UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 8 | Number 2 Article 4

2-1-1930

Editorial Board/Notes

North Carolina Law Review

The
North Carolina Law Review

Volume Eight | February, 1930 | Number Two

NOTES

THE BARTH CASE AND REVIVAL OF INCOME TAX CLAIMS BY RETROACTIVE REPEAL OF LIMITATIONS

In September, 1919, the John Barth Company filed claims in abatement for its 1918 income taxes, pursuant to §214 (a) and §234 (a), paragraph 14 (a),[1] of the Revenue Acts of 1918 and 1921 (hereinafter called the bond provision), and executed a bond to pay "on notice and demand by the collector . . . any part of such tax found by the Commissioner to be due." On March 25, 1926, the Commissioner rejected the claim in part, and upon refusal of the taxpayer and surety to pay, authorized suit on the bond. The Circuit Court of

[1] U. S. Comp. St. §§6336½g(a), 6336½pp(a), deductions for inventory losses.

Appeals,[2] in June, 1928, dismissed the complaint upon the following grounds: That collection of the tax was barred by §250 (d),[3] Acts of 1918 and 1921, providing a five year period of limitation. That the liability of the surety on the bond was extinguished by §1106 (a),[4] Act of 1926 (hereinafter called the extinguishing provision) which provided that the running of the statute of limitations should not only bar the remedy but extinguish the tax liability. That the repeal of the extinguishing provision "as of the date of its enactment" by the Revenue Act of 1928[5] was ineffective to revive liability on the bond. The Supreme Court[6] in May 1929, *held* the limitation on collection of the tax in §250 (d) inapplicable to the situation where a bond is given under the bond provision of §234 (a), paragraph 14 (a), and reversed the judgment.

Is this decision limited to the situation where a claim in abatement is filed and a bond given under the section specifically providing for a bond and claim in abatement, or does it apply to all cases where claims are filed and bonds given? The Supreme Court opinion is far from clear, but it appears that the statute of limitations in the former situation would be suspended until the Commissioner has passed upon the claim in abatement, in view of the limitation in the bond provision that where a claim is filed and bond given thereunder, "payment of the tax covered by such claim shall not be required until the claim is decided."[7] There may well be a distinction between the liability upon a bond given under this provision and one not given thereunder, in the sense that the provision impliedly extends the statute of limitations for the period during which collection of the tax is prohibited.

If this interpretation of the decision is correct, the question remains as to the result in the usual case where a bond is given to stay collection of an assessment but not under the specific bond provision.

[2] United States v. John Barth Co. and U. S. F. and G. Co., 27 F. (2d) 682 (C. C. A. 7th, 1928).
[3] U. S. Comp. St. §6336½tt(d).
[4] 44 Stat. L. c. 27, p. 2, 9, 26 U. S. C. A. §1249.
[5] §612 Revenue Act of 1928, 45 St. L. 791, 875.
[6] United States v. John Barth Co., 279 U. S. 370, 48 Sup. Ct. 366 (1929).
[7] *Supra* note 1. The statement of the court that the bond is "a substitution for the obligation arising under the return and assessment to pay the tax," giving the United States "a cause of action separate and distinct from an action to collect taxes which it already had," (*Supra* note 6, at 375) seems inconsistent with an implied extension by the "bond provision" of the statute. It is conceded that no limitation has run on the bond, but if the bond is a "substitute," the statute would have run on the tax liability.

The Circuit Court of Appeals[8] in the *Barth* case, finding no extension of the limitation period by this provision, directly faced this question. The five year limitation period[9] would have run on collection of the tax in the Barth case, unless waived, and the mere filing of the claim and giving of the bond would not toll the statute.[10] The claim of the government would then rest entirely on the bond, the liability of the surety depending upon the construction of his obligation to pay "whatever *tax* is found to be *due*."

The limitation period having run on the tax, under the provision of the 1926[11] Act that the running of the statute of limitations should not only bar the remedy but also extinguish the liability, there would be no "tax due" by the principal,[12] and hence no obligation on the

[8] *Supra* note 2.

[9] Statute runs from time return is due or made for 1918, and from filing of the return for 1921, *supra* note 3; but not from filing of tentative return, Oak Worsted Mills v. United States, (Ct. Claims 1929) No. J-180, United States Daily, Dec. 18, 1929, 1929 Prentice-Hall Federal Tax Service, ¶1918. Bars not only court proceedings but also collection by distraint, Bowers v. New York and Albany Lighterage Co., 273 U. S. 346, 47 Sup. Ct. 389 (1927).

Section 278(d), Act of 1924, provided that where the assessment is made within the period prescribed, such tax may be collected by proceeding in court within six years after assessment of the tax. But §278(e) of the same act provided that this section shall not authorize the collection of the tax if at the time of the enactment of the act such proceeding was barred by the period of limitations then in existence. In Russell v. U. S., 278 U. S. 181, 49 Sup. Ct. 121 (1928), the Supreme Court held §278(d) not retroactive. Hence, if there was no suspension of the statute in the Barth case, the 1924 provisions would not extend time for collection of defendant's 1918 taxes. See Albus, *The Statute of Limitations as Affected by Recent Court Decisions*, 5 NAT. INC. TAX MAG. 166.

[10] C. B. Shaffer, 12 B. T. A. 298; Muller, Ex'r., 13 B. T. A. 1175. Statute is waived only by consent in writing by the commissioner and taxpayer to later determination and assessment of the tax, §250(d), Act of 1921, *supra* note 3.

[11] *Supra* note 4.

[12] The Circuit Court of Appeals, *supra* note 2, at p. 784 distinguished between an obligation to pay a "*sum of money* which the Commissioner should find due as a tax" and the obligation of defendant surety to pay a "tax due," justifying this distinction upon the ground that a surety's contract should be construed strictly, and held the surety's obligation as fully met by extinguishment of the tax as by payment by the taxpayer. *Accord*: Bardy v. U. S., 24 F. (2d) 205 (D. C. Mass., 1927). See M. P. Spencer, 11 B. T. A. 437. *Contra:* U. S. v. Onken Bros. Co., 23 F. (2d) 367 (D. C. D. Wyo. 1927); Gray Motor Co. v. U. S., 16 F. (2d) 367 (C. C. A. 5th 1927); U. S. v. Rennolds, 27 F. (2d) 902 (D. C. N. Y. 1928); *cf.* Bardy v. U. S., 24 F. (2d) 205 (D. C. Mass. 1927) (outlawed tax is as if never laid); M. P. Spencer, 11 B. T. A. 437 (liability was extinguished by §1106(a) and not assessable against transferee).

The 1926 extinguishing provision was construed as operating retroactively to determine the effect of the statutory bar completed before the passage of the act. If so, the discussion in the text and conclusions would be applicable

bond. What, then, is the effect of the retroactive repeal of this provision by the Revenue Act of 1928?[13] This question, escaped by the Supreme Court of the United States in the *Barth* case, stands on the frontier of federal tax litigation. Many pending cases await its final determination.

Three views have been taken of the validity (under various due process and vested rights clauses of state and federal constitutions) of statutes reviving causes of action barred by limitations. The leading case of *Campbell v. Holt*[14] adopts the view[15] which in general terms affirms their validity. The ground taken is that the statute of limitations acts only upon the remedy and not upon the right, and that the prior existence and present non-payment of original obligations make the revival just in all cases not involving title to specific property (as to which it is agreed that the bar of the statute creates a vested right that cannot be thus impaired).

both where statutory bar was completed before 1926 and where it was completed after 1926 and before its repeal.

Departmental rulings are to the effect that waivers filed after the running of the statutory period and after liabilities are extinguished under provision of §1106(a), Act of 1926, are nullities and do not extend time for taxpayer claiming refunds, (G. C. M. 5983, VIII-38-4363, Prentice-Hall Tax Service 1929, ¶1498, waiver before passage of 1928 Act) nor for assessment or collection of tax by government (G. C. M. 5601, VIII-5-4088, Prentice-Hall Tax Service 1929, ¶335): see Joy Floral Co v. Commissioner, 29 F. (2d) 865 (Ct. App. D. C. 1928).

[13] The validity of the repeal of the extinguishing provision before the statute of limitations has completely expired on collection of the tax is not questioned, since the extinguishing provision deals only with completed bars. The power to change the statute of limitations before the period has expired is conceded by the courts, with the limitation that such change must allow a reasonable time within which to exercise the right. See I WOOD, LIMITATIONS, (4th ed. 1916) §11; NOTES (1904) 95 A. S. R. 658; (1907) 111 A. S. R. 456; (1899) 45 L. R. A. 611; (1925) 36 A. L. R. 1316, 1319.

[14] 115 U. S. 620, 6 Sup. Ct. 209 (1884), Justices Bradley and Harlan dissenting; Capps Mfg. Co. v. U. S., 15 F. (2d) 528 (C. C. A. 5th 1926); Linter v. Heye, 194 U. S. 628, 24 Sup. Ct. 856 (1903); F. M. Aiken, 10 B. T. A. 553 (1928), applying rule to income tax statutes.

[15] Dunbar v. Boston etc. Corp., 181 Mass. 383, 63 N. E. 913 (1926); Jackson Hill Coal Co. v. Comm'rs., 181 Ind. 340, 104 N. E. 498 (1914); House v. Carr, 185 N. Y. 458, 78 N. E. 172 (1906), power of sale under barred mortgage upheld; Johnson v. Eynne, 64 Kan. 138, 67 Pac. 549 (1901), bar not basis for bill quia timet on personal claim; see WOOD, *op. cit. supra* note 13, §§11, 63a, 68.

Early North Carolina cases deny the power of the legislature to revive a barred claim: Whitehurst v. Dey, 90 N. C. 542, 545 (1884). Later opinions, however, seem to approve the rule of Campbell v. Holt, *supra* note 14, although the decisions have not been direct upon the point: Dunn v. Beaman, 126 N. C. 766, 770, 36 S. E. 172, 173 (1900); Graves v. Howard, 159 N. C. 602, 73 S. E. 992 (1912); Williams v. Motor Express Lines, 195 N. C. 682, 143 S. E. 256 (1927); *cf.* Vanderbilt v. A. C. L. Ry., 188 N. C. 568, 125 S. E. 387 (1924).

The second view,[16] broadly denying the proposition, is that the right to remain free from future actions on obligations once barred is an interest as desirable to protect as an interest in specific property, actions for the recovery of which have been barred. The bar of the statute is therefore effective to extinguish the liability itself, a view most consistent with the purpose of a statute of repose.[17] Property is no longer an exclusively physical concept and logical consistency demands the same result whenever the defendant has gained immunity from suit whether plaintiff's claim sounds in tort, contract, replevin or ejectment.

The third view, while denying any general validity to legislative attempts to revive barred actions for debts or torts, sustains them where the defenses are based on formalities and technical mistakes, and where "the circumstances . . . appeal with some strength to the prevailing view of justice."[18]

In other words, the three views come down to this: where the court construes the running of the limitation period as barring the remedy only, it upholds legislative extensions; but where the statute is viewed as barring the liability itself, legislative extensions are held void. The reversal of the rule of *Campbell v. Holt*[19] by the extinguishing provision of the Revenue Act of 1926 would, therefore, constitute the statutory bar a vested "immunity" in the taxpayer. The due process provision of the fifth amendment does not, however, so limit the taxing power of Congress as to prevent the taking away of vested rights by a valid exercise of such power.[20] As to the taxpayer, the repeal of the extinguishing provision may therefore be upheld as a mode of imposing a new tax obligation.[21] But the

[16] Board of Education v. Blodgett, 155 Ill. 448, 46 A. S. R. 353, 31 L. R. A. 73, 40 N. E. 1027 (1895); Fish v. Farwell, 160 Ill. 236, 43 N. E. 367 (1896); Eingartner v. Illinois Steel Co., 103 Wis. 380, 79 N. W. 435 (1899); Ryder v. Wilson's Ex'rs., 41 N. J. L. 9 (1879). For general discussion, see notes cited *supra* note 13.

[17] Wood, *op. cit. supra* note 13, §49.

[18] Danforth v. Groton Water Co., 178 Mass. 473, 477, 59 N. E. 1033, 1035 (1901), by Holmes, C. J.

[19] *Supra* note 6.

[20] HOLMES, FEDERAL TAXATION (6 ed. 1927) §952.

[21] "No vested right accrues to the taxpayer out of the running of the period of limitation" (meaning merely that whatever rights accrue through the bar of the statute may be taken away by valid exercise of taxing power): Huntley v. Gile, 32 F. (2d) 857, 859 (C. C. A. 9th, 1929), citing Rafferty v. Smith, Bell and Co., 257 U. S. 226, 42 S. Ct. 71 (1921); U. S. v. Heinszen and Co., 206 U. S. 370, 386, 27 Sup. Ct. 742 (1906), act ratifying illegal collection of tax

surety's liability is derivative, and his contract does not extend to a new tax on the taxpayer principal. As to the surety, the repealing provision cannot be reasonably construed as an exercise of the taxing power.[22] Hence, the repeal of the extinguishing provision should be ineffective to revive liability on the bond.

This was the result of the decision upon rehearing of the *Barth* case in the Circuit Court of Appeals, which the Supreme Court found unnecessary to consider. The Circuit Court of Appeals, however, stated no reasons for its conclusion. It is submitted that for the reasons given in the foregoing discussion the Supreme Court should, when the point is squarely raised, adopt a similar view.

J. H. ANDERSON, JR.

DELAY IN PRESENTMENT OF DOMICILED NOTE

In a recent case[1] the plaintiff, as indorsee, held a note of the defendant maker payable at the maker's bank at a specified date. Between the dates of the maturity of the note and demand on the maker the bank failed and the maker lost deposits sufficient to pay the note. In a suit on the note a verdict was directed for plaintiff, without interest and costs. On appeal it was urged that, under section 87 of the Negotiable Instruments Law, plaintiff should bear the loss caused by his failure to present. It was held, two justices dissenting, that no presentment is necessary to charge the party primarily liable, and the judgment should be affirmed.

The majority of courts attempting to determine the question of the instant case have adopted the theory that the bank at which a domiciled note (i.e., one payable at a bank) is made payable, is the agent of the parties.[2] The rights of the maker can not be justly de-

valid because of power of Congress to have authorized imposition of taxes in mode in which they were enforced.

Exercise of the taxing power is constitutional unless it is so arbitrary as to amount to a confiscation of property, or is so wanting in basis for classification as to produce a gross and patent inequality. There is no precise application of the rule of reasonableness of classification to taxing power of Congress. The rule of equality only requires that the law shall operate on all alike under the same circumstances. HOLMES, *op. cit. supra* note 20. For discussion of constitutionality of retroactive taxing statutes, see NOTE (1928) 28 COL. L. REV. 777.

[22] Moreover, imposition of a new obligation on the surety measured by the old liability on the bond is entirely different from re-imposition of a once valid tax on the taxpayer principal. The revival of the surety's obligation would not be in the class of excise or privilege taxes, but would resemble a direct tax on sureties in similar situations measured by definite sums previously due under past closed contracts, and as such would be void without apportionment.

[1] Federal International Credit Bank v. Epstin, 148 S. E. 713 (S. C. 1929).

[2] Note 2 A. L. R. at 1782.

termined on this theory as the bank is, in fact, debtor to its depositors, not their agent. And the bank becomes the agent of the holder only if he presents it at the bank for collection. At common law, and under the Negotiable Instruments Law, courts adopting the agency theory have unanimously held that if the holder neglects to present he loses nothing but interest and costs,[3] but if he is diligent and does present to the bank designated as the place of payment the loss due to bank failure falls on him because his agent, the bank, was negligent in not remitting while funds were available.[4]

Another theory advanced by many courts is that a note payable at a bank is analogous to a check. The limits to which the analogy should be carried were not clearly defined in section 87 of the Negotiable Instruments Law.[5] As there is no distinction to be drawn between cases decided on this theory before and after passage of this law no special discussion of the common law is necessary. Section 87 provides that a note payable at a bank where the maker has sufficient funds is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon. The courts and bankers interpret this, generally, to mean that the bank has permission to pay the note as it would a check.[6] The analogy would probably be ex-

[3] Wood v. Merchant's Saving Co., 41 Ill. 267 (1866); Adams v. Hackensack Improvement Commission, 15 Vroom 638, 44 N. J. L. 638, 43 Am. Rep. 406 (1882); Williamsport Gas Co. v. Pinkerton, 95 Pa. 62 (1880); Binghampton Pharmacy v. First Nat. Bank, 131 Tenn. 711, 176 S. W. 1038, 2 A. L. R. 1377 and Note (1915); Sebag v. Abrithol, 4 M. & S. 462, 105 Eng. Reprints 905 (1816).

[4] Kansas City Bank v. Dick, 84 Kan. 252, 114 Pac. 378 (1911); Peaslee-Gulbert Co. v. Dixon, 172 N. C. 411, 90 S. E. 421 (1916); Smith v. Essex Co. Bank, 22 Barb. 627 (N. Y. 1856); Baldwin's Bank of Penn. Yan v. Smith, 215 N. Y. 76, 109 N. E. 138 (1915). Cases adopting the agency theory are based almost wholly on the English case of Sebag v. Abrithol and Wood v. Merchant's Saving Co., *supra* note 3, neither of which are authority for that theory. While agency has nothing to do with determining the rights of the holder against the maker, it may be useful in determining the rights between the holder and the bank if the bank neglects to collect out of available funds, the bank being liable as agent to its principal, the holder: 2 Paton's Digest §§372a, 1502a.

[5] (1928) 22 ILL. L. REV. 833, 846, that the meaning of §87 is not clear.

[6] Bedford Bank v. Acoam, 125 Ind. 584, 25 N. E. 713, 9 L. R. A. 560, 21 Am. St. Rep. 258 (1890); Heinrich v. First Nat. Bank of Middleton, 219 N. Y. 1, 113 N. E. 531, L. R. A. 1917A 655 (1916); West St. Louis Trust Co. v. American Surety Co. of N. Y., 5 S. W. (2d) 669 (1928); see Aetna Nat. Bank v. Fourth Nat. Bank of N. Y., 46 N. Y. 82, 88, 7 Am. Rep. 314, 318 (1871), "An acceptance or promissory note thus payable (at a bank) is, if the party is in funds, that is, has the amount to his credit, equivalent to a check, and is, in effect, an order or draft on the bank in favor of the holder, for the amount of the note or acceptance." I DANIELS, NEGOTIABLE INSTRUMENTS (6 ed. 1913) §326a; 2 MORSE, BANKS AND BANKING (6 ed. 1928) §557; 2 PATON'S DIGEST (1926) §§3719a, 3721a, 3744a. *Contra*: Wood v. Merchant's Saving Co., 41 Ill. 267 (1866); Grissom v. Bank, 87 Tenn. 350, 10 S. W. 744, 10 Am. St. Rep. 669, 3 L. R. A. 273, (1889).

Answers to letters sent to several banks in North Carolina asking them if

tended to include losses occurring after maturity as in the case of failure to present a check in a reasonable time, were it not for the fact that section 70 provides that no presentment is necessary to charge a party primarily liable,[7] a provision which many courts interpret as contradictory to the suggested analogy.[8] There is no necessary contradiction, however.[9] Damages caused to the maker by the holder's failure to present a domiciled note at maturity may be awarded without denying the liability of the maker as the party primarily liable. In some cases the maker's counterclaim for damages would amount to practically as much as his liability on the note, but that fact does not operate to relieve him of a primary obligation.

they paid domiciled notes without express authority, indicate that the bank's interpretation of §87 is that it gives authority to pay the note as if it were a check. Eight out of thirteen banks questioned said they had authority to do so, while three concluded that they had no such authority. Two did not commit themselves. But twelve banks stated that, for the convenience of their depositors, they did not pay the notes without communicating with the maker, while one bank paid as if the note were a check. Like inquiries in communities outside the state received similar answers. See (1928) 13 MINN. L. REV. 281, 284.

The question of the bank's liability to the maker of a domiciled note for refusal to pay if the maker can not be communicated with is pertinent. Refusal to pay a check when the drawer has funds sufficient to cover it subjects the bank to a suit in tort: (1928) 6 N. C. L. Rev. 324. At common law there were three views concerning the authority and duty of the bank to pay a domiciled note as if it were a check: authority to pay, duty to pay, and no authority or duty to pay. §87 of the Negotiable Instruments Law reconciled these theories and made it the duty of the bank to pay the note. 2 PATON'S DIGEST (1926) §§3719a, 3721a; MORSE, *op. cit. supra*, §557. See Brooke v. Tradesman Nat. Bank, 69 Hun 202, 204, 23 N. Y. Supp. 802 (1893). Under this view the bank would doubtless be theoretically liable to the maker of a domiciled note for non-payment as it would for dishonoring a check. Whether or not there is actual liability would depend on the custom of the bank in paying the notes. If it were accustomed to pay them as checks, refusal to pay would be equivalent to business slander of the maker. If no such custom existed, as the above inquiry shows to be true of North Carolina, the community would not so interpret the bank's refusal to pay.

[7] Iowa Loan & Trust Co. v. Seaman, 210 N. W. 937 (Iowa, 1926); Farmers' Nat. Bank v. Venner, 192 Mass. 531, 78 N. E. 540 (1906); Piper v. Haywood, 71 Misc. Rep. 41, 127 N. Y. Supp. 240 (1911); DANIEL, *op. cit. supra* note 6, §326a; NORTON, BILLS AND NOTES (4th ed.) 1914 §69 and p. 194, note 1; BRANNAN NEGOTIABLE INSTRUMENTS (4th ed. 1926) §§71 and 87; 2 PATON'S DIGEST (1926) §3744a.

[8] Binghampton Pharmacy v. First Nat. Bank, 131 Tenn. 711, 176 S. W. 1038, 2 A. L. R. 1377 (1915); Aetna Nat. Bank v. Fourth Nat. Bank of N. Y., 46 N. Y. 82, 7 Am. Rep. 314 (1871); BRANNAN, *op. cit. supra* note 7, §87; (1926) 29 HARV. L. REV. 204.

[9] Many courts unwarrantedly use §70 to defeat any attempt under §87 to put the loss by bank failure on the holder of a domiciled note. If equity demands that the loss fall on the maker, let the following states be guiding stars: Illinois, Kansas, Nebraska, and South Dakota (never adopted §87), North Dakota (repealed it), and Georgia and Minnesota (expressly provided that a note payable at a bank is not equivalent to an order on the bank to pay the same for the account of the principal debtor thereon).

The provision in the note that it will be paid at a bank is material, as the parties have made it payable there for some reason.[10] Delaware and England hold this provision so material that compliance with it must be alleged before suit can be brought on the note.[11] Section 70 of the Negotiable Instruments Law recognizes the provision by providing that if the maker has sufficient funds on deposit to meet the note when due he will be deemed to have made a tender, thus saving costs of suit on the note and interest after maturity. As a tender is beneficial to the maker he will most likely keep funds at the bank to meet the note. However, to constitute a tender, the funds must be kept there until the note is presented,[12] an indefinite length of time. If the holder, in practical effect, causes the funds to be kept in a weak bank until they are lost by bank failure he should assume the loss.[13] While it can not be said that the holder is under such a duty to present as would subject him to a suit for failure to do so, he may be said to be a party to the material agreement in the note that it would be payable at a particular place. Section 70 of the Negotiable Instruments Law puts the holder under a *liability* to lose costs of suit and interest after maturity. Since he is not immune to losses for failure to present he should assume all losses he had *power* to prevent.

H. B. PARKER.

TAX ADVANTAGES OF INCORPORATING NORTH CAROLINA ENTERPRISES OUTSIDE THE STATE[1]

Lack of uniformity of state laws has made selection of corporate domiciles by promoters a favorite business method for tax economy.

[10] Bedford Bank v. Acoam, 125 Ind. 584, 25 N. E. 713, 21 Am. St. Rep. 258, 9 L. R. A. 560 (1890).

[11] Shaw v. Newton, 5 Del. 19, 90 Atl. 465 (1914); Rowe v. Young, 2 Brod. & Brig. 165, 129 Eng. Reprints 921 (1820); Spindler v. Grellette, S. C. 5 D. & L. 191, 154 Eng. Reprints 163 (1847).

[12] Isbell v. Walton, Trust Co., 63 Okla. 182, 163 Pac. 716 (1917).

[13] Bank of Charleston Nat. Banking Ass'n. v. Zorn, 14 S. C. 444, 37 Am Rep. 733 (1880); STORY, PROMISSORY NOTES (1850) §§227, 228; DANIEL, *op. cit. supra*, note 6; NORTON, *op. cit. supra*, note 7, p. 194. See Wallace v. McConnell, 13 Peters 136, 149, 10 L. ed. 95 (1839); Eldred v. Hawes, 4 Conn. 465, 471 (1823); Reeve v. Pack, 6 Mich. 240, 241 (1859); Daughtery v. Western Bank, 13 Ga. 287, 293 (1813); Fitler v. Beckley, 2 Watts & S. 458, 462 (Pa. 1841); Wilcott v. Van Santvoord, 17 Johns 248, 8 Am. Dec. 396, 401, 404 (N. Y. 1819); Armistead v. Armisteads, 10 Leigh 512, 525 (Va. 1893).

[1] See charts *infra* pp. 193-195.

For comparison of taxes upon physical plant, see Macon, *Interstate Comparison of Tax Burden and Cotton Mills* (limited to state and local taxes), N. C. CLUB YEAR-BOOK, 1927-28. See also, REPORT OF N. C. TAX COMMISSION, 1928, ch. X, *Taxation of Public Service Corporations,* and ch. XI, *Legal Restrictions on Taxation of Public Service Corporations,* both applicable to general business corporation taxation.

A substantial part of the tax burden is determined by the law of the state of incorporation, and obtaining a domicile in any given state requires no more than the negligible price for the purchase of formal legal existence and representation.

It is the purpose of this paper to discuss, from a tax viewpoint, the relative advantages of organizing a North Carolina enterprise in certain "favored" states rather than in North Carolina. For illustration, calculations are made for an hypothetical business corporation of $500,000 capital, the physical property and plant of which is located within the state, (1) where all of its business will be transacted within North Carolina, and (2) where only half of its business will be within the state. The following discussion involves only taxes paid by foreign and domestic corporations to North Carolina, consideration of the taxes to be paid to other states to which the business extends being unnecessary since these would be a constant item regardless of the domicile selected. The accompanying tables[2] indicate in addition the taxes to the state of incorporation if other than North Carolina. The states included in the charts are those generally favored by corporations because of low tax rates, the liberality of their corporation laws and the broad powers allowed.[3] North Carolina offers no special favors in these respects.

The North Carolina income tax of 4 1/2 per cent is applied to the net earnings of a domestic corporation wherever derived,[4] a credit being allowed for the income tax paid to other states for business transacted there.[5] Foreign corporations are taxed upon the proportion of business attributable to North Carolina.[6] A credit is also allowed the foreign corporation for a proportionate part of the income

[2] Balance sheet for hypothetical corporation (*infra* chart note 2) based on figures used in *Comparative Tax Burden on Business Corporation*, N. C. TAX COM. REPORT 1928, p. 748.

[3] Prentice-Hall Comparative Chart, 1929. North Carolina compares favorably with these states in powers allowed, but requires somewhat more elaborate annual reports from corporations: N. C. Laws 1929, c. 344, s. 603.

[4] N. C. Laws 1929, c. 345, s. 311, N. C. Code (Michie 1929 supplement) §7889 (317).

[5] N. C. Laws 1929, c. 345, s. 323, par. 10, N. C. Code (Michie 1929 supplement) §7880 (328) ss. 10. The states taxing corporate net earnings are: Arkansas, California, Connecticut, Massachusetts, Mississippi, Missouri, Montana, New York, North Carolina, North Dakota, Oregon, South Carolina, Virginia, Wisconsin.

[6] *Supra* note 4. For discussion of Corporate Income Taxation and Interstate Commerce, see N. C. TAX COM. REPORT 1928, pp. 249-53; Newcomer, *State Taxation of Interstate Commerce*, NAT. TAX ASS. BUL., Oct. 1929; note Ann. Cas. 1918A 426-38.

tax payable to the state of incorporation, upon a reciprocal basis.[7] The only income tax advantage in favor of foreign incorporation, therefore, would be where the business will be divided between North Carolina and jurisdictions which do not tax corporate earnings.

Upon the theory that the taxable *situs* of intangible personal property is the domicile of the owner, much of the intangible property of a foreign corporation is not subject to local property taxes in North Carolina.[8] Organization of holding companies in states exempting intangibles from property taxes has long been a favored method for avoiding the burden on this class of property,[9] the shares of the company being free from taxation as representing interests in property already taxed.[10] However, it seems that intangibles of the North Carolina enterprise doing business entirely within the State could be

[7] N. C. LAWS 1929, c. 345, s. 325, N. C. CODE (Michie 1929 supplement) §7880 (331), credit allowed for such proportion of tax payable to domicile state as the income from N. C. business is to entire net income, provided domicile state allows similar credit to N. C. corporations, which reduces the relative disadvantage of incorporation in a state taxing incomes, but otherwise favorable.

[8] State may tax only property actually or constructively in its territory, Union Refrigerator Transit Co. v. Kentucky, 190 U. S. 194, 26 S. Ct. 36 (1905); 2 COOLEY, TAXATION (4th ed. 1924) §§447, 451. Mere presence of bank deposit insufficient to fix taxation *situs*, Tampa v. Florida, 89 Fla. 514, 105 So. 115 (1925); COOLEY, *op. cit. supra*, §452. Tangible property taxed where located, Delaware L. and W. Ry. v. Pennsylvania, 198 U. S. 341, 25 Sup. Ct. 669 (1904). Intangibles at domicile of owner, Fidelity and Col. Trust Co. v. Louisville, 245 U. S. 54, 38 Sup. Ct. 40 (1917); Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. ed. 558 (1879); United Verde Cooper Co. v. Feitner, 54 App. Div. 217, 66 N. Y., Supp. 769 (1900); *In re* Pantlind Hotel Co., 232 Mich. 330, 205 N. W. 99 (1925) (Delaware corporation's stock of Michigan corporation not taxable in Michigan); see Alston v. Warren Co., 197 N. C. 470, 471, 149 S. E. 680, 681 (1929); but see DeCaffey v. Leder, 250 U. S. 375, 39 Sup. Ct. 524 (1918); cf. Appeal of Callery, 278 Pa. 235, 16 Atl. 222 (1922). Unless otherwise provided by statute, Cory v. Baltimore, 196 U. S. 466, 25 Sup. Ct. 297 (1904) (fixing situs of corporate shares at domicile of corporation), or unless having acquired "business situs" in another state, *infra* note 11. See COOLEY, *op. cit. supra*, §§462, 914; Notes (1926) 26 COL. L. REV. 229; (1928) 27 MICH. L. REV. 350; (1928) 42 HARV. L. REV. 262; (1927) 6 N. C. L. REV. 66.

"Intangible personal property includes open accounts and bills receivable, credits whether or not evidenced by a writing, promissory notes, mortgages (considered as personalty), bonds, shares of stock, deposits in banks, judgments, and the like, where the debt or obligation is the real thing," COOLEY, *op. cit. supra* §455.

The ease with which the tax on intangibles is avoided is strong argument for change in the law. See Keister, *The Taxing of Intangible Personal Property*, N. C. CLUB YEAR-BOOK, 1927-28; N. C. TAX COM. REPORT 1928, p. 321.

[10] N. C. LAWS 1929, c. 344, s. 306 (9), N. C. CODE (Michie 1929 supplement) §7911 (111) ss. 9 original act held valid in Person v. Watts, 184 N. C. 499, 115 S. E. 336 (1922), discussed in NOTE (1922) 1 N. C. L. REV. 203. It is suggested that little intangible property would be left to tax if all forms that represented interests in property already taxed were exempt. See KEISTER, *op. cit. supra* note 9.

taxed locally upon the theory that such property has acquired a "business *situs*," independent of the owner's domicile, where the physical plant is located and the business carried on.[11] A limited inquiry discloses that local tax assessors generally make no attempt to tax intangibles of any foreign corporation, because of the practical difficulties in reaching this form of property.[12]

A third tax which tends to discourage North Carolina incorporation is the "corporate excess" tax, measured by the local property rate upon the excess of the market value of the capital stock outstanding over the assessed value of other taxable property of the corporation.[13] Thus, theoretically, this tax, with the taxes on all other property of

[11] The rule expressed in the maxim *mobilia sequuntur personam* yields to the fact of actual control, and intangibles are taxed in state other than that of owner's domicile on theory of business *situs*, and that the state controlling and protecting the property should be allowed to tax it, Liverpool and L. and G. Ins. Co. of N. Y. v. Bd. of Assessors, 221 U. S. 346, 31 Sup. Ct. 550, L. R. A. 1915C 903 (credits originating from insurance business in state, taxed under express terms of statute, the court pointing out that it was dealing not merely with single credit or series of separate credits, but with a business); Metropolitan Life Ins. Co. of N. Y. v. City of New Orleans, 205 U. S. 395, 27 Sup. Ct. 499 (1906); State Bd. of Assessors v. Comptoir Nat. d'Escompte, 191 U. S. 388, 24 Sup. Ct. 109 (1903); Redmond v. Rutherford, 87 N. C. 122 (1882) (note secured by land, owned by non-resident and in hands of agent in business within the State, opinion by Ruffin, J.). *Cf.* Fidelity and Columbia Trust Co. v. City of Louisville, 245 U. S. 54, 38 Sup. Ct. 40, L. R. A. 1918C 124 (bank deposit in foreign state originating from business there, taxed at domicile of owner). Double taxation involved in adoption by two states of inconsistent principles, while economically undesirable, is not unconstitutional, Kidd v. Alabama, 188 U. S. 730, 23 Sup. Ct. 401 (1902). *Cf.* Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83, 50 S. Ct. 59 (1929).

The exception of local taxation rests upon localization of the business. The cases have been restricted to situations where credits or securities have been dealt with in active business in state other than owner's domicile, and where taxing statute expressly included such credits of non-residents. It becomes more uncertain, therefore, whether or not such property would fall within the general terms, "property within the jurisdiction of the state," of North Carolina statute. [N. C. LAWS 1929, c. 344, s. 300; N. C. CODE (Michie 1929 supplement) §7971 (105)]. Such terms included deposit in bank to credit of non-resident for inheritance tax, however. Blackstone v. Miller, 188 U. S. 189, 23 S. Ct. 277 (1902); Re Houdayer, 150 N. Y. 37, 34 L. R. A. 235, 55 A. S. R. 642, 44 N. E. 718 (1896). The cases holding credits taxable dealt with those originating in business done by a branch of a foreign corporation, cases cited *supra*. *A priori*, credits of enterprise incorporated in another state with physical plant, etc., within the State are taxable where actual head offices are located.

For discussion of "business situs" of credits, see 2 COOLEY, TAXATION (4th ed. 1924) §§465-468; Notes (1910) 26 L. R. A. (N.S.) 1120 (bank deposits); (1908) 14 L. R. A. (N.S.) 493; (1906) 2 L. R. A. (N.S.) 637.

[12] In the absence of specific statutory provision on the subject, the general understanding of local assessors seems to be that such credits are not taxable. An attempt to assess such property, if made, might be rendered futile by bookkeeping manipulations of corporations.

[13] N. C. LAWS 1929, c. 344, s. 603 (2) (6), N. C. CODE (Michie 1929 supplement) §7971 (154) ss 2, 6.

the corporation, completes the local taxation of the entire value of the corporation as a going concern.[14] Foreign corporations are not taxed upon any part of their corporate excess,[15] nor is their property within the State assessed at its enhanced going-concern value,[16] in North Carolina. The difference between the strict interpretation of the statute and the interpretation accepted in administration can very easily change to a marked degree the total amount which would be paid by a domestic concern as a corporate excess tax. The report of the State Board of Assessment for 1928,[17] shows a rather small percentage of corporations having any taxable corporate excess, and only in exceptional cases is the excess more than negligible. Just how far administrative leniency will reduce the tax has not, and of course, cannot be considered in a comparative study of State laws. The official policy cannot be predicted for a given year. The amount shown in the chart is therefore computed upon the assumption that the corporate excess tax is based upon assessment of stock at its full value.

The initial organization tax for North Carolina corporations has been increased from twenty to forty cents per thousand dollars of authorized capital stock.[18] This is applied to no-par value shares at

[14] Upon principle, the true value of the property and franchise of the corporation should be equalized to make it conform to the prevailing degree of under-assessment practiced in respect of other kinds of property, Justice Brandeis, in Southern Ry. Co. v. Watts, 260 U. S. 519, 526, 43 Sup. Ct. 192, 195 (1923); see N. C. TAX COM. REPORT 1928, p. 245. As to ordinary business corporations, no data on the practice is obtainable. Equalization may be obtained through the administrative policy discussed in text, see *infra* note 17.

The same principle should also be applied to both tangible and intangible personal property. The study of the N. C. Tax Commission, in computing taxes for an hypothetical business corporation, used 65% of true value as proper assessment for personal property, tangible and intangible, N. C. TAX COM. REPORT 1928, p. 749, which policy is followed in the accompanying charts. The equalization is destroyed in the present computation, however, by deducting from the true value of corporate shares the assessed value of corporate property.

[15] See State v. Williams-Echols Dry Goods Co., 176 Ark. 324, 3 S. W. (2d) 340 (1928), holding unconstitutional a statute applying the corporate excess tax to foreign corporations.

[16] Held valid in Pullman Co. v. Richardson, 261 U. S. 330, 331, 43 Sup. Ct. 366 (1923); Postal Tel. Co. v. Adams, 155 U. S. 688, 15 Sup. Ct. 268 (1895). See N. C. Tax Com. Report 1928, pp. 244-46 (evaluation methods). Must not be pretext for extra-territorial taxation, Wallace v. Hines, 253 U. S. 66, 69, 40 Sup. Ct. 435 (1920).

[17] REPORT OF STATE BOARD OF ASSESSMENT AND REVENUE, 1928, statements 27 and 28. Difficulty of evaluation and check-up on reports of corporations, prevents correct determination of corporate excess for closed corporations, stock of which is not on the market. Low corporate excess values may also represent a recognition to some extent of the discrimination involved in a literal interpretation of the law.

[18] N. C. LAWS 1929, c. 36, N. C. CODE (Michie 1929 supplement) §1218.

a fixed value of $100 a share.[19] The admission tax for foreign corporations remains at twenty cents per thousand of authorized capital stock, with a maximum tax of $250.[20]

The annual franchise tax for domestic corporations is $1.00 per $1,000 of issued capital stock, surplus, and undivided profits,[21] while the yearly tax for the foreign corporation is measured by the same rate upon the proportion of its stock value represented by its North Carolina property and business.[22] The values given stock, surplus, etc., must not be less than the values given the corporate property within the State, plus the corporate excess.[23]

While the burden of the inheritance tax upon shares of North Carolina corporations owned by non-residents is also a factor to be considered, this tax has become relatively unimportant through the adoption by the great majority of the states of reciprocal provisions exempting non-resident owned shares from taxation.[24] An inheritance tax on shares of stock in foreign corporations owned by a non-resident is invalid even though the corporation may have property within the taxing state.[25] However, the State may and does levy a transfer tax upon all shares of domestic corporations,[26] with the exceptions under the reciprocity provision.[27]

[19] N. C. CODE (Michie 1927) §1167(e), annotator suggesting repugnancy to equality clause of N. C. Constitution. For latest discussion of taxation of no-par value stock, see Note (1929) 43 HARV. L. REV. 104-9.

[20] N. C. CODE (Michie 1927) §1181.

[21] N. C. LAWS 1929, c. 345, s. 210, N. C. CODE (Michie 1929 supplement) §7880 (307).

[22] N. C. LAWS 1929, c. 345, s. 211, N. C. CODE (Michie 1929 supplement) §7880 (308). For constitutional restrictions upon special license or privilege taxes, see N. C. TAX COM. REPORT 1928, pp. 253-64.

[23] *Supra* note 21.

[24] At time of Nat. Tax Ass'n meeting in 1928, the reciprocity arrangement existed between twenty states: Connecticut, California, Georgia, Illinois, Maine, Maryland, Mississippi, New Hampshire, New York, Ohio, Oregon and Pennsylvania, provided for reciprocity; shares of non-residents were entirely exempt in Colorado, Delaware, Massachusetts, New Jersey, Rhode Island, Tennessee, Vermont and Virginia; no inheritance tax existed in Alabama, Florida, Nevada, and District of Columbia. This list has grown considerably during the past year, North Carolina among the states adopting reciprocity provision, *infra* note 27.

[25] Rhode Island Hospital Trust Co. v. Doughton, 270 U. S. 69, 46 S. Ct. 256 (1925), over'g 187 N. C. 263, 121 S. E. 741 (1924); see (1926) 26 COL. L. REV. 763, (1926) 39 HARV. L. REV. 898, (1926) 4 N. C. L. REV. 94.

[26] N. C. LAWS 1929, c. 345, s. 20, N. C. CODE (Michie 1929 supplement) §7880 (211), held constitutional in Cory v. Baltimore, *supra* note 8. Reports required of executors, N. C. LAWS 1929, c. 345, s. 10, N. C. CODE (Michie 1929 supplement) §7880 (201). Payment of tax condition precedent to transfer of shares on corporation books. N. C. CODE 1927, §7880 (200).

[27] N. C. LAWS 1929, c. 345, s. 13, N. C. CODE (Michie, 1929 supplement) §7880 (204).

COMPARATIVE CHART OF CORPORATION TAX LAWS[1]

	Income	Intangibles	Corporate Excess	Franchise	Organization	Inheritance
North Carolina	*Domestic*: 4½% net income wherever derived, with credit for tax paid elsewhere on business done in other states. *Foreign*: 4½ net income attributable to business within State.	All except shares stock, and gov. bonds. Taxed locally as other property.	Local property rate on excess of stock value over assessed value of other taxable property.	*Domestic*: $1.00 per $1,000 capital stock and surplus. *Foreign*: Same, on proportionate basis.	40 cents $1,000 authorized stock for domestic; 20 cents per $1,000 authorized stock for admission of foreign. No-par shares given $100 value.	Shares of residents taxed; shares of non-residents taxed except those of persons domiciled in reciprocal states.
Arizona	No tax	No exemptions from gen. property tax.	None	None	Miscellaneous fees $35 Publication costs $30.	Non-resident owned shares taxed as those of residents.
Delaware	No tax	No exemptions	None	$5-$50 1st 10,000 shares authorized stock; $25 each. additional 10,000	1¢ per share of authorized par value stock, ½¢ per share no-par stock, up to 20,000 shares.	Shares of non-residents not taxed.
Florida	No Tax (not without const. amd't)	No tax on intangibles[2]	None	None	None	None
Maine	No tax	No exemptions, except loans secured by mortgages on land in state, and stocks.	None	$5-$75+, upon authorized stock.	$25+, authorized capital stock.	Shares of residents taxed: shares of non-residents taxed, with reciprocal exemptions.
Maryland[3]	No tax	Exempts all intangibles of domestic corporation doing no part of business in state.	None	$10-$150 1st $1,000,000 capital stock issued.	$20-$350 to 1st $2,000,000 authorized stock; no-par shares at $100 value.	None on shares of ordinary business corporations.
Nevada	No tax	No exemptions	None	None	10¢ per $1,000 authorized stock to 1st $1,000,000, 5 each additional $1,000. 10¢ per 1,000 shares no-par stock.	None
New Jersey	No tax	No exemptions, except stocks and bonds.	None	$10-$140 1st $1,000,000 issued capital stock; 3¢ per share no-par shares 1st 20,000.	20¢ per $1,000 authorized capital stock. 1¢ per share no-par stock, min. $25.	Shares of residents taxed: shares of non-residents taxed, with reciprocal exemptions.

For footnotes, see p. 195.

COMPARISON OF TAXES PAYABLE BY HYPOTHETICAL CORPORATION[4]

		1	2	3	4	5	6	7	8	9	10
		Income Tax[5]	Tax on Intangibles[6]	Corporate Excess[7]	Franchise Tax	Total to Each State	Total payable annually to domicile state plus amount payable to N. C. where corporation does: 100% N.C. business (col. 5 plus total N.C. No. 3)	Total payable annually to domicile state plus amount payable to N. C. where corporation does: 50% N.C. business (col. 5 plus total N.C. No. 2)	Total annual gain[8] by incorporation in state named where corporation does: 100% N.C. business (total N.C. No. 1 minus col. 6).	Total annual gain[8] by incorporation in state named where corporation does: 50% N.C. business (total N.C. No. 1 minus col. 7).	Organization tax. (N. C. admission tax for foreign corporations should be added to org. tax in domicile state).
North Carolina	[1] Domestic incorporation	$2,923.74	$1,457.17	$4,335.85	$ 705.00	$9,421.76					$200.00
North Carolina	[2] Foreign, 50% N. C. business	1,461.87	0	0	352.50[9]	1,814.37					105.00
North Carolina	[3] Foreign, 100% N.C. business	2,923.74	0	0	705.00	3,628.74					105.00
Arizona		0	1,457.17	0	0	1,457.17	$5,085.91	$3,271.54	$4,335.85	$6,150.22	65.00
Delaware		0	1,457.17	0	50.00	1,507.17	5,135.91	3,321.54	4,285.85	6,100.22	50.00
Florida		0	0	0	0	0	3,628.74	1,814.37	5,793.02	7,607.39	0
Maine		0	1,457.17	0	75.00	1,532.17	5,160.91	3,346.54	4,260.85	6,075.22	25.00
Maryland		0	0	0	120.00	120.00	3,748.74	1,934.37	5,673.02	7,487.39	100.00
Nevada		0	1,457.17	0	0	1,457.17	5,085.91	3,271.54	4,335.85	6,150.22	50.00
New Jersey		0	1,457.17	0	470.00	1,927.17	5,555.91	3,741.54	3,865.85	5,680.22	100.00

FOOTNOTES TO CHARTS

[1] Data based upon examination of State statutes, inquiries of State tax bodies, local assessors in important counties, etc., in each of States named, and upon Report of N. Y. State Tax Commission, 1927, table 38, Prentice-Hall Comparative Corporation Law Chart, 1929, and pamphlets of Corporation Service Co., of Delaware, Nevada Agency and Trust Co., of Nevada.

[2] Although classified property tax is authorized by constitution, legislature has made no provision for levying any tax on intangibles. See Acts of 1929, ch. 14571,§1.

[3] Maryland seems to make a specific bid for incorporation by providing "Intangible personal property . . . owned by any domestic ordinary business corporation which does no part of its business within this State" shall be exempt from property taxes. Pub. Gen. Laws, Act 81,§23.

[4] The hypothetical corporation and basis for taxation here used are those found in *Comparative Tax Burden on Business Corporations*, N. C. Tax Com. Report 1928, p. 748. The actual taxes payable are computed for two situations: where the corporation does business entirely in North Carolina, and where it does part within the State and part in states not taxing corporate incomes. Upon the basis of the Tax Commission's study of balance sheets and statements of leading industrial corporations for five years, and averaging the results, a corporation with assets totalling $1,000,000 would have the following balance sheet set-up:

ASSETS		LIABILITIES	
Real estate, machinery, etc.	$ 520,000	Funded debt (at 5½%)	$ 120,000
Cash and marketable industrial securites (bank deposits $50,000)	110,000	Common stock (4,700 shares of $100 par)	470,000
Accounts receivable	70,000	Surplus	210,000
Inventories	165,000	Current liabilities	70,000
Prepayments, deferred charges, bond discounts, etc.	135,000	Reserves and miscellaneous liabilities	130,000
	$1,000,000		$1,000,000

[5] Applying figures of the Bureau of Internal Revenue for 1924 to our corporation, 11% profit before taxes and interest on invested capital is deducted, the Tax Commission study determined the taxable net income after deducting other taxes to be $64,972.09, N. C. Tax Com. Report 1928, *supra* note 2.

[6] The tax on intangibles for North Carolina is computed at the rate of 2.038% on an assessment at 65% of true value, the average North Carolina local property tax rate and percentage of underassessment for real property used in N. C. Tax Com. Report 1928, p. 748. The Tax Commission's comparative study equalized both tangible and intangible personal property of its corporation at this percentage, see text, note 14. The tax for our corporation, upon this basis, would be 2.038% of intangibles, assessed value $71,500, true value $110,000 ($180,000 less $70,000 bona fide indebtedness). If, however, the "industrial securities" item on the balance sheet included any shares of stock, these would be exempt in North Carolina, *supra* note 10 of text. The same is true as to stocks in Maine, and stocks and bonds in New Jersey. The rate and amount determined for North Carolina is given arbitrarily for the tax in other states, since the amount for each state would depend upon the rate, and actual practice of assessors, at the locality where the corporation maintains its nominal headoffice. For example, the rate per $1,000, adjusted according to ratio of assessed value to legal basis, as shown by the Detroit Bureau of Governmental Research, Inc., *Comparative Tax Rates for Cities*, 18 Nat. Municip. Rev. 756 (1929), is as follows: Phoenix, Ariz. $19.69; Wilmington, Del., $22.10; Portland, Me., $21.20;Baltimore, Md., $22.42; Camden, N. J., $22.26; Newark, N. J., $38.00; as compared with an average adjusted rate of $13.23 for North Carolina, (1928) which of course, will vary according to the location of the principal place of business. High local property rates may reduce the advantages of incorporation in certain states, but it may be possible to select as the domicile within the state, a locality with lower rate than above indicated.

In response to inquiries of local tax assessors, the following was received from Phoenix, Arizona: "Intangible personal property, such as credits, notes, mortgages, etc., are not taxed in the state of Arizona," It is belived this states the local *practice*, as the law indicates otherwize. A similar situation may exist in other states, the responses from which were not definite upon this point.

[7] Basis of Tax Commission's study, *supra* note 6: 4,700 shares at $150, or $705,000, less assessed value of real and personal property, $492,250 (65% of $520,000 real and $345,000 personal property) or $212,750, at 2.038%.

[8] From these gains should be subtracted the expense of establishing and maintaining legal representation in another state.

[9] This tax computed on basis of 50% of stock and surplus, but an exact figure would be higher since the proportion depends in part upon the tangible property within the state, note 21 text.

Although the figures submitted in the accompanying charts are of course not wholly accurate and are subject to adjustment for specific cases (and while the advantage shown would be less or even negligible for small companies), the investigation establishes the following general conclusions: The North Carolina enterprise doing its entire business within the State may realize substantial economy through foreign incorporation insofar as local taxation of intangibles of foreign corporations *is not* attempted and as the corporate excess tax *is* enforced against domestic corporations. In addition the tax upon net earnings attributable to business without the State may be avoided through foreign incorporation, where such foreign business is within states not taxing corporate net incomes. Comparisons of less substantial taxes appear from the tables. From a public point of view, the possibility of complications upon insolvency, receivership, and litigation, make it desirable that North Carolina tax laws be more nearly equal to those of other states to the end that the company whose practical business headoffices and plant are in the State be also domiciled here.[28]

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[28] For discussion of *situs* of domestic corporations for taxation, see Note (1928) 42 HARV. L. REV. 262, which suggests the possibility of reducing tax on intangible personal property of domestic corporations by selecting as principal piece of business within the state, a locality with low property tax rates.