Purpose of Administration. Administration upon the assets of a decedent may be made in any state where property of the decedent can be found to administer upon. This would seem to follow inevitably from the generally accepted doctrine that an administrator or executor is an official of the court which appoints him, which court has no power to give him authority to act officially in another state. Intangible property, such as choses in action and contract obligations, has been treated as having a location for the purpose of forming a basis for administration in several places. The state where the obligor is domiciled, even though the obligation is evidenced by a negotiable instrument may administer. The presence of the negotiable instrument may also afford a basis for administration by the state where it is physically located. Again, the state where the debtor is present, though not domiciled, may administer, as may the state where the debtor has property which can be reached and applied on the obligation. Since the obligor should be compelled to make but one lawful payment of the obligation and the purpose of the administration of a decedent's estate is to assemble the assets, including the collection of obligations owing, and pay the debts and distribute the remaining assets to those entitled there to, there seem to be no serious objections or hardships incident to this multiple administration. Neither is it thought that this problem encounters any limitations imposed by the Constitution of the United States. The fact, however, that choses in action or contract obligations have been held to have a situs for the purpose of forming a basis of administration in so many different states would seem to demonstrate how frail a reed the so-called situs of intangibles of this nature is, and to justify the contention that a chose in action or contract obligation, being

14 Saunders v. Weston (1882) 74 Me. 85; Turner v. Campbell (1907) 124 Mo. App. 133, 101 S.W. 119; Fox v. Carr (N. Y. 1879) 16 Hun. 434.
incapable of occupying any position in space, can be dealt with by no state on the sole basis of its presence there.\textsuperscript{17}

\textit{Situs for the Purpose of Garnishment or Trustee Process.} In so far as a chose in action or contract obligation is regarded as property and since the judgment in a garnishment proceeding has been held to discharge the obligation of the garnishee, this problem involves questions both of Conflict of Laws and Constitutional Law.\textsuperscript{18}

The earlier decisions held that a garnishment proceeding was in the nature of a proceeding \textit{in rem} or \textit{quasi in rem} and that the \textit{res} must have a location or situs, although the usual difficulty in determining its exact location was experienced.\textsuperscript{19} Later the idea of situs for the purpose of determining the jurisdiction to reach a chose in action or contract obligation by garnishment was abandoned by at least some of the courts, the Supreme Court of the United States saying:

"We do not see the materiality of the expression 'situs of the debt,' when used in connection with attachment proceedings. If by \textit{situs} is meant the place of the creation of the debt, that fact is immaterial. If it be meant that the obligation to pay the debt can only be enforced at the \textit{situs} thus fixed, we think it plainly untrue. The obligation of the debtor to pay his debt clings to and accompanies him wherever he goes."\textsuperscript{20}

It was further held in the same case that the judgment in a garnishment proceeding rendered by a court having jurisdiction of the person of the debtor is entitled to the benefit of the full faith and credit clause of the Constitution of the United States and hence will act as a discharge of the garnishee's obligation, unless "the garnishee were guilty of negligence in the attachment proceeding." It has been held sufficient to bring the judgment in the garnishment proceeding within the protection of the full faith and credit clause that the notice given to the creditor be actual, though not judicial, and although given after the rendition of the judgment by the trial court but prior to final determination on appeal.\textsuperscript{21}

In order, however, that a court may adjudicate as to the "personal rights" of an alleged claimant in a chose in action "rather than . . . discover property and apply it to debts," \textit{i.e.}, of the garnisher, jurisdiction of the person of the creditor as well as the debtor must be had.\textsuperscript{22} The explanation of this distinction would seem to be that a garnishment proceeding is regarded as in the nature of a proceeding \textit{in rem}, the obligation

\textsuperscript{17}Beale, \textit{op. cit. supra} note 4, § 51.1.
\textsuperscript{18}1 Wharton, \textit{op. cit. supra} note 1, § 368a.
\textsuperscript{19}Minor, \textit{op. cit. supra} note 10, § 125, and cases there cited.
\textsuperscript{20}Harris v. Balk (1905) 198 U. S. 215.
\textsuperscript{22}New York Life Insurance Co. v. Dunlevy (1916) 241 U. S. 518.
being the \textit{res} which can be reached by acquiring jurisdiction of the obligor. This explanation, however, is not uniformly accepted.\textsuperscript{23}

As a matter of Conflict of Laws and apart from the effect of the Constitution of the United States it is doubtful if the power of a court to deal with and discharge an obligation merely by obtaining jurisdiction of the person of the debtor will be recognized by other states.\textsuperscript{24} Furthermore, it is difficult to reconcile the holding in the garnishment cases with those decisions holding that personal jurisdiction of an insolvent obligor is not sufficient to enable a court which does not also have jurisdiction over the obligee to grant a discharge of the obligation which need be recognized by courts of other states, even by states of the United States.\textsuperscript{25}

\textit{Situs for the Purpose of Assignment.} Whether or not a chose in action or contract obligation is capable of being transferred or assigned is generally held, in the United States, to be determinable by the law of the state creating the chose in action or obligation.\textsuperscript{26} Whether a cause of action in tort is assignable is governed by the law of the state which created the cause of action.\textsuperscript{27}

An eminent English writer on the subject of Conflict of Laws states that "An assignment of a movable which cannot be touched, \textit{i.e.,} of a debt, giving good title thereto according to the lex situs of the debt (in so far as by analogy a \textit{situs} can be attributed to a debt) is valid."\textsuperscript{28} The very definite weight of authority in the United States holds that the validity of an assignment of a chose in action or contract obligation which was capable of assignment by the law creating it is determined by the law of the state where the assignment is made.\textsuperscript{29} Since the as-

\textsuperscript{23} \textit{Beale, op. cit. supra} note 4, § 108.2.
\textsuperscript{24} \textit{Beale, op. cit. supra} note 4, § 108.3; \textit{Goodrich, op. cit. supra} note 3, 129, 130; \textit{Weitzel v. Weitzel} (1924) 27 Ariz. 117, 120 Pac. 1106.
\textsuperscript{25} "Insolvent laws of one State cannot discharge the contract rights held by citizens of other States, because they have no extra-territorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other State voluntarily becomes a party to the proceeding, has no jurisdiction in the case." \textit{Baldwin v. Hale} (1863) 68 U. S. (1 Wall.) 223, 234; \textit{Phoenix National Bank v. Batcheller} (1890) 151 Mass. 589, 24 N. E. 917.
\textsuperscript{26} \textit{Restatement, op. cit. supra} note 2, § 348; \textit{Beale, op. cit. supra} note 4, § 348.2; \textit{1 Weartton, op. cit. supra} note 1, § 363 (b).
\textsuperscript{27} \textit{1 Weartton, op. cit. supra} note 1, §363 (b); \textit{Vimont v. Chicago & N. W. Ry. Co.} (1885) 69 Iowa 296, 22 N. W. 906.
\textsuperscript{28} \textit{Dicey, op. cit. supra} note 1, Rule 153 and cases there cited. Although there is English authority holding that the validity of such an assignment is determinable by the law of the state where made (\textit{Lee v. Adby} (1886) 17 Q. B. D. 309) and although Mr. Dicey's statement has been criticized (\textit{1926} 70 Sol. J. 947, 959), it has substantial support and probably correctly states the English law. \textit{In re Queensland etc. Co.} [1892] 1 Ch. 219; \textit{In re Maudslay, Sons & Field} [1900] 1 Ch. 602.
\textsuperscript{29} \textit{Minor, op. cit. supra} note 10, § 122; \textit{Goodrich, op. cit. supra} note 3, § 110; \textit{Beale, op. cit. supra} note 4, § 350.1 and cases there cited; \textit{Restatement, op. cit. supra} note 2, §350; \textit{1 Weartton, op. cit. supra} note 1, § 363 (b).
assignment of a chose in action or simple contract debt is brought about by a contract or by creating an irrevocable power of attorney, it would seem that the prevailing authority in this country is sound in so far as it determines the validity of the assignment between the assignor and assignee. It does not follow, however, that the law determining the validity of the assignment as between the assignor and assignee will determine the effect of the assignment on the obligor. The situation is somewhat similar to that presented by a contract made in one state to convey land or other tangible property in another state. The law of the place of contracting is generally held to determine the validity of the contract, but the law of the place where the property is located will determine the effect of the contract upon the legal interests in the property.

General assignments for the benefit of creditors fall into two classifications, viz., involuntary, where an assignment is sought to be effected by operation of law, and voluntary, resulting from an actual and voluntary assignment by the owner.

Statutory provisions for the involuntary assignment of all the movable property of a debtor for the benefit of his creditors are usually construed as insolvency laws, and the prevailing rule is that they will not be given effect as to property in another state if to do so would interfere with the ability of local creditors to pursue their remedies against local assets of their debtor. Since it is well settled in the United States that a creditor can reach his debtor's asset, consisting of a chose in action or contractual obligation, by obtaining jurisdiction over the person of his debtor's obligor, it would seem to follow that involuntary assignments need not be recognized by other states as to the local debtors of the involuntary assignor or insolvent.

As to voluntary assignments of all movable property of the debtor, both tangible and intangible, the prevailing rule in the United States is that the law of the state where the assignments are made will govern unless opposed to the public policy of the situs of the property in question. It is to be noted that this rule is essentially one of the Conflict of Laws. There are practical reasons making it desirable as a matter of general policy that the law of a single state should control as to the transfer of all movables for the purpose of assembling and administering them for the benefit of all creditors of the owner. A similar situation is presented in the question of succession to movable property on the owner's death.

30 Restatement, op. cit. supra note 2, § 332.
31 Ibid. § 258.
32 Ibid. § 264; Beale, op. cit. supra note 4, § 264.1; 1 Wharton, op. cit. supra note 1, § 353 (a).
33 Restatement, op. cit. supra note 2, § 263; Beale, op. cit. supra note 4, § 263.1.
34 Restatement, op. cit. supra note 2, § 303.
and in determining the marital interests in movables owned by the respective parties at the time of marriage. In each of these situations there is but one act involved, the owner's voluntary assignment, his death or marriage. The movable property is physically capable of being assembled and administered as a unit, and there are practical advantages in permitting the same to be done. Wisdom would seem to support a policy permitting the validity of the transfer to be determined by the law of one state, regardless of where the various items of property are located, and in the case of a voluntary assignment for the benefit of all creditors the law of the place where the assignment is made may well be accepted. There are no constitutional limitations prohibiting one state from accepting the law of another as a part of its own law applicable to property within its control. It is to be noted, however, that the law of the state which has control of the property is the final arbiter and this state need not accept as applicable the law of the state where the assignment is made if such law is opposed to its public policy. Accordingly a state having control over property may, save as it is limited by the Constitution of the United States, give a preference to creditors residing in that state. It may prefer resident creditors over those of foreign countries, or over foreign corporate creditors, including corporations chartered in another state of the United States, neither of which are within the protection of the Constitution. The same reasoning applies to choses in action and contract debts but also involves the question as to what state has control over such assets. It is almost uniformly held that if such an asset has been garnisheed prior to the general assignment, the garnishing creditor will be afforded priority over the general assignee. If the state where the obligor is located has sufficient control over the debt to reach it through garnishment proceedings and thus prevent its transfer, it would seem that it should have the power to do the same by positive law. There is authority to this effect.

In England the validity of the assignment of a chose in action or contract debt being determined by the law of the state having control of the obligor, no exception is made as to general assignments for the benefit of creditors. In California, however, it has been held that the situs of a debt is with the

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35 Ibid. § 289.
36 Goodrich, op. cit. supra note 3, § 171.
37 Blake v. McClung (1898) 172 U. S. 239; Beale, op. cit. supra note 4, § 264.2.
38 Lorenzen, Conflict of Laws (2d ed. 1909) 572-574, note and cases there cited.
39 Smith and Wheeler v. Lamson Bros. (1898) 82 Ill. App. 466; 1 Wharton, op. cit. supra note 1, § 353 (f).
40 Dicey, op. cit. supra note 1, Rule 153.
41 In re Maudsley, Sons & Field (1900) 1 Ch. 602.
creditor, and if a non-resident who has among his assets a debt due from a resident of California makes a general assignment in another state which is valid there, such an assignment is not as to the debt of the California resident made invalid by section 3451 of the Civil Code, which provides that a resident of another state cannot make a general assignment of property situated in California for the satisfaction of all of his creditors except as provided by California law. In so far as the decision construes the code section in question as not being intended to apply to choses in action held by non-resident creditors, it may be accepted, but in so far as it purports to hold that California cannot make its law applicable to an assignment of claims against California resident obligors, for the reasons hereafter discussed in connection with the case of the Estate of Layton, it is open to serious question.

Situs for the Purpose of Taxation. For the purpose of taxation it has been suggested that choses in action and contract obligations may have a situs in any one or all of several possible states. Also, it has been contended that such intangible property has no location within a state, and therefore, cannot be taxed by any state simply because of its territorial power over such property. As a matter of constitutional law it was formerly held that such intangibles might be subject to at least an inheritance tax by more than one state. The Supreme Court of the United States as though indicating the truth of the statement, that the Constitution is what the Justices of the Supreme Court say it is, in considering the validity of an attempt by a state to tax intangible assets and in response to the suggestion that to sustain the tax in question would result in double taxation and thus violate the Fourteenth Amendment, remarked in 1920, that "it is sufficient to say that the Fourteenth Amendment does not prohibit double taxation." Nine years later, in passing upon the constitutionality of an attempt by the state of Minnesota to impose an inheritance tax upon the succession to bonds issued by the state of Minnesota and certain of its municipalities and owned by a domiciliary of the state of New York, a majority of the court stated:

"... the inevitable tendency of that view [permitting double taxation of intangibles] is to disturb good relations among the states and produce the kind of discontent expected to subside after the establishment of the union. ... the practical effect of it has been bad ... Blackstone v. Miller no longer can be regarded as a correct exposition of existing law; and to prevent misunderstanding it is definitely overruled."

43 Farmers Loan & Trust Co. v. Minnesota (1930) 280 U. S. 204; Note (1931) 9 N. C. L. REV. 415-417.
44 Beale, op. cit. supra note 4, § 118 (C) 22.
45 Blackstone v. Miller (1903) 188 U. S. 189.
46 Cream of Wheat Co. v. County of Grand Forks (1920) 253 U. S. 325.
47 Farmers Loan & Trust Co. v. Minnesota, supra note 43, at 209.
The court in its decision seems to have been guided by matters of policy rather than any lack of control over the obligation by the state where the obligor was located, saying:

"... taxation is an intensely practical matter, and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences. We have determined that in general intangibles may be properly taxed at the domicile of their owner, and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles."

It is to be further noted that when the constitutional limitations are not applicable the sovereign wherein the tangible evidences of contractual obligations are located may tax them. As a matter of constitutional law it may be conceded that at present intangibles may be lawfully subjected to an inheritance tax by the state where the owner is domiciled at death, and probably only by that state. This is true even though the intangibles are evidenced by negotiable instruments such as bonds and other securities. To this rule there is at least one well recognized exception. A state where intangibles are held to have "a business situs" may tax them. Such a tax may be in the nature of a property tax and quite apart from an excise tax upon the privilege of carrying on business. Just what an intangible needs do in order to acquire a legal home known as a "business situs" is a question still in the lap of the courts who conceived the idea. In a recent decision the Supreme Court of the United States had occasion to deal with the subject and in so doing left open the question as to the extent to which intangible assets having a "business situs" may be subject to multiple taxation. In that case a Delaware corporation was doing business in Minnesota. This business consisted in managing its controlling interest in banking corporations created by the states of Montana and North Dakota. The certificates of stock in these banking corporations, owned by the Delaware corporation, were by it kept in Minnesota in the possession of its resident agent, and it there held directors and stock holders meetings and received dividends upon its stock holdings. Minnesota sought to impose a property tax upon the company's stock holdings in the North Dakota and Montana corporations which already had been taxed by the states where those corporations were domiciled. The court held that the stock had acquired a "business situs" in Minnesota and could be taxed there even though it had been taxed by the states where the corporations were domiciled. The court said:

“It is plain that the business which appellant carries on in Minnesota, or directs from its offices maintained there, is sufficiently identified with Minnesota to establish a ‘commercial domicil’ there, and to give a business situs there, for purposes of taxation, to intangibles which are used in the business or are incidental to it, and have thus ‘became integral parts of some local business.’—The doctrine that intangibles may be taxed at their business situs, as distinguished from the legal domicil of their owner, has usually been applied to obligations to pay money, acquired in the course of a localized business.—Appellant’s entire business in Minnesota is founded on its ownership of the shares of stock and their use as instruments of corporate control. They are as much ‘integral parts’ of the local business as accounts receivable in a merchandising business, or the bank accounts in which the proceeds of the accounts receivable are deposited upon collection. . . . We do not find it necessary to decide whether taxation of the shares in Montana or North Dakota is foreclosed by sustaining the Minnesota tax. Nor need we inquire whether a non-resident shareholder, by acquiring stock in a local corporation, so far subjects his investment to the control and laws of the state which has created the corporation as to preclude any objection, on grounds of due process, to the taxation of the shares there, even though they are subject to taxation elsewhere, at their business situs. We leave those questions open. It is enough for present purposes that this Court has often upheld and never denied the constitutional power to tax shares of stock at the place of the domicil of the owner. . . . And it has fully recognized that the business situs of an intangible affords an adequate basis for fixing a place of taxation.”

Situs for Purpose of Succession. The well established rule in the United States as in England is that upon the death of the owner his personal property, both tangible and intangible, passes, both by intestate and testamentary succession, in accordance with the law of the owner’s domicil at the time of death, regardless of where the property is situated. As to property located in a state other than the owner’s domicil, this rule is applied by the state where the property is located as a matter of comity and may be changed by that state. At least two states have made such a change.51 There would seem to be no constitutional objection to such legislation as it has been held that prospective heirs, devisees and legatees, have no legal interest in the property of a deceased prior to his death,52 nor has the owner of property any constitutional right to dispose of the same by will.53 As to tangible personal property it has been held that the law of the state where it is actually located may refuse to accept the succession laws of the domicil of the non-resident owner if the latter are opposed to the public policy of the law of the situs of the property.54

In California a limitation has been imposed by statute upon the

52 Cordova v. Folgueras (1913) 227 U. S. 375.
54 Succession of Petit (1897) 49 La. Ann. 625, 21 So. 717.
power to dispose by will of real or personal property for charitable pur-
poses. This restriction has been held to include realty owned by a non-
resident domiciliary, and in the light of Frick v. Pennsylvania probably would be extended to tangible personal property located here. It has been held, however, that the section does not apply to contract debts of California obligors where the creditor is domiciled in another state even though the obligations are evidenced by promissory notes or bonds which were physically present in this state at the time of the owner’s death. The opinion leaves some uncertainty as to whether the decision is based upon the construction of the statute or upon a fundamental lack of control by the state over obligations of resident obligors, when the creditor is domiciled elsewhere. The court in its opinion says:

“The Amendment, coupled with section 1313 [now Probate Code Sec. 41] declares no rule as to the situs of decedent’s property.”

A little farther on, however, it is said:

“This state being without power to legislate and thus control the distribution of property located in a foreign domiciliary jurisdiction the amendment to Sec. 1285 [now Probate Code Sec. 26] cannot be construed to have that effect even if the language of the amendment were capable of such an interpretation.”

We are not here concerned with the decision in so far as it may be considered a construction of the legislative intent, but in so far as it may be deemed to hold that the state where the obligor is present or domiciled has no power to reach and control the right of succession to such obligations it seems open to serious question. In Illinois and Mississippi, where as heretofore indicated the common law as to the right of succession to personal property has been changed by legislation, the courts have construed the legislation as not being intended to apply to choses in action or contract debts when the creditor is a non-resident even though the obligor is a resident of the state. The same construction has been applied, even though the tangible evidences of the debts are present within the state. In at least one of these cases, however, it is expressly recognized that the state where the debtor resides has such power if it desire to exercise it. The court in its opinion states:

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56 (1925) 268 U. S. 473.
57 Estate of Dwyer (1911) 159 Cal. 680, 115 Pac. 242; Estate of Lathrop (1913) 165 Cal. 243, 131 Pac. 752.
58 Estate of Layton (1933) 217 Cal. 451, 19 P. (2d) 793.
59 Ibid. at 465, 19 P. (2d) at 798.
60 Channel v. Capen (1892) 46 Ill. App. 234, aff’d Cooper v. Beers (1892) 143 Ill. 25, 33 N. E. 61; Speed v. Kelly (1881) 59 Miss. 47.
61 Cooper v. Beers, supra note 60.
62 Speed v. Kelly, supra note 60, at 51. However, if the chose in action was acquired incident to the carrying on of a business in the state where the debtor resides it has been held to be within the scope of such a statute. Jahier v. Rascoe (1885) 62 Miss. 699.
"We entertain no doubt of the power of the legislature to overturn the fiction of law that personal property has its situs at the domicil of the owner, and to make it distributable by the laws of this State; that the character of the property in no manner impairs the power; that the locality given to choses in action, by the fiction that it follows the person of the owner, is as susceptible to be changed and fixed at the place of the residence of the debtor for purposes of distribution, as the fiction that tangible property is governed by the laws of the domicil may be changed and fixed at the place of the actual situs of the property. The fiction is not a rule of international law, but a mere principle, which produces uniformity of judicial action, and is applied by the courts through comity, but which no court would enforce against either a positive statute or the public policy of its State. . . . Unless, then, we can construe the statute as fixing the locality in this State of all debts due by persons resident here, the debts due to the intestate are distributable under the laws of the State of Louisiana, in which he was domiciled."

The court of appeals of New York in a recent decision held that the validity of a trust agreement executed in Canada by a Canadian domiciliary, but purporting to transfer certain securities evidenced by tangible documents which were located in the state of New York, was to be determined by the law of New York. The decision was not based upon the ground that the assets had acquired a business situs in New York. The supreme court of California has held that a foreign domiciliary administrator, present in this state, who has in his possession a certificate of deposit evidencing an indebtedness from a debtor resident in California, can be compelled to surrender possession of the certificate to an ancillary administrator of the creditor’s estate appointed in California.

In the light of the World War legislation, who would question the control of the state where the obligor is resident, over obligations owned by citizens of enemy countries?

Since there is substantial authority to the effect that a creditor’s interest in a chose in action or contract obligation can be reached for the purpose of garnishment by acquiring jurisdiction over the person of the obligor; that the presence of a debtor in a state may afford that state power to administer upon the debt as an asset of the deceased creditor; that a state where the obligor is resident may refuse to recognize involuntary general assignments for the benefit of creditors sought to be made under the law of other states and may protect resident creditors against discriminatory voluntary assignments made in other states; that a state where the debtor resides and the tangible evidence of the debt is located may in the absence of constitutional limitations impose an estate tax upon such asset, it seems strange that a state where the obligor is resident and where the tangible evidences of the indebtedness are located

63 Hutchison v. Ross (1933) 262 N. Y. 38, 187 N. E. 65.
64 McCully v. Cooper (1896) 114 Cal. 258, 46 Pac. 82.
has no power to control the right of succession to such obligations.\textsuperscript{65} It is suggested that in so far as the decision in *Estate of Layton* is thought to hold the contrary, it will not have a large or permanent following.

*William M. Simmons.*

**Hastings College of the Law,**

**San Francisco, California.**