NOTES

PLACE OF ASSESSMENT AND TAXATION[1] OF TANGIBLE PERSONAL PROPERTY IN INDIANA

The taxation of tangible personal property[2] is a well-established state technique for producing revenue.[3] The place at which such property should be taxed, however, has long been a subject of litigation and controversy,[4] especially when the owner was domiciled in one state and the property was located in a different state.[5] Although the taxation of

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1. In general, assessment and taxation are used synonymously, but assessment, in its technical signification, is only taxation for a special purpose. Atlantic Coast Line R.R. v. Town of Ahoskie, 192 N.C. 258, 134 S.E. 653 (1926); Home Owners' Loan Corp. v. Tyson, 133 Ohio St. 184, 12 N.E.2d 478 (1938). Collister v. Kovanda, 51 Ohio App. 43, 199 N.E. 477 (1935). Properly speaking assessment does not include the levy of taxes. Commissioner v. Patrick Cudahy Family Co., 102 F.2d 930 (7th Cir. 1939). It has been held in Indiana that assessment for taxation is the valuation of property to determine the proportion which it, or its owners, shall pay. Riggs v. Board of Comm'rs, 118 Ind. 172, 103 N.E. 1075 (1914). In respect to property taxes in Indiana assessment and taxation are really separate transactions. Taxation is the result of an assessment; there is no taxation of property without an assessment. In spite of this technical distinction, the terms can be, and are, used interchangeably without confusion unless there is a reference to the particular act, since the place of assessment is almost always the place of taxation.

2. Originally all personal property, both tangible and intangible, was to be assessed under the provisions of IND. ANN. STAT. § 64-404 (Burns Supp. 1957). In 1933, however, a specific method was provided for the taxation of intangible property. IND. ANN. STAT. § 64-902 (Burns 1951). Such taxation was "to be in lieu of all other taxes. . . ." IND. ANN. STAT. § 64-931 (Burns 1951). The assembly, however, did not specifically state that § 64-404, which required the listing of all personal property for assessment, was no longer, applicable to intangible property. Since some types of intangibles are specifically exempt from taxation [IND. ANN. STAT. § 64-901 (Burns 1951)] under the intangibles act, it is not clear whether this exempt intangible property is subject to taxation under the general provisions of § 64-404. It was the opinion of the Attorney General (1944 OPS. IND. ATT'Y GEN. 41) that such intangibles were not taxable as personal property under the provisions of § 64-404. The present assessment list does not include a section for the listing of intangible property. Consequently the term "personal property" as used in § 64-404 now refers to only tangible personal property. It is worthwhile to note that the 1955 assembly did not change this wording in amending § 64-404.

3. For a general discussion of the development of state property taxes, see BUEHLER, PERSONAL PROPERTY TAXATION, c. 7 (1939); NATIONAL INDUSTRIAL CONFERENCE BOARD, STATE AND LOCAL TAXATION OF PROPERTY 1-15 (1930); SELIGMAN, ESSAYS IN TAXATION, c. 2 (10th ed. rev. 1925).

4. See, *e.g.*, Eversole v. Cook, 92 Ind. 222 (1883); Borland v. City of Boston, 132 Mass. 88 (1883); State *ex rel.* Sharp v. Casper, 36 N.J.L. 367 (Sup. Ct. 1873).

5. See, *e.g.*, People v. Niles, 35 Cal. 282 (1868); Standard Oil Co. v. Bachelor, 89 Ind. 472 (1877); Rieman v. Shepard, 27 Ind. 288 (1866); Powell v. City of Madison, 21 Ind. 335 (1863); Hunter v. Board of Supervisors, 33 Iowa 376 (1871); State v. Haight, 30 N.J.L. 428 (Sup. Ct. 1863).

tangible personal property is essentially a state function[6] and, correspondingly, a state problem, the Supreme Court of the United States has considered the problem of the proper place of taxation[7]—but only when it was urged that the taxation system of a state contravened the due process, equal protection[8] or commerce clause[9] of the federal constitution.

The problem of where property is to be assessed and taxed when the owner is domiciled in one taxing district of a state and the property is located in another taxing district of the same state has received very little consideration by legal writers and is seldom raised in adjudication. This problem appears to be solely a state question, since no federal question is involved, and it has been held that it is within a legislature's discretion to fix the situs of property for taxation.[10]

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6. See BONELLI, THE VIEWPOINT OF THE STATE ADMINISTRATORS ON PROBLEMS OF THE COMMISSION ON INTERGOVERNMENTAL RELATIONS 16 (NATIONAL TAX ASSOCIATION 1954). The author states that the federal government has been excluded from the field of property taxation by constitutional restrictions. See also Brown, *State Property Taxes and the Federal Supreme Court,* 14 IND. L.J. 491 (1939). "Nevertheless, there is one important form of taxes which is without its [the federal government's] scope. This is the ordinary property tax. The reason is, of course, that a property tax is a direct tax, and the constitution provides that direct taxes imposed by the government must be apportioned among the states according to population. (U.S. CONST., art. I, § 2 cl. 3; art. I, § 9 cl. 4) It needs no argument that this *practically* precludes the Federal government from imposing a property or other direct tax." (Emphasis added.) *Id.* at 491. The federal government, however, has levied a property tax three times—in 1798 on dwellings, slaves and land; similarly during the war of 1812; and during the Civil War. DAVIS, TRENDS AND ROLE OF THE PROPERTY TAX 302, 305 (NATIONAL TAX ASSOCIATION 1954). It appears as if the federal government has never levied a property tax on tangible personal property.

7. See, *e.g.,* Braniff Airways v. Nebraska State Board of Equalization and Assessment, 347 U.S. 590 (1954); Northwest Airlines v. Minnesota, 322 U.S. 292 (1944); Safe Deposit Co. v. Virginia, 280 U.S. 83 (1929); Frick v. Pennsylvania, 268 U.S. 473 (1925); Union Ref. Transit Co. v. Kentucky, 199 U.S. 194 (1905); Delaware R.R. v. Pennsylvania, 198 U.S. 341 (1905); Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891).

8. U.S. CONST. amend. XIV, § 1.

9. *Id.* art. I, § 8, cl. 3.

10. See Columbus Southern Ry. v. Wright, 151 U.S. 470 (1894). A Georgia statute distributed for the purposes of taxation the rolling stock and personal property of railroad companies among the several counties traversed by the roads, and subjected it to the varying rates of taxation prevailing therein instead of taxing it in the county of the principal offices of the roads, as was done in the case of individuals and other corporations. A domestice railroad contended that it was being denied "equal protection of laws" (among other things) by such taxation. The Court overruled this contention and held that it was within the province of the state legislature to give personal property a situs other than that of the domicile of the owner. *Accord,* General American Tank Car Corp. v. Day, 270 U.S. 367 (1926). In this case the Court stated, "We are not concerned with the particular method adopted by Louisiana of allocating the tax between the state and its political subdivisions. That is a matter within the competency of the state legislature." *Id.* at 372. In General Motors Acceptance Corp. v. Hulbert, 317 U.S. 590 (1942), the contention was raised that an Oklahoma statute fixing the situs of intangible personal property for taxation was a denial of "due process" and "equal protection of the laws" under the fourteenth amendment. The Court dismissed the appeal, *per curiam,* for the want of a substantial federal question—citing as authority the *Wright* and *Day* cases.

Under the present Indiana assessment system some taxing districts are not receiving revenue to which they are legally entitled, while other districts are receiving revenue to which they have no legal claim. In some instances where the property is not taxed at all, both the state and the proper taxing district are losing revenue.

A focus on the specific problem in the Indiana personal property tax system will entail a determination of the proper place of assessment under the statute and its judicial interpretations, together with an examination of the present enforcement practice. Finally, there will be a consideration of a different basis for the taxation of tangible personal property.

PRESENT INDIANA PERSONAL PROPERTY TAX ACT

The present personal property tax act[11] has been in force, with a few minor exceptions, since 1891.[12] The general rule is as follows:

> "All personal property shall be assessed to the owner in the township, town, or city of which he is an inhabitant on the first day of March. . . ."[13]

This rule appears void of contradiction and clear on its face except for the word "inhabitant." The act does not specify how "inhabitant" is to be construed. The first interpretation of the word as used in this tax act was formed in *Schmoll v. Schenck*[14] in 1907. The court held that "inhabitant" meant "a true, fixed place from which one has no present intention of moving"[15] or, in other words, a person who is domiciled at

11. IND. ANN. STAT. § 64-404 (Burns Supp. 1957).
12. IND. REV. STAT. § 8531 (Myers 1892).
13. IND. ANN. STAT. § 64-404 (Burns Supp. 1957). There are twelve exceptions to this general rule; the first two exceptions, however, are the only ones that are of importance in connection with this discussion. The first exception provides that all goods and chattels are to be taxed at the place where situated "if the owner or person having control thereof hires or occupies a store, mill, dockyard, piling ground, place for sale of property, shop, office, mine, farm, place of storage, manufactory or warehouse therein *for use in connection with such goods and chattels.* . . ." (Emphasis added.) The second exception provides that all animals shall be assessed at the place where they are kept throughout the year. Thus, it can be seen that these two exceptions sap much of the force of the general rule. Practically speaking, the taxation of property which is situated at the place where the owner is an "inhabitant" is actually being taxed at that place where it is situated. Consequently, this fact plus the two aforementioned exceptions probably result in the taxation of most personal property in Indiana at that place where it is situated. There are, however, many instances in which tangible personal property is situated in a place other than where the owner is an "inhabitant" and which does not fall within the purview of the first two exceptions. In such cases the general rule would apply, and it is the taxation of such property that is the instant concern.
14. 40 Ind. App. 581, 82 N.E. 805 (1907).
15. *Id.* at 588, 82 N.E. at 808.

a certain place.[16] The task of the court in making this decision was not an easy one. "Inhabitant" had been held to have sundry meanings.[17] The court resolved this issue by assuming, apparently, that the legislature intended inhabitant to mean either one who is residing at a certain place or one who is domiciled at a certain place, since these were the only two of the divers meanings the court considered in construing "inhabitant."[18] Precedent was not clear as to the differences or similarities in meaning of "residence," "inhabitant," and "domicile."[19] "Resident" and "inhabitant" had been used interchangeably and synonymously,[20] and both words had been held to mean a person who was domiciled at a certain place.[21] Both words, however, had been construed to have other meanings.[22] "Residing" had been defined in a prior tax case as conveying "the idea of a fixed and permanent residence, and not a temporary or transitory place of abode."[23] The word "resident" as used in voting cases had also been

16. *E.g.,* Croop v. Walton, 199 Ind. 262, 157 N.E. 275 (1927) which interpreted the phrase "a true fixed place . . ." to mean that place where one was domiciled. The terms "residence" and "domicile" have been given ambiguous meanings and interpretations. For an excellent discussion of this problem, see Reese and Green, *That Elusive Word, "Residence,"* 6 VAND. L. REV. 561 (1953). To facilitate understanding and to avoid this confusion, when used in the ensuing discussion, "domicile" and "domiciliary" shall convey the meaning of a permanent place of abode; "residence," "resident," and "residing" shall convey the meaning of only a temporary place of abode.

17. "It [inhabitant] has been construed to mean an occupant of land; a resident; a permanent resident; one having a domicile; a citizen; a qualified voter; a settlor." Schmoll v. Schenck, 40 Ind. App. 581, 587, 82 N.E. 805, 807 (1907).

18. See note 33 *infra.*

19. See the following confusing language used in Pedigo v. Grimes, 112 Ind. 148, 154, 13 N.E. 700, 703 (1887). "It can hardly be doubted that a man living in Evansville is a resident [domiciliary?] of that city, although he may intend to remove to Indianapolis either at a fixed time or at an indefinite period in the future. So if a man should take a business position at Bloomington, intending to remain as long as the business required, he would acquire a residence [domicile?] at that place, even though his purpose may be to return at some future time to the place of his former domicile. Of course, a removal without any intention of making the place the domicile would not secure a residence [domicile?], no matter how long the person intended to remain; but if the intention was to make the place the domicile, a legal residence [domicile?] would be acquired."

20. *E.g.,* Culbertson v. Board of Comm'rs, 52 Ind. 361, 366 (1876), where the court stated, "The words 'inhabitant' and 'resident,' 'reside,' and 'residing' are used as synonymous." In McCormick v. Board of Comm'rs, 68 Ind. 214, 217 (1879) the court stated that "inhabitant" was the nearest synonym to "resident" in the English language.

21. *E.g.,* Pedigo v. Grimes, 112 Ind. 148, 13 N.E. 700 (1887) ("resident" held to mean a person who was domiciled at a certain place); *Ex parte* Laboyteaux, 65 Ind. 545 (1879) ("inhabitant" construed as "domiciliary" although word "domiciliary" not used). Culbertson v. Board of Comm'rs, 52 Ind. 361 (1876) ("residing" held to mean place of domicile); Quinn v. State, 32 Ind. 485 (1871) ("resides" given the interpretation of "domicile" although the word "domicile" not used).

22. See note 17 *supra;* see also note 25 *infra.*

23. Culbertson v. Board of Comm'rs, 52 Ind. 361, 366 (1876).

held to mean a person who was domiciled at a certain place.[24] In other non-tax contexts, however, the court had held "resident" to mean one who merely had his home at a certain place at a given time.[25] The legislature appeared to use the words interchangeably[26] and seldom expressed its intention in respect to their meaning. Moreover, the word "inhabitant" had never been used in a prior tax statute. The 1852 legislature had enacted a statutory rule of construction which provided that "inhabitant may be construed to mean a resident in *any* place."[27] (Emphasis added.) This statutory rule, however, could not be used to interpret inhabitant until it had been construed itself, since it was not clear whether the legislature intended the phrase "resident in any place" to convey a meaning of domicile or of residence.[28] Speaking of the present tax act, the court, by obiter dictum, said, "[G]enerally personal property is listed in the township *where the owner resides,* or 'is an inhabitant,' as the statute expresses it."[29] (Emphasis added.) The meaning of "resides" was not specified by the court. In the *Schenck* case the court did not try to reconcile these ambiguous and inconsistent holdings; instead, it noted that "inhabitant" could not be given an exact definition applicable to all cases, but that the connection in which "inhabitant" was used would

24. See Pedigo v. Grimes, *supra* note 21; Quinn v. State, 35 Ind. 485 (1871); Maddox v. State, 32 Ind. 111 (1869) (using term "residence" but giving definition of "domicile"); French v. Lighty, 9 Ind. 475, 477 n.1 (1857).

25. See, *e.g.,* Relender v. State *ex rel.* Utz, 149 Ind. 283, 288, 49 N.E. 30, 32 (1897) where the court held that art. 6, § 6 of the Indiana Constitution which requires a county official to reside in the county of his office "must be construed as requiring him to be a resident thereof—not in the general sense of the term, but he is required to actually reside therein. . . ." State *ex rel.* Cornwell v. Allen, 21 Ind. 516 (1863); *cf.* Union National Bank v. Finley, 180 Ind. 470, 103 N.E. 110 (1913) in which the court held that within the meaning of the attachment law giving a right of attachment on the ground of non-residence, the word "residence" contemplated an actual residence as distinguished from a legal or constructive one. It was the opinion of the Indiana Attorney General that "resides" as used in a welfare statute "should be construed as a place of temporary sojourn and not a permanent domicile." 1936 OPS. IND. ATT'Y GEN. 297, 301. (Surely the Attorney General intended to use the conjunction "either . . . or" instead of "and," since it is most unlikely that the legislature would intend to give aid to needy persons who only had a temporary abode in Indiana and deny it to those who had a permanent abode in Indiana.) *But see* Wallace v. State, 147 Ind. 621, 47 N.E. 13 (1896). The word "residence" in a criminal statute which provided "whoever kidnaps or forcibly or fraudulently carries off or decoys from his place of residence. . . . " was held to mean neither a permanent nor temporary place of abode but any place a person had a right to be. The court said the obvious purpose of the statute was "to provide against the kidnapping of a person from any place where he had a right [?] to be, whether that be the place of temporary sojourn or permanent domicile." *Id.* at 624, 47 N.E. at 14.

26. This conclusion is verified by the tax act in question. The word "inhabitant" is used in the general rule, but the word "resides" is used in the exceptions. To further add to the confusion, the word "dwelt" is used in the sixth exception. *Cf.* Reese and Green, *supra* note 16.

27. IND. REV. STAT. c. 17, § 1 (1852); now IND. ANN. STAT. § 1-201 (Burns 1946).

28. See note 33 *infra.*

29. Burns v. State, 5 Ind. App. 385, 394, 21 N.E. 547, 550 (1892).

determine its construction.[30] It might well be that the legislature adopted the word "inhabitant" to avoid the confusion existing between the terms "domicile" and "residence";[31] this confusion could have been explicitly resolved by incorporating in the tax statute a section[32] setting out the meaning of "inhabitant." The legislature, however, did not provide such a section; consequently, the court was forced to speculate as to the intention of the legislature with only the contradictory holdings of the past for a guide. Accordingly, the court in the *Schenck* case chose to interpret "inhabitant" as indicating "that place where one is domiciled."[33] This interpretation has been accepted in subsequent cases, and, therefore, prompts the conclusion that it is the present operative rule.[34]

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30. 40 Ind. App. 581, 587, 82 N.E. 805, 807 (1907).

31. It would certainly appear reasonable to assume that the legislature was aware of this confusion and contradiction when it chose the word "inhabitant" to be used in the tax act of 1891. Yet, if the legislature were aware and intended at the same time that personal property was to be assessed at the domicile of the owner, it is difficult to understand why the word "domiciliary" was not used. The use of this word would have left little doubt as to its meaning. Even the use of the word "resident" would have been a better choice than "inhabitant," since "residing" in 1876 had been held to mean that place where one was domiciled in the tax case of Culbertson v. Board of Comm'rs, 52 Ind. 361 (1876).

32. *Cf.* IND. ANN. STAT. § 29-4803 (Burns 1949). In this franchise statute the legislature specifically set out how the word "resident" was to be interpreted.

33. After stating the various interpretations of "inhabitant," the court quoted definitions of "inhabitant" and "domicile" from ANDERSON LAW DICTIONARY (1893). The court continued, "'*A resident of a place,* is one whose place of abode is there, and who has no present intention of moving therefrom.' (Our italics.) 24 AM. AND ENG. ENCY. LAW (2d ed.), 694. Our lawmakers selected the word 'inhabitant,' a word, as we have seen [from the dictionary definitions] embracing locality of domicil or fixed, permanent home, and which excludes the idea of a temporary residence, as particularizing the character of the residence intended where property of the class described in the complaint shall be taxed.

"Considering the force[?] given the word 'resident' when used in the phrase 'a resident of a place,' and our right by statute to construe 'inhabitant' to mean 'a resident in any place,' we have the word 'inhabitant' and phrase 'resident in any place,' as meaning a true fixed place, from which one has no present intention of moving." 40 Ind. App. 581, 588, 82 N.E. 805, 807 (1907). The logic of the last quoted sentence is questionable; however, any argument in respect to its veracity would appear to be merely pendantic, since it has become the accepted law of the state. See cases cited note 34 *infra*. Nevertheless, it appears as if the court would have based its conclusion upon more solid grounds if it had ignored the statutory rule of construction of "inhabitant" because of the confusion it created. It was not mandatory that the court use this rule, since, as the court said, it had the "right" to use it. Since "resides" was used in the exceptions of the act, it certainly would have been proper for the court to have held that "resides" and "inhabitant" were synonymous. (In Brookover v. Kase, 41 Ind. App. 102, 83 N.E. 524 (1908) "resides" as used in the fifth exception to the tax act was held to mean that place where one was domiciled.) "Residing" had been held to mean that place where one was domiciled in a past tax case and "resident" had been construed to have the same meaning in the great majority of non-tax cases. Based upon these decisions, a conclusion that it was the legislative intent that "inhabitant" be interpreted as a "domiciliary" would appear to be sound.

34. See Croop v. Walton, 199 Ind. 262, 157 N.E. 275 (1927); Brendal v. Kugler, 122 Ind. App. 104, 101 N.E.2d 661 (1951); *cf.* Ahern v. Burk, 179 Ind. 179, 99 N.E. 1004 (1912) (holding that due to the statutory rule of construction pertaining to "inhabitant,"

ACQUISITION OF A DOMICILE

Certain factual requirements are discussed in the cases dealing with choice of law problems as being necessary for the acquisition of a new domicile or the retention of an established one.[35] These cases, however, are concerned with domicile in an interstate sense.[36] Consequently, it must be determined whether the factual requirements for the acquisition of a domicile in an intrastate sense are of the same nature.

In *Schmoll v. Schenck*[37] the city of Peru assessed the intangible personal property[38] of Mrs. Schenck for the years 1893-1903. She contended that Peru could not legally tax her since she was an "inhabitant" of Vevay. It was conceded that she had been an "inhabitant" of Vevay in 1893. The special findings by the trial court disclosed the following facts: In 1893 she sold her home in Vevay. In 1897 she bought a lot in Peru in her own name and had a house constructed thereon for the use of her daughter and son-in-law. From 1893 to 1903 she spent about nine-tenths of her time in Peru and the remainder in Vevay and other places. She stayed at various places while she was in Peru,[39] and had listed and paid taxes on the intangible property in question in Vevay from 1893 to 1903.

The court, holding that Mrs. Schenck was an "inhabitant" of Vevay, reasoned that the acquisition of a new domicile required not only residence

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a complaint alleging that a testator was a "resident" was good on demurrer, although the statute provided that wills would be proven in any county where the testator was an "inhabitant").

35. See generally Beale, *Proof of Domicile,* 74 U. PA. L. REV. 552 (1926).

36. A case is not a conflict of laws case unless there is an interstate element in the case. See CHEATHAM, GOODRICH, GRISWALD, AND REESE, CONFLICT OF LAWS 25 (4th ed. 1957).

37. 40 Ind. App. 581, 82 N.E. 805 (1907).

38. Although this case involved the taxation of intangible personal property, it, nevertheless, is pertinent in this discussion of the taxation of tangible personal property, since the chief issue of the case was the interpretation of the word "inhabitant" which determined the situs of taxation of both types of property. It is worthwhile to note that the proper place of taxation of tangible personal property was mentioned in the *Schenck* case but was not in issue. Mrs. Schenck owned a small amount of tangible personal property, consisting of a horse, buggy and household goods, which was situated in Peru. From 1893-1898 she listed it for taxation in Vevay. From 1898-1902 she listed the property in Peru, acting on the advice that tangible personal property should be listed for taxation in the township, town or city where the same was located, irrespective of the owner's domicile. At the time of each listing, she claimed Vevay as her domicile. Since this question was not in issue, the court gave no opinion in respect to the proper place of taxation. Since, at that time, both tangible and intangible personal property were to be assessed under the same provisions, both types of property should have been assessed and taxed at that place where Mrs. Schenck was an "inhabitant," regardless of the location of the property.

39. It is not clear from the facts of this case where Mrs. Schenck lived when she was in Peru. It would appear that the type of dwelling she occupied during the years she was in Peru would have been some indication of her intent to establish a domicile in Peru or to retain her established domicile in Vevay.

in a place but also the intent to make it the permanent place of abode.[40]

It was apparent from the facts that Mrs. Schenck had acquired a residence of some kind in Peru; the main question was whether she intended to make Peru her domicile. The court held that intention was to be determined not only by expressions of intention but also by the general acts and conduct of the person—the latter being controlling if inconsistent with the former.[41] The language used by the court clearly shows that acts are to be given more weight than mere pronouncements of intention in determining the domiciliary intent of a person. In this case it was clear that Mrs. Schenck expressed the intention to retain Vevay as her domicile. In weighing the evidence, the court was of the opinion that the acts manifesting intention to establish a new domicile were outweighed by those showing the intention to retain Vevay as the domicile; consequently, the court concluded that it was the manifested intent of Mrs. Schenck to retain her established domicile.[42] This conclusion, however, is questionable, since most of the acts the court relied upon as manifesting the intent to retain Vevay as the domicile do not really appear to show such an intent.[43]

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40. "In the case at bar, it is admitted that appellee [Mrs. Schenck] in 1893 was an inhabitant of Vevay, Indiana. With that fact admitted, the rule is well established in both this country and England that such habitancy or domicile will continue until both residence in a new locality and intent to make it his home occur." Schmoll v. Schenck, 40 Ind. App. 581, 590, 82 N.E. 805, 808 (1907).

41. *Ibid.*

42. *Id.* at 591, 82 N.E. at 809.

43. Some of the acts of intention that convinced the court that Mrs. Schenck intended to retain her established domicile in Vevay were as follow:

a. The magnitude of her interest in Vevay. (Since the court did not consider Mrs. Schenck's act of selling her private home in Vevay as an act showing intention to abandon her domicile there, logically it would appear as if neither should the fact that she retained most of her holdings in Vevay have been considered as an act showing intention to retain the established domicile in Vevay.)

b. The acts of listing the property in question for taxation in Vevay. (It is submitted that little weight should be accorded to this act as indicative of any intention due to the fact that the average rate of taxation in Vevay from 1893-1903 was sixty and one-sixth cents while it was $1.42 in Peru for the same period.)

c. Mrs. Schenck's long admitted residence in Vevay. (This fact would appear to have no pertinency whatsoever in respect to her intent from 1893-1903, since she had not resided in Vevay since 1893. Once it has been determined that there is an established domicile, it would appear to make no difference whether it has been so for years or merely for days.)

d. The fact that by the will of her late husband she became the owner of all the property of which he was seized when he died. (This fact certainly does not show any intention on the part of Mrs. Schenck.)

e. The fact that during all of the time in question Mrs. Schenck was unmarried. (It is difficult to perceive what this fact would have to do with the intention of Mrs. Schenck. It is true that if she had remarried, it would have been presumed under Indiana law that her domicile became that of her husband's; however, it certainly does not follow that because she did not remarry, she intended to retain her established domicile in Vevay.)

In *Croop v. Walton*[44] the tax officials of Elkhart, Indiana, assessed the intangible property of Walton for the years 1918-1923. Walton claimed that he was not subject to taxation for his intangibles in Indiana due to the fact that he was an "inhabitant" of Sturgis, Michigan. It appears that the parties agreed that Walton was domiciled in Sturgis until September, 1917. He purchased a residence in Elkhart in 1915 for the purpose of residing there until his daughter, who was divorced, became settled elsewhere. He sold his home in Sturgis in January, 1916. His daughter died in March, 1916, before he moved into the Elkhart house. After the death of the daughter, Mrs. Walton spent the next year and a half in various hospitals throughout the country. She suffered a painful nervous agitation affecting her health whenever she returned to Sturgis. In September, 1917, Walton and his wife moved into the Elkhart house which became their chief dwelling place. Walton was the manager of a business in Sturgis, and for one year after September, 1917, went to Sturgis on an average of six days a week—during the next two years, four or five days a week—and after that, until 1927, about two days a week. He listed all of his intangibles for taxation in Sturgis and informed the Elkhart County Assessor that his "legal residence" was in Sturgis. Walton argued that he intended to return to Sturgis upon the restoration of his wife's health. In this case there was a complete removal of residence from Sturgis to Elkhart. The only concrete fact that tied Walton to Sturgis was the manufacturing corporation which he managed there. The court, nevertheless, held that he was an "inhabitant" of Sturgis on the grounds that his residence in Elkhart was only temporary—even though it had continued there for a number of years—since he intended to return to his established domicile at a later time.[45] It was further held that not only must an established domicile be abandoned in order to acquire a new domicile but that there also must be an intent to reside at the new place permanently or at least indefinitely.[46] The court appeared to accept as a general rule that when there is a complete removal of residence with an intention to remain an indefinite time (even though there may be a floating intention to return to the former domicile at some future and indefinite time) there has been a change of domicile.[47] Applying this test, the court ruled that the intent to return to the established domicile based upon some event which could be reasonably foreseen—such as the restoration of health—is not such an indeterminate or floating inten-

44. 199 Ind. 262, 157 N.E. 275 (1927).
45. *Id.* at 270-71, 157 N.E. at 278.
46. *Ibid.*
47. *Ibid.*

tion.[48] This case definitely shows that it is not necessary to maintain a residence at the old domicile in order to be domiciled there, or, in other words, a person may reside in one place and nevertheless be domiciled in another. Concerning this point, the court in the *Schenck* case said that as applied to the tax statute it was not necessary that a person intend to return to a particular building or house but only that he intend to return to the township, town or city of his established domicile.[49]

The *Schenck* and *Walton* cases appear to be the only cases facing the issue of who is an "inhabitant" under the provisions of this tax act.[50] In the *Walton* case, however, the court referred to the principle of law stated in *Culbertson v. Board of Comm'rs*[51] as being "determinative of the questions here involved";[52] this reference was peculiar inasmuch as the issue in the *Culbertson* case involved the interpretation of "residing" and not "inhabitant." The *Culbertson* case was decided under the tax act of 1852 which provided that ". . . all personal property owned by persons residing within this state . . . shall be subject to taxation."[53] Culbertson claimed that he was not liable for taxation on his intangible property for the years 1870-1872 because he was residing in Europe during that period of time. The court held that the word "residing" as used in the tax statute "was intended to convey the idea of a fixed and permanent residence and not a temporary, transitory place of abode."[54]

It was conceded that until August, 1870, Culbertson's domicile was in New Albany. In August, 1870, he rented his home, agreeing to give the tenant three months notice before requiring him to vacate the premises. Culbertson then departed with his family for Europe with the expressed expectation of returning to his home at some indefinite time in the future, probably in two or three years. Four months later he wrote his brother that "they of course will only tax me on my realty this year, as I ceased to be a citizen for a year or two, and as life is uncertain may never become one again."[55] Culbertson lived in London for about three months and then traveled from place to place on the continent for two years. He notified his tenant in August, 1872, that he would require him to vacate

48. *Ibid.* See cases cited *Id.* at 270, 157 N.E. at 278 for jurisdictions that have accepted this qualification. See generally Annot., 9 L.R.A. (N.S.) 1159 (1907) for discussion of when and under what circumstances the removal of a person from one place to another in search of health will indicate a change of domicile.

49. Schmoll v. Schenck, 40 Ind. App. 581, 588, 82 N.E. 805, 808 (1907).

50. Undoubtedly, the cost of litigation has been the chief deterrent to a greater amount of litigation of the problems in this area.

51. 52 Ind. 361 (1876).

52. 199 Ind. 262, 274, 157 N.E. 275, 279 (1927).

53. IND. REV. STAT. c. 6, § 3 (1852).

54. 52 Ind. 361, 367 (1876).

55. *Id.* at 363.

the house in November, at which time Culbertson and his family returned to New Albany. The court held that Culbertson had retained his domicile since he had not acquired one elsewhere.[56] It was the decision of the court that an absence, either for the purpose of business or pleasure, from one's established domicile which is accompanied with the intent to return upon the accomplishment of such purpose does not result in the loss of the established domicile.[57]

In the *Schenck, Walton* and *Culbertson* cases the decisions were in favor of the established domicile. Schenck and Walton maintained that they intended to retain the established domicile even though they were residing elsewhere. Culbertson, on the other hand, asserted that he intended to acquire a new domicile. The factual differences give the cases an appearance of inconsistency; yet they are reconcilable since in each case the court focused on the acts which manifested intent.[58]

It appears that if a person is domiciled for taxation purposes in Indiana, he is likewise domiciled for voting purposes, probate purposes and for all other purposes dependent upon domicile. This conclusion is warranted, notwithstanding the fact that the word used in the relevant statute is "resident" or "inhabitant," if the court interprets the word used to mean "that place where one is domiciled."[59] From the *Schenck* and

56. "A man must have a domicile at some place and he can have but one. In order to lose one, therefore he must acquire another." *Id.* at 370.

57. "If the departure from one's fixed and settled abode is for a purpose in its nature temporary, whether it be business or pleasure accompanied with an intent of returning and resuming the former place of abode as soon as such purpose is accomplished; in general, such a person continues to be an inhabitant at such place of abode. . . ." *Id.* at 368 quoting with approval Sears v. City of Boston, 42 Mass. 250 (1840).

58. The facts of the cases indicate that the court would have been on much firmer ground to have held that Schenck and Walton had acquired a new domicile, since they manifested acts of intention of acquiring a new domicile by taking up actual residence in one place to the exclusion of all others. Culbertson did not really establish a residence in any one place, much less a domicile; he merely traveled from place to place. His declarations of intention to give up his established domicile appear to have been only self-serving to avoid paying taxes.

59. The fact that the court makes no distinction among the cases—regardless of the fact that the statute involved may concern voting, tax, probate, attachment, divorce, garnishment, etc.—once the question of domicile is before the court substantiates this conclusion. See, *e.g.*, Ulrey v. Ulrey, 231 Ind. 63, 106 N.E.2d 793 (1952) (a divorce case) citing Hayward v. Hayward, 65 Ind. App. 440, 115 N.E. 966 (1917) (a probate case) and Culbertson v. Board of Comm'rs, 52 Ind. 361 (1876) (a tax case); Croop v. Walton, 199 Ind. 262, 157 N.E. 275 (1927) (a tax case) citing Hayward v. Hayward, *supra* (a probate case) and McDowell v. Friedman Bros. Shoe Co., 135 Mo. App. 276, 115 S.W. 1028 (1908) (a garnishment case); Pedigo v. Grimes, 113 Ind. 148, 13 N.E. 700 (1887) (a voting case) citing Astley v. Capron, 89 Ind. 167 (1883) (a resident householder exemption case), Culbertson v. Board of Comm'rs, *supra* (a tax case) and McCollem v. White, 23 Ind. 43 (1864) (an attachment case); Brendal v. Kugler, 122 Ind. App. 104, 101 N.E.2d 661 (1951) (a probate case) citing Pedigo v. Grimes, *supra* (a voting case), Schmoll v. Schenck, 40 Ind. App. 581, 82 N.E. 805 (1907) (a tax case) and Green v. Simon, 17 Ind. App. 360, 46 N.E. 693 (1897) (a resident house-

Walton cases it may be inferred that the Indiana Court does not apply less stringent rules for the showing of a change in an intrastate domicile than are applied for the showing of a change in an interstate one.[60]

ENFORCEMENT PROBLEMS

Once the question of domicile is settled, the tax statute itself makes it clear that all tangible personal property is to be taxed at such domicile, unless it be within one of the exceptions of the tax act. Consequently, if a person is domiciled in Marion County and has a summer home in Brown County, all of his tangible personal property situated at such summer home should be listed for taxation in Marion County. Conversely, if a person is domiciled in Brown County but is residing in Marion County, all of his tangible property situated in Marion County should be listed for taxation in Brown County. Likewise, road construction equipment located for the entire year in a county other than the domicile of the owner has no taxable situs there and should be taxed only at the domicile of the owner. Theoretically, the conclusions posited to these hypotheticals appear to be sound and based upon the law as interpreted by the courts. A full treatment of the problem, however, necessitates an examination of the practices of the administrative officials.

The recent controversy between the Monroe County Assessor and the students of Indiana University concerning the proper place of assessment of the students' tangible personal property[61] affords an excellent

holder exemption case); Schmoll v. Schenck, *supra* (a tax case) citing Pedigo v. Grimes, *supra* (a voting case), Brittenbaum v. Robinson, 18 Ind. App. 502, 48 N.E. 265 (1897) (a mortgage recording case), and Green v. Simon, *supra* (a resident householder exemption case). *Cf.* Note, *Evidentiary Factors in the Determination of Domicile,* 61 HARV. L. REV. 1232, 1234 (1949) stating "Courts adjudicating one type of legal relationship liberally cite, on the issue of domicile, cases determining other categories."

60. *Contra* Hayward v. Hayward, *supra* note 59. This case involved a change of the domicile of a mentally incompetent person. The court stated: "A change of domicile involving a state of this country and a foreign country or two states of the federal union involves also a change in the laws relating to the succession to, or distribution of, the personal property of a decedent. In this respect a change in national or quasi-national domicile differs from a change in mere municipal domicile, or from one part of a state to another. For such reasons, the courts are more liberal in recognizing the power of proper representative person to perform the intent and perform the act requisite in changing the domicile of an incompetent person or a person *non sui juris,* where the change relates to municipal rather than to national or quasi-national domicile." *Id.* at 451, 115 N.E. at 970.

61. Prior to 1957 students attending Indiana University (which is situated in Monroe County) were not assessed in Monroe County nor did they pay taxes there except by choice. In fact, it appears as if many students did not pay personal property taxes at any place. Those who paid personal property taxes usually did so in order to obtain license plates for their automobiles. See IND. ANN. STAT. § 42-102 (Burns 1952). Some students, however, even managed to purchase license plates without paying personal property taxes. See INDIANA COMM. ON STATE TAX AND FINANCING POLICY, PRELIMINARY REPORT 12 (1954), where the Comm. stated: "It is apparent that despite laws to

opportunity for examining the administrative difficulties experienced with the present tax act as well as for pursuing some of the logical and necessary ramifications of an assessor's determination of "inhabitant." The assessor took the position that all student-owned tangible personal property present at the site of the institution should be taxed there.[62] The Chairman of the State Board of Tax Commissioners, on the other hand, was of the opinion that single students were not "inhabitants" at the site of the institution and, therefore, should not be taxed there; as to married students, however, he concluded that if they maintained a home for their families at the site of the institution, they became "inhabitants" and were subject to the tangible personal property tax.[63]

The solution of the problem is not as simple as either of these two unofficial opinions tend to indicate. Neither opinion appears to be

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the contrary, licenses are still being issued without presentation of the personal property tax receipt."

The students were very vehement about being taxed in Monroe county and contended that they were being taxed without representation, since students cannot vote at the site of an institution of learning. See IND. ANN. STAT. § 29-4905 (Burns Supp. 1957) which states: "No student or his wife shall be deemed to have gained a residence for voting purposes in the state or township, ward or precinct where the residence is established solely for attendance at such institution of learning. . . ." Although this statute has never been tested by the court, it does not appear to forbid all students from voting in the college community but only those who are in the community solely for the purpose of attending the college. If a student actually intends to establish his domicile in the college community, he should be permitted to vote there. *Compare In re* Bankford, 126 Misc. 174, 212 N.Y. Supp. 202 (1925), *with* Blankford v. Finch, 241 N.Y. 180, 149 N.E. 415 (1925); *In re* McCormack, 86 App. Div. 362, 83 N.Y. Supp. 847 (1903); *In re* Barry, 164 N.Y. 18, 58 N.E. 12 (1899). The NEW YORK CONSTITUTION, art. II, § 3 states: "For the purpose of voting, no person shall be deemed to have gained or lost a residence . . . while a student of any seminary of learning. . . ." Regardless of this constitutional provision the New York courts held that the right to vote may be acquired independently of the character of presence as a student. See generally comment, 3 GEO. WASH. L. REV. 121 (1934); Annot., 37 A.L.R. 134 (1945) on domicile of students for voting purposes.

62. Daily Herald-Telephone (Bloomington, Ind.), March 15, 1957, p. 1, col. 8. The practice of taxing students for some or all items of tangible personal property located at the situs of the institution of learning appears to be prevalent throughout the state. See Daily Herald-Telephone (Bloomington, Ind.), March 18, 1957, p. 1, col. 1; *id.*, March 15, 1957, p. 1, col. 8; *id.*, January 22, 1957, p. 1, col. 7.

The *Indiana Law Journal* has conducted a survey of the counties in Indiana in which institutions of learning are located in an attempt to determine whether students are taxed for tangible personal property at such places. Thirteen returns (62%) were received of a total of twenty-one questionnaires. The returns show that all of the counties assess students for some items of tangible personal property—a majority assess only a few items such as cars and television sets, while a few counties assess all items located at the site of the college. The returns indicated that a majority of the county assessors do not assess a student if he has been assessed by his home county. The names of the individual assessors who supplied answers will remain confidential. The returns are on file in the business office of the *Indiana Law Journal.*

63. The Indiana Daily Student (Indiana University, Bloomington, Ind.), January 15, 1958, p. 1, col. 7.

correct. First, it is not all students who should be assessed,[64] but only those who are "inhabitants" of Monroe County. Those students who reside in Monroe County for the sole purpose of obtaining a college education and who plan to return to their established domicile upon the completion of their education most definitely are not "inhabitants" of the county where the college is situated.[65] Moreover, under the present Indiana law, all students who are minors are presumed to be domiciled at the place of their father's domicile.[66]

A more difficult problem is presented with respect to those students who neither intend to return to their established domicile nor intend to make the college community their domicile.[67] They, too, are living in the college community to get an education, and any intent to establish a domicile will be dependent, to a great extent, upon the job opportunities that are available upon their graduation. The rule in Indiana concerning the establishment of a new domicile is that a person must reside in a place with the intent of remaining there for an indefinite period of time with no present intention of leaving.[68] This rule applied in conjunction with the rule that a person does not lose an established domicile until a new one is acquired[69] leads to the conclusion that such students are still "inhabitants" at their established domicile.

The fact that a student is married and has established a household in a place should not result in a change in the requisites for domicile as applied to him. The same criteria that are applied to single students are

64. This statement is made in reference to students who are inhabitants of other counties of Indiana. The situation of non-resident students—those students who are inhabitants of other states—is controlled by the fourth exception of the tax act which provides: "Personal property of non-residents of the state shall be assessed to the owner . . . in the township, town, or city where the same may be. . . ." IND. ANN. STAT. § 64-404 (Burns Supp. 1957). Consequently, there seems to be no doubt under Indiana law that the tangible personal property of non-resident students should be taxed at the place where the college is located.

65. See Pedigo v. Grimes, 113 Ind. 148, 12 N.E. 700 (1887).

66. During minority an infant's domicile is that of his father during his lifetime; on the death of the father, the infant's domicile becomes that of its mother. Johnson v. Smith, 194 Ind. App. 619, 180 N.E. 188 (1932). An infant not being sui juris is incapable of fixing or changing his domicile, and on the death of both parents, the domicile last derived from them continues to be the infant's domicile until legally changed or until the child reaches majority. Waren v. Hofer, 12 Ind. 167 (1859); Johnson v. Smith, *supra*. See generally Beale, *Domicile of an Infant*, 8 CORNELL L.Q. 103 (1923); Note, *Acquisition of Independent Domicile by Infants*, 5 NOTRE DAME LAW. 26 (1929); Note, 8 IND. L.J. 266 (1933); Annot., *Domicile of Infant on Death of Both Parents*, 32 A.L.R.2d 863 (1953); STUMBERG, CONFLICT OF LAWS 45-50 (2d ed. 1951).

67. See STUMBERG, *op. cit. supra* note 66, at 32, where he states that the place where such a person is living "is the one with which he has the most substantial connection and should therefor be designated as his domicile."

68. See, *e.g.*, Ulrey v. Ulrey, 231 Ind. 63, 106 N.E.2d 793 (1952); Croop v. Walton, 199 Ind. 262, 157 N.E. 275 (1927); Schmoll v. Schenck, 40 Ind. App. 581, 82 N.E. 805 (1907).

69. *Ibid.*

applied to married students in determining where they are domiciled.[70] Although it is true that a married student who maintains a home in the college community is more apt to have committed acts which would tend to indicate the establishment of a domicile, such as voting in the county, participating in community affairs, etc., there is no validity in a conclusion that all married students are "inhabitants" of the college community. Therefore, it is urged that, in the majority of instances, a student is not an "inhabitant" of the place where the institution of learning is located,[71] regardless of his marital status, and thus is not subject to the taxation of his tangible personal property located there.[72]

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70. *Cf.* French v. Lighty, 9 Ind. 475, 478 n.1 (1857) for the converse reasoning. The court noted, "A single man can no more be without a fixed domicile than a man of family; and though the domicile of the former may be more difficult to find and prove, yet the rules of evidence by which it is ascertained are the same as those applicable in the determining the domicile of other persons."

71. See Dale v. Irvin, 78 Ill. 170 (1875). In this case the court found that as a general rule students were no more than mere strangers in the college town, and that not one student out of twenty could be considered an inhabitant of the college town. This statement appears to be just as valid today as it was then.

72. The State Board of Tax Commissioners referred the student problem to the Attorney General of Indiana. On February 26, 1958, the Attorney General handed down his official opinion. 1958 OPS. IND. ATT'Y GEN. No. 16. It was his opinion, based on the *Schenck* and *Walton* cases, that students should be assessed only in the county where they were domiciled. He concluded that as a general rule students were not domiciled at the place where the college or university was located if they were merely there to attend the institution of learning and intended to return to their established domicile upon the completion of their education. He specifically pointed out that marital status did not necessarily have any effect on the domicile of a student.

Regardless of the fact that a student may not be an inhabitant of the place where the institution of learning is located, if he lives in a dormitory situated on state-owned land, it may be that his personal property located there should be taxed by the township in which the state-owned land is situated. This proposition would appear to be true if the eighth exception of § 64-404 is applicable in this situation. This exception reads: "All personal property of any person situate upon . . . the land . . . of this state . . . shall be deemed personal property for the purposes of taxation and assessment, and shall be assessed as personal property to the owner . . . in the township, town, or city to which said lands belong or of which they form a part. . . ." Two requirements must be satisfied before this exception would apply. First, the land on which the dormitory is situated must be state owned. The ownership of the land of state supported colleges complicates the problem. IND. ANN. STAT. § 28-5722 (Burns 1933) authorizes the trustees of the state supported colleges to acquire land for the purpose of building dormitories and that "title to all property so acquired . . . shall be taken and held by and in the name of the said trustees in their corporate capacities. . . ." It is questionable whether land so held is state-owned. Technically, perhaps it is not, since it is not held in the name of the state. However, since legislative action was required to enable the trustees to hold the land in their corporate capacity, it would appear that the legislature could require the trustees to deed the land back to the state. IND. ANN. STAT. § 28-5723 (Burns 1933) authorizes the trustees to issue bonds to build dormitories. These bonds are exempt from state taxes. IND. ANN. STAT. § 28-5726 (Burns 1933). Furthermore, the interest on these bonds is exempt from federal income taxes due to the fact that "bonds . . . issued by the trustees of the university . . . are regarded as instrumentalities of the state issued for the purpose of carrying out an essential governmental function of the state." 1932-33: G.C.M. 10557, XI-1 CUM. BULL. 21, 22 (1932). (Although this was a hypothetical opinion, it is rather apparent that it concerned the bonds that were issued

It is to be noted particularly that the Monroe County Assessor assessed the students only for their tangible personal property located in Monroe County.[73] If, however, he had concluded that the students were inhabitants of Monroe County, then it was his duty[74] to assess all tangible personal property owned by the students, regardless of where it was located in Indiana, unless it was within one of the exceptions of the tax act. Furthermore, the assessor did not assess those students who had already been assessed by another county.[75] Such a practice also appears

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for the construction of the Union Building at Indiana University. The opinion was handed down in 1932, the same year that the Union Building at Indiana University was completed. The opinion states that the supreme court of the state had held the university to be an integral part of the free public school system of the state. See Fisher v. Brower, 159 Ind. 139, 144, 64 N.E. 614, 616 (1902) where the Supreme Court of Indiana held that "Indiana University is an integral part of our free school system." Although this opinion concerned bonds issued to construct a union building which is for the use of the public as well as students, a fortiori it would be applicable to bonds issued for the construction of dormitories which are solely for the use of students.) Consequently, although title to the land is technically in the trustees, it seems as if the land, in reality, is under the control of the state. Whether or not this type of land is state-owned land within the meaning of the eighth exception of § 64-404 is open to conjecture.

Second, assuming that the land is within the eighth exception, the requirement that the property be situated upon the land must be met. The word "situate" as used in this context, appears to have never been defined by the Indiana Court, but there have been decisions on the situs of tangible personal property under a statute that required the taxation of all property within the state. The applicability of these decisions, however, is questionable, since the court appeared to be chiefly interested in defeating the doctrine of *mobilia personam sequuntur* and not in setting out standards for the determination of situs. See Board of Comm'rs v. Standard Oil Co., 103 Ind. 302, 2 N.E. 758 (1885); Standard Oil Co. v. Combs, 96 Ind. 179 (1884); Powell v. City of Madison, 21 Ind. 335 (1863). "Situate" has been interpreted by other courts, but these constructions are of little value, since, as it has been shown, few courts agree on the proper definition of the word. It would depend upon the discretion of the court whether property located in a place for nine months would be situated there. Since the owner of the property has only a temporary abode at such a place, it could be argued that the property was also only located there temporarily and thus would not be taxable there.

This exception was enacted as part of the tax act of 1891 and has ever since been a part of the personal property tax act. It has never been interpreted and was not mentioned in the Attorney General's opinion of February 15, 1958. 1958 OPS. IND. ATT'Y GEN. No. 16. The reason for its existence and the nature of its application is still open to conjecture.

If this exception were to apply to land on which dormitories are located, it would result in an anomalous situation. Students living in dormitories would be taxed at the situs of the institution of learning, while those who lived in fraternity houses or in private apartments would be taxed at their place of "inhabitancy."

This exception also raises a question in respect to the proper place of taxation of construction equipment present on state owned land while fulfilling a contract to erect a building, road, etc. In this situation the place of taxation would turn on the interpretation given to "situate."

73. Daily Herald-Telephone (Bloomington, Ind.), March 18, 1957, p. 1, col. 8.

74. See IND. ANN. STAT. § 64-1023 (Burns 1951) which requires the county assessor to take the following oath when he delivers the assessment list to the auditor: "[I]n no case have I knowingly omitted to demand a statement of the description and value of personal property . . . which any person is required by law to list."

75. Daily Herald-Telephone (Bloomington, Ind.), March 19, 1957, p. 1, col. 5. *But see id.*, March 26, 1957, p. 1, col. 2, in which the assessor announced that all tangible

to be without authority. Once the assessor had determined that the students were "inhabitants" of Monroe County—a determination he had to make to arrive at the conclusion that students should be taxed in Monroe County—he should have considered an assessment by any other county as erroneous. It is possible, however, that the assessor did not base his conclusion upon the above ground but upon the basis that property which is not assessed at the proper place of assessment can be assessed at the place where it is located.[76] A practice based upon such a conclusion also appears to be inconsistent with the statute.

The problems of the present tangible personal property tax act are not limited to the fact that the enforcement officials may not follow the *Schenck* interpretation which requires the taxation of such property at the place where the owner is an "inhabitant." Even if it is assumed that an assessor has correctly determined that a person is an "inhabitant" under the present tax act, he is still faced with the problem of discovering property that is located outside the taxing district. Although the owner is required to declare all taxable property that he owns,[77] the idea that property beyond the perception of the assessor would be consistently declared by even the "honest" taxpayer would be very improbable. This criticism can be made of any tax system based upon assessment.[78] There appears to be no other practical way of discovering tangible personal property under an assessment system; consequently, the word of the owner has to be accepted unless the assessor has personal knowledge that such a person owns property not declared. In addition to the problem of identifying the property, there remains the difficulty of evaluating the property for assessment purposes. Needless to say, even the "honest" taxpayer is tempted to under-valuate his property in such a situation.[79]

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personal property of a student located in Monroe County would be assessed in 1958, regardless of the fact that it may have been assessed by the "home county" of the student.

76. See *id.*, March 22, 1957, p. 1, col. 7, which reported that the Monroe County Assessor stated: "[I]t is just as important for us to live up to our oath by seeing to it that those who possess property here *but do not pay taxes elsewhere* are assessed in Monroe County." (Emphasis added.)

77. IND. ANN. STAT. § 64-401 (Burns 1951).

78. "[I]nstead of being a tax on personal property, it has in effect become a tax upon ignorance and honesty . . . its imposition is restricted to those who are not informed of the means of evasion, or knowing the means, are restricted by a nice sense of honor from resorting to them." SELIGMAN, ESSAYS IN TAXATION 27 (10th ed. rev. 1925) quoting REPORT OF THE COMM'RS OF TAXATION AND ASSESSMENTS IN THE CITY OF NEW YORK 9 (1872).

79. See NATIONAL INDUSTRIAL CONFERENCE BOARD, STATE AND LOCAL TAXATION OF PROPERTY 86 (1930). "If property is to be valued properly, it must be viewed personally by the assessor." See also INDIANA COMMISSION ON STATE TAX AND FINANCING POLICY, PRELIMINARY REPORT 49-50 (1954) for a general discussion of the methods and problems of the present system of evaluation of household goods for assessment purposes.

However, to require the assessor to travel to the place where the property is located or to require the owner to bring the property to his domicile for assessment purposes would be very impractical. Some suggested solutions for these problems will be pointed out below.

TAXATION AT THE SITUS OF THE PROPERTY

A majority of the states provide for the taxation of tangible personal property at its situs[80] instead of at the domicile of the owner. There is much merit to a "situs" system. Not only is the property at the place where the interested assessor can personally view it, but it is taxed at that place which accords it protection and other services throughout the year.

The determination of "situs," of course, presents many of the problems encountered in determining "domicile." A variety of standards for determining "situs" have been adopted. In Kentucky the property must be permanently located at the place where it is sought to be taxed;[81] in Georgia and New Jersey it must have acquired a more or less permanent location;[82] in Virginia it has been held that the statute basing tax situs on physical location contemplates that location which has a degree of permanency or that personalty which has become a part of the common mass of property in the taxing district;[83] in California the taxation of tangible property as between different counties in the state is governed by substantially the same rule as that governing the taxation of such property as between different states or countries;[84] in Texas the constitutional provision that all property should be assessed for taxation in the

80. See NATIONAL INDUSTRIAL CONFERENCE BOARD, *op. cit. supra* note 79, at 35. "Real estate is uniformly taxed at its location. There is, however, no uniformity in the definition of the taxable situs of personal property. The old common law rule was that personal property was taxable at the domicile of the owner, but the states generally have enacted laws making location the taxable situs of most classes of tangible personal property. *It is difficult to classify the states in this regard as the statutory provisions usually apply only to particular classes of property and many of them are conditional in character.* About fourteen states, however, tax most tangible property at the domicile of the owner, while about thirty states now tax the bulk of such property at its location. . . . The practice, however, as is so frequently the case with taxation systems, often varies from the letter of the law. With or without extra-legal agreement, assessors frequently list property according to their own judgment as to the merits of the case." (Emphasis added.)

81. *E.g.*, Askland Oil and Refining Co. v. Depart. of Revenue, 256 S.W.2d 359 (Ky. 1953).

82. *E.g.*, Collins v. Mills, 198 Ga. 18, 30 S.E.2d 866 (1944); George M. Brewster & Son v. Borough of Bogate, 20 N.J. Super. 487, 90 A.2d 58 (1952).

83. *E.g.*, City of New Port News v. Commonwealth, 165 Va. 635, 183 S.E. 514 (1936).

84. See Sayles v. Los Angeles County, 59 Cal. App.2d 295, 138 P.2d 768 (1943). *But see* Church v. City of Los Angeles, 34 Cal.2d 695, 214 P.2d 550 (1950), which, in restating the rule, held that tangible personal property is to be taxed at that place where it is permanently located.

county where the property is situated means the county in which situated for the purposes of taxation under common law;[85] in Iowa a statute requires such property to be assessed where the property has been situated for the greatest part of the year.[86] Regardless of the criteria used to determine taxable situs, all of the "situs" states hold that if the property has not acquired the requisite situs, it is to be taxed at the domicile of the owner.[87] Consequently, the existing systems of taxing property at its situs must not only deal with the problems of situs but also with those of domicile.

It is arguable that none of these interpretations as to what constitutes situs is practical and workable with the exception of the practice adopted by Iowa. It must be remembered that a township or county assessor makes the assessment and not a court. It is unrealistic to expect an assessor to determine where the property would be situated "under common law" or to cope with a standard expressed in terms of the rule "that governs the taxation of such property as between different states or countries."

Comparison of the Two Major Systems of Taxation of Tangible Personal Property

In addition to being difficult to enforce, a scheme fixing the taxation of tangible personal property at the domicile of the owner is subject to the criticism that such a system does not result in the property paying for the services it receives at the place where it is situated. This criticism is itself vulnerable to attack, since an argument can be made that, realistically, it is the owner who is taxed and not the property.[88] The governmental unit in which the owner resides furnishes him many more services than are furnished solely to his property by the unit where it is situated; consequently, this argument concludes that the governmental unit which furnishes the owner services should be entitled to the revenue that the owner must pay because of his ownership of the property. By way of rebuttal, however, it can be contended that it is the property itself which is taxed with the owner only being responsible for the payment of the taxes. The property is the determining factor; it is only when a person

85. *E.g.*, Great Southern Life Insurance Co. v. City of Austin, 112 Tex. 1, 243 S.W. 778 (1922); 6 Baylor L. Rev. 324 (1954).

86. Iowa Code § 428.8 (1946); Capital Construction Co. v. City of Des Moines, 211 Iowa 1228, 235 N.W. 476 (1931).

87. See notes 81, 82, 83, 84, 85, 86 *supra*.

88. *Cf.* Comment, 10 Ind. L.J. 450 (1935), which states that property taxes are taxes levied indirectly on individuals because of their ownership. *But see* National Industrial Conference Board, *supra* note 79, at 3. "The property tax today is an objective tax on the property itself. . . ."

owns property that he is required to pay this tax. A rationale effecting a compromise between the preceding contentions is that inasmuch as the services provided the property are, in the final analysis, enjoyed by the owner, he should be taxed to support the government which has provided his property with services. Realty is uniformly taxed at its situs;[89] there seems to be no valid economic reason that would require the taxation of personalty elsewhere. Thus, the better economic solution seems to be the one which remunerates the governmental unit which provides services to the property without regard to the domicile or residence of the owner.

Both systems of assessments are impractical and are difficult to enforce inasmuch as the interpretation of "domicile" and "situs" are so intricate that neither of these terms is workable as a standard for solving the divers factual problems with which an assessor is constantly faced. Both of these schemes provide for the taxation of all property subject to taxation[90] and, by inference, the taxation of all property only once.[91] Both systems, however, are deficient in that much property that is subject to taxation is never taxed. One of the chief reasons that some property escapes taxation is that once the assessor decides that the owner of the property is not domiciled in his taxing district or that the property has no taxable situs in his district, he has fully performed his duties.[92] The assessor at the place where the property should be assessed has no way of discovering the property except through the declaration of the owner. Perhaps, under a domicile standard, the assessor at the place where the property is located should notify the assessor at the place where the property should be assessed of the existence of such property.[93] This method could be relied on to avoid the doubtful method of accepting the owner's word. Double taxation is also possible under both systems. If two or more assessors rule that a person is domiciled in their respective

89. *E.g.*, IND. ANN. STAT. § 64-501 (Burns 1951); see also note 80 *supra*.

90. *E.g.*, IND. ANN. STAT. § 64-103 (Burns 1951) (domicile state); GA. CODE ANN. § 92-101 (1937) (situs state); CAL. REV. & TAX. CODE § 201 (situs state); IOWA CODE ANN. § 427.13 (1949) (situs state); KY. REV. STAT. § 122.190 (1950) (situs state); N.J. REV. STAT. § 54.4-1 (Supp. 1957) (situs state); TEX. REV. CIV. STAT. art. 7145 (1951) (situs state); VA. CONST., art. XIII, § 168 (situs state).

91. See CAL. REV. & TAX. CODE § 103 which specifically states that double taxation is not permitted.

92. While there are no provisions in the statutes specifically setting out that the assessor has no further duties once he has made such a determination, it can be inferred from the fact that there are no provisions requiring him to make any disposition of a case once he has determined that the owner is not domiciled in his district or that the property has no situs in his district.

93. The best way to determine that a person is not domiciled in X is to show that he is domiciled in Y. Thus, most cases in which the assessor decides that a person is not domiciled in his district result from the owner being able to convince the assessor that he (the owner) is domiciled elsewhere. The foregoing would also apply to a "situs" question.

taxing districts or that property has a taxable situs in their respective taxing districts, the owner can appeal such assessments through various administrative[94] and judicial channels.[95] However, the expense may be prohibitive.

It has been shown that the present methods of taxing tangible personal property, basing authority for assessment either on domicile or situs, are not fully effective tax systems. Critics of property assessment systems advocate that they should be abolished and that other methods—such as a sales tax or income tax—be adopted for procuring revenue.[96] There are also many inherent difficulties in such systems.[97] Only three states have replaced the assessment system with an in lieu tax.[98] It is doubtful that any of these in lieu tax schemes would be feasible in Indiana due to the constitutional provision that limits the amount of indebtedness a political or municipal corporation may incur by the value of the taxable property within the corporation, to be ascertained by the last assessment for state and county taxes.[99] It would also be questionable if such schemes

94. For the procedure to contest an assessment, see IND. ANN. STAT. §§ 64-1201, 1202, 1205, 1303, 1309, 1313, 1321 (Burns 1951). These provisions authorize an aggrieved person to appeal an assessment to a County Board of Review. If he is not satisfied with its decision, he can appeal to the State Board of Tax Commissioners. See also IND. ANN. STAT. § 64-413 (Burns 1951), which provides: "[I]n case of doubt as to the proper place to assess personal property, if the doubt arises as to different townships in the county the county assessor shall determine the place, and if the doubt arises as to different counties, the State Board of Tax Commissioners shall determine; such determination shall be summary and final."

95. See, *e.g.*, Croop v. Walton, 199 Ind. 262, 265, 157 N.E. 275, 276 (1927). "In a situation where the property is not subject to taxation the assessment is void and its collection can be restrained by injunction regardless of the right to appeal or to file claim for refund." See also Malott v. Lapsley, 88 Ind. App. 467, 164 N.E. 640 (1928); Sluder v. Mahan, 124 Ind. App. 661, 121 N.E. 137 (1954). The *Mahan* case held that injunctive relief against the collection of taxes allegedly illegaly assessed is a right which has long existed under the common law.

96. See, *e.g.*, CORNICK, EVALUATION OF ALTERNATIVE BASES FOR THE PROPERTY TAX 60 (NATIONAL TAX ASSOCIATION 1952); FIRST ROUND TABLE—PERSONAL PROPERTY TAX 77 (NATIONAL TAX ASSOCIATION 1950); INTERIM REPORT OF THE COMMITTEE ON PERSONAL PROPERTY TAXATION ON THE TAXATION OF TANGIBLE PERSONAL PROPERTY USED IN BUSINESS 76 (NATIONAL TAX ASSOCIATION 1952) (hereinafter cited as INTERIM REPORT).

97. See, *e.g.*, Rice, *Primary Problems in Property Tax Valuation*, 27 TAXES 135, 144 (1949). Mr. Rice stated that "while criticisms of theory and practice in property taxation generally have been manifold for many years, no practicable substitute for the tax has been or appears likely to be devised." *Cf.* INTERIM REPORT, *supra* note 96, at 106. "There are at least four major bars to replacement of the ad valorem tax on . . . business personalty with an in lieu tax. These are: (1) general inertia as regards tax reform, (2) constitutional uniformity requirements in some jurisdictions, (3) frequent constitutional or statutory limitations relating local government bond issuing authority to the local property tax base, (4) the difficulty of developing a satisfactory alternative revenue source in form of either a local non-property tax or a state-collected, locally-shared tax."

98. Delaware (DEL. CODE ANN. tit. 30, § 102 (1953); New York (N.Y. TAX LAW § 3); Pennsylvania (PA. STAT. ANN. tit. 72, §§ 3244, 3257, 4782 (1949).

99. IND. CONST., art. 13, § 1.

would be constitutional.[100]

It is urged that any good property assessment system should have the following characteristics:

(1) It should provide for the taxation of such property at that place which has afforded it services for the greater part of the year.[101]

(2) It should result in the taxation of all property subject to taxation.

(3) It should make double taxation an impossibility.

(4) It should be sufficiently practical so that the enforcement agency can enforce the law without making a determination of domicile or situs.

If Indiana retains its present assessment method which is predicated on the domicile of the owner, some improvements can be made that would solve many of the problems of the system. One solution would be to inaugurate a mutual exchange of assessment among the assessors of the state. For example, if the assessor of Monroe County discovers tangible personal property situated in Monroe County but owned by an inhabitant of Vigo County, he would make an estimate of the value of the property and send it to the assessor of Vigo County who would consult with the owner as to the proper value of the property before it was entered as an official assessment. In a case where the owner resides where the property is located, but is an inhabitant in another county, the property could actually be assessed with such assessment being sent to the assessor of the owner's domicile. The most apparent weakness in this solution is that the expenses of some counties in making the mutual assessments would be far greater than the benefits received. It would appear, however, that some system of remuneration for such assessments, based on the amount actually collected by the receiving county, could be created to avoid this

100. See IND. CONST., art. 10, § 1, which provides: "The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious or charitable purposes. . . ." Even if an in lieu scheme could be devised that would be a tax on tangible personal property and which resulted in a uniform and equal rate of taxation, it would still appear to be unconstitutional, since the constitution provides for a uniform rate of assessment as well as taxation. This may be one situation in which the technical distinction between assessment and taxation is important. See also 1954 OPS. IND. ATT'Y GEN. 18. It was the opinion of the Attorney General that it would not be possible to exempt household furnishings and equipment from the personal property tax rolls specifically by statute without a constitutional amendment. *Cf.* Comment, 10 IND. L.J. 450 (1935).

101. If the owner has not owned the property throughout the year, then it should be taxed at that place at which it had been present for the greater period of time. Likewise ,if the property has been situated in more than two taxing districts, it should be taxed in the district where it had been present for the greatest period of time. A system of apportionment would appear to be too complicated to be practical.

difficulty. For example, the county of domicile could pay the county that made the mutual assessment five per cent of the amount collected from such assessment.

If this suggested solution were followed in good faith, it would appear that: (1) more of the tangible personal property subject to taxation would be taxed, (2) such property would be taxed at the proper place as designated by the tax act, and (3) the possibility of double taxation would be lessened. The gain in revenue should more than compensate for the additional administrative burden. These results are of sufficient importance, by themselves, to warrant a change in the present assessment system.[102]

In the alternative, if Indiana were to adopt the situs method of assessment, there are two systems which should be given consideration. The simpler and the more practical one to enforce would be a system which would authorize the assessment of all property that is found within the taxing district at any time during the "assessment period."[103] Double taxation of property could be avoided by providing that the first assessment operate as a bar to all other assessments. Such a system has all of the characteristics set out for an effective assessment system except that of contributing to the support of the governmental unit which has actually provided the property with services for the greater part of the year. Furthermore, this system could, and probably would, result in a large amount of property being removed during the "assessment period" to a place that had a low tax rate. On the other hand, the second system would require assessment only at the place where property has been situated for the greater part of the year. This approach is both sound and workable, and has all of the characteristics listed for an effective assessment system. The assessor would need only to make a factual determination of how long the property has been in the taxing district. However, this factual determination, itself, could present a problem since it its almost impossible for the assessor to discover the length of time that property has been situated within the taxing district except by the word of the owner. As pointed out heretofore, in any tax system based upon assessments the word of the owner of the property has to be

102. It should be pointed out that the characteristics of the present assessment system prevent the adoption of any improvements that would bring about the desired results of remunerating the governmental unit that actually provides services to the property for the greater part of the year and relieving the assessor from venturing a determination of domicile. The accomplishment of these objectives would necessitate the complete abandonment of the present system.

103. "Assessment period" is that period during which the property is to be assessed for taxation. In Indiana the assessment period is from March 1 to May 15. IND. ANN. STAT. § 64-401 (Burns 1951).

accepted at some point. Despite the fact that such a system might result in the owner swearing that his property was situated in a taxing district which had a lower tax rate instead of in the one in which it was actually present for the greater part of the year, there appears to be no feasible substitute for determining where the property has been situated.[104] A system which utilizes a presumption that the property has been situated for the greater part of the year at the place where found during the "assessment period" only invites the owner to remove his property to a district that has a low tax rate.

A more serious problem is presented by property that is found in one taxing district during the "assessment period" when the owner resides in another taxing district. This problem could be solved by having the assessor send a notice to the owner stating that the property will be assessed in the taxing district in which the property is located unless the owner sends a sworn affidavit within a certain period of time stating that the poperty has been situated in another district for the greater part of the year.[105] Upon the receipt of such affidavit the assessor would forward it with the assessment to the interested assessor who would then enter the assessment upon his assessment roll. This system, being in effect a mutual assessment system, might well call for remuneration to the assessor who actually made the assessment. Recently purchased property in transit to its destination would require a different method of assessment. The only practical solution appears to be one that requires assessment of such property only at its destination.[106]

CONCLUSION

It has been shown that the present system of taxation of tangible personal property in Indiana is in serious need of a re-evaluation by the legislature and of a change that would result in a more equitable and practical system. If the present basis of personal property taxation, viz., inhabitant, is retained, the adoption of the suggested "mutual assessments" would result in a more effective, more equitable tax system and should result in more revenue. In the alternative, it is strongly urged

104. A sworn affidavit of the owner would have to be accepted. The legal sanctions presently in force for the making of a false affidavit could be utilized to curtail false statements. See IND. ANN. STAT. § 64-609 (Burns 1951).

105. The owner would likewise be required to send a sworn affidavit if the property had been located for the greater part of the year in the district where assessed. If this requirement were not added, the owner would be tempted to do nothing and let the property be taxed where located if the rate were lower at that place than where the property had actually been situated for the greater part of the year.

106. *Contra,* IND. ANN. STAT. § 64-407 (Burns 1951).

that a system requiring taxation at the place where the property has been located for the greater part of the year is the best system available under an assessment arrangement.

OMISSION OF MISTAKEN INSERTIONS IN WILL CONTESTS

Although the English probate courts frequently have exercised the power to omit words mistakenly inserted in a will, American courts have neither exercised nor denied this power. However, if the mistaken insertion results in a misdescription of the person or object intended, and if the description in the will is ambiguous when disposition of the property is attempted, the power of construction will be used by both the English and American courts to clarify the ambiguity, thereby correcting the mistake. Unfortunately the construction power cannot be used to correct all such misdescriptions. Several states have adopted a strict rule excluding extrinsic evidence which purports to prove the ambiguity of a description which applies perfectly to an existing person or object due to facts and circumstances relating to the testator; thus, even when a testator describes property that he does not own, this rule has been applied to prevent the admission of extrinsic evidence to show that the description is ambiguous because the testator owns property similarly described.[1] Furthermore, mistaken insertions which result in misdescriptions that are not ambiguous when disposition is attempted, or which result in non-misdescriptions[2] cannot be corrected by construction because the only evidence available to correct the mistake would be evidence that a word was inserted by mistake; and, such evidence is not admissible in a construction proceeding. The English probate courts would correct such mistaken insertions by omission. Assuming that a remedy should exist to correct all mistaken insertions and thereby

1. Estate of Lynch, 142 Cal. 373, 75 Pac. 1086 (1904); Perkins v. O'Donald, 77 Fla. 710, 82 So. 401 (1919); Stevenson v. Stevenson, 285 Ill. 486, 121 N.E. 202 (1918); McGovern v. McGovern, 75 Minn. 314, 77 N.W. 970 (1899); Barner v. Lehr, 190 Miss. 77, 199 So. 273 (1940). *But see* Wheaton v. Pope, 91 Minn. 299, 97 N.W. 1046 (1904).

2. The term "non-misdescription" refers to situations in which the mistake does not involve a description and to situations in which the property described is intended but there is a mistake as to the amount intended. See note 39 *infra*. Although non-misdescriptions could include all patent and latent mistaken insertions which do not result in misdescriptions, the term has significance only with respect to latent mistaken insertions and is, therefore, used only in reference to latent mistaken insertions. However, even if the term were used to include patent mistaken insertions, correction by construction would be impossible except in a few rare cases. See note 47 *infra* and accompanying text.