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H. A. W.
West Virginia University College of Law

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POWER OF A STATE TO TAX INTANGIBLES OF A FOREIGN CORPORATION

It is a well-settled proposition that one state may not constitutionally levy a tax upon property in another, this being held to be a violation of the due process clause of the Fourteenth Amendment.[1] In the case of tangible property the rule is not particularly difficult to apply, but in the case of intangibles, choses in action, which, in the very nature of things, cannot be physically located in any particular place, how can a state be accused of levying an unconstitutional tax upon property in another state when it levies the tax upon intangibles belonging to any person in any state?[2]

[1] Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 26 S. Ct. 36 (1905); United States v. Bennett, 232 U. S. 299, 34 S. Ct. 433 (1913); Frick v. Pennsylvania, 268 U. S. 473, 45 S. Ct. 603 (1924).

[2] But see Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83, 50 S. Ct. 59 (1929), 67 A. L. R. 386 (1930); Farmers' Loan & Trust Co. v. Minnesota, 280 U. S. 204, 50 S. Ct. 98, 65 A. L. R. 1000 (1930); Baldwin v. Missouri, 281 U. S. 586, 50 S. Ct. 436 (1930), 72 A. L. R. 1303 (1931); Beidler v. South Carolina Tax Commission, 282 U. S. 1, 51 S. Ct. 54 (1930); First National Bank of Boston v. Maine, 284 U. S. 312, 52 S. Ct. 174, 77 A. L. R. 1401 (1932);

The maxim *mobilia sequuntur personam*[3] is generally applied to give to intangibles a fictitious situs for purposes of taxation, *i. e.*, the domicil of the owner. It is readily apparent that if this were an ironclad rule very undesirable results would be reached in many cases by its application. A corporation not infrequently carries on the greater part of its business in states other than that in which it is domiciled, and where a business is carried on in such a state, receiving all the benefits of government from that state, it would seem most unreasonable to hold that it should be excused from contributing its just share to the expense of maintaining that government simply by reason of the fact that some other state had created that corporation.

The efforts to avoid such a pernicious result led to the formulation of the "business situs" doctrine, usually stated, in effect, that intangibles may acquire a situs for purposes of taxation at a place other than the domicil of the owner where they have become an integral part of a local business. The earliest case on the point[4] seems to rest not so much on the theory that the intangibles were part of a local business but that notes, tangible evidences of the obligations, were within the taxing state. As might have been expected, this was repudiated in short order,[5] but even after it had been held that it was unnecessary that evidences of the obligations be within the taxing state, we find the Court, in *State Board of Assessors v. Comptoir National D'Escompte*,[6] endeavoring to sustain a tax upon intangibles on the basis of this outmoded idea. Subsequent cases, however, seem to have crystallized the exception in its present form.[7]

The recent Supreme Court case of *Wheeling Steel Corp. v. Fox*,[8] affirming the judgment of the West Virginia Supreme Court of Appeals,[9] presents an interesting aspect of the problem. In that

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Lowndes, *Passing of Situs — Jurisdiction to Tax Shares of Corporate Stock* (1932) 45 HARV. L. REV. 777.

[3] Generally loosely translated "moveables follow the person".

[4] New Orleans v. Stemple, 175 U. S. 309, 20 S. Ct. 110 (1899).

[5] Bristol v. Washington County, 177 U. S. 133, 20 S. Ct. 585 (1900).

[6] 191 U. S. 388, 24 S. Ct. 109 (1903).

[7] Metropolitan Life Ins. Co. v. City of New Orleans, 205 U. S. 395, 27 S. Ct. 499 (1907); Buck v. Beach, 206 U. S. 392, 27 S. Ct. 712 (1907); Liverpool & London & Globe Ins. Co. v. Board of Assessors, 221 U. S. 346, 31 S. Ct. 550, L. R. A. 1915C 903 (1911); Orient Ins. Co. v. Board of Assessors, 221 U. S. 358, 31 S. Ct. 554 (1911).

[8] 298 U. S. 193, 56 S. Ct. 773 (1935).

[9] *Re* Wheeling Steel Corp. Assessment, 115 W. Va. 553, 177 S. E. 535 (1934), 104 A. L. R. 802 (1936).

case a corporation created under the laws of Delaware maintained its "business offices" in West Virginia, having only such nominal offices in Delaware as were necessary for it to keep its corporate franchise. The corporation owned certain intangibles, consisting for the most part of debts owed by debtors who were not domiciled in either Delaware or West Virginia. The West Virginia court held that these intangibles were taxable under the local statute.[10] The Supreme Court held that the West Virginia statutes were constitutional, not violating the due process and equal protection clauses of the Fourteenth Amendment, because these intangibles had become integral parts of a local business thereby acquiring a situs for taxation other than at the domicil of their owner.[11]

The *Wheeling Steel* case seems to carry the doctrine of business situs further than any case decided heretofore. This is best illustrated by reference to a very illuminating article on the subject by Powell.

> "In all the Supreme Court cases in which the doctrine of business *situs* has been applied, the taxing state has been the domicil of the debtors as well as the place where the business was conducted . . . . there is not a little reason to suspect that the court might not discover a business *situs* unless the domicil of the debtor as well as the conduct of business is within the taxing jurisdiction.
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> "The basis for this suspicion is the emphasis placed by Mr. Justice Hughes in *Liverpool etc. Ins. Co. v. Board of Assessors*[12] on the fact that the taxing state was the domicil of the debtor."[13]

It is to be noted that in the *Wheeling Steel* case, in which the opinion was written by the same eminent jurist who placed so much emphasis on the fact that debtor was domiciled in the taxing state in the *Liverpool Insurance Company* case, the greater part of the debtors were domiciled in states other than the taxing state, although the opinion makes no note of this fact.

Hence it would seem that the only element necessary to give a state jurisdiction to tax intangibles is that the business of which the intangibles are a part be carried on in the taxing state. It is sub-

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10 W. VA. REV. CODE (1931) c. 11, art. 3, § 12, as amended by W. Va. Acts 1933, c. 38; c. 11, art. 3, § 13.

11 Petition for a rehearing denied, 57 S. Ct. 4 (1936).

12 221 U. S. 346, 31 S. Ct. 550 (1911).

13 Powell, *Business Situs of Credits* (1921) 28 W. VA. L. Q. 89, 104.

mitted that such a result is sound. As is pointed out by Powell[14] the real criterion as to whether a state may tax the intangibles of a nonresident corporation is fairness. Is it fair for the particular state to tax the assets of the particular business? If this question be answered affirmatively the intangibles are said to have a business situs in the state. In other words, the conception of business situs affords a convenient method of explaining a result which the court has already reached but is not a reason for reaching the result.[15] It is perhaps most aptly described as "a tag for a result."[16] If this be true is there any necessity for maintaining a gossamer barricade of pseudo-requirements for the operation of the doctrine? The idea that tangible evidences of indebtedness must be present in the taxing state has been discarded, and in the *Wheeling Steel* case[17] the Court has apparently relegated to the judicial attic the theory that the debtor must be domiciled in the taxing state. It seems, therefore, that the Supreme Court has reduced the doctrine of business situs to its lowest common denominator, *i. e.*, there must be a business carried on in the state, and it must be fair for the state to tax that business.

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[14] *Id.* at 108.

[15] *Cf.* Lowndes, *supra* n. 2, at 777, where business situs was termed "the legal trumpery with which the court embroiders its opinions in order to give a delusive inevitability to its conclusions."

[16] Powell, *supra* n. 13, at 90.

[17] Wheeling Steel Corp. v. Fox, 298 U. S. 193, 56 S. Ct. 773 (1935).