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## TAXATION - BUSINESS SITUS OF INTANGIBLES - ASSETS

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TAXATION — BUSINESS SITUS OF INTANGIBLES — ASSETS — Defendant holding company, a Delaware corporation, was engaged in a chain banking business in the northwest. It held the stocks of its subsidiaries, the banks, at its business headquarters, which was located in Minnesota. The holding company protested the payment of the Minnesota money and credits tax<sup>1</sup> on stocks of six Montana and two North Dakota subsidiary banks. The holding company argued that it had already paid a tax on the stock to the states in which the banks were incorporated, and that the Minnesota tax thus resulted in double taxation and was contrary to the due process clause of the Fourteenth Amendment. The court *held* that the tax was valid. The stocks held by the holding company were intangible assets that had acquired a business situs in Minnesota because, by holding these stocks and thus controlling the banks, the holding company had amalgamated a super banking structure. While the court frowned upon the taxation by the domiciliary states of the banks, it pointed out that their action could not deprive Minnesota of her right to tax. *State v. First Bank Stock Corp.*, 197 Minn. 544, 267 N. W. 519 (1936).

The problem of taxation of intangible assets has long troubled the courts. The confusion results from the complexity of the economic interests involved and the limited legal concepts which are available to cope with them.<sup>2</sup> The problem has been made even more difficult by the present hostility of the United States Supreme Court towards multiple taxation.<sup>3</sup> The task of picking out one

<sup>1</sup> The money and credits tax was a property tax clarifying money and credits under a special exclusive rate. Minn. Stat. (Mason 1927), §§ 2337-2349.

<sup>2</sup> Leland, "Harding on Taxation," 24 CAL. L. REV. 379 (1936); cf. Brown, "Domicil versus Situs as the Basis of Tax Jurisdiction," 12 IND. L. J. 87 (1936). See also Lowndes, "Bases of Jurisdiction in State Taxation of Inheritances and Property," 29 MICH. L. REV. 850 at 871 et seq. (1931).

<sup>3</sup> *Farmers Loan & T. Co. v. Minnesota*, 280 U. S. 204, 50 S. Ct. 98 (1930); *Baldwin v. Missouri*, 281 U. S. 586, 50 S. Ct. 436 (1930); *First Nat. Bank of Boston v. Maine*, 284 U. S. 312, 52 S. Ct. 174 (1932). "The Supreme Court has taken upon itself the task of policing this [the states'] quest for revenue; and, if it does not actually temper the wind to the shorn lamb, it does attempt to see that the shearers are not too many and not wholly strangers to the range." Merrill, "Jurisdiction to Tax — Another Word," 44 YALE L. J. 582 at 583 (1935).

or more of the economic interests involved and holding this to be the exclusive basis for tax jurisdiction is bound to result in a more or less arbitrary choice, causing disagreement even among those on the same bench.<sup>4</sup> In making this choice, the Supreme Court has favored the rule of allowing taxation of intangible assets at the domicil of the owner.<sup>5</sup> As yet, however, the Court has not declared this rule to be absolutely exclusive.<sup>6</sup> Long ago it was held that intangibles which were the subject matter of a business conducted in a state acquired a fictional "business situs" there so as to enable that state to tax them regardless of the domicil of the owner.<sup>7</sup> The normal case, where a business situs was said to have been acquired by intangible assets, has been where a resident agent operated a loaning business in that state.<sup>8</sup> This tax jurisdiction has been upheld on the ground that it equalizes the conditions of competition between the foreign and the domestic businesses.<sup>9</sup> Since the main factor of the normal type of case was the use of these assets in competition with domestic business in the state, the rule has been extended to cover similar situations.<sup>10</sup> Thus, where the credits are necessary to the carrying out of the business, but are not the subject matter thereof, they have been said to have acquired a business situs.<sup>11</sup> In the principal case the stock held by the holding company was not bought and sold in the operation of a loaning business, but was merely held and used to control and manage the subsidiaries. In holding that this stock had acquired a business situs, the court went beyond the traditional confines of the rule, but stayed well within its policy. The multiple taxation protested in the principal case was the taxation by the states of incorporation of the subsidiary banks (Montana and North

<sup>4</sup> Cf. majority and minority opinions in *First National Bank of Boston v. Maine*, 284 U. S. 312, 52 S. Ct. 174 (1932). Also dissent of Holmes, J., in *Baldwin v. Missouri*, 281 U. S. 586, 50 S. Ct. 436 (1930).

<sup>5</sup> *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204, 50 S. Ct. 98 (1930); *Baldwin v. Missouri*, 281 U. S. 586, 50 S. Ct. 436 (1930); *Beidler v. South Carolina Tax Comm.*, 282 U. S. 1, 51 S. Ct. 54 (1930).

<sup>6</sup> In *First Nat. Bank of Boston v. Maine*, 284 U. S. 312, 52 S. Ct. 174 (1932), the majority opinion of Justice Sutherland intimates that the maxim *mobilia sequuntur personam* is but a rule of policy that in absence of anything better, the jurisdiction of the domicil was the most reasonable choice. Brown, "Domicil versus Situs as the Basis of Tax Jurisdiction," 12 IND. L. J. 87 at 93 (1936). In general, see HARDING, *DOUBLE TAXATION OF PROPERTY AND INCOME* 176 et seq. (1933).

<sup>7</sup> *Catlin v. Hull*, 21 Vt. 152 (1849); *New Orleans v. Stempel*, 175 U. S. 309, 20 S. Ct. 110 (1899), where it was first used as a make-weight argument; *State Bd. of Assessors v. Comptoir National D'Escompte*, 191 U. S. 388, 24 S. Ct. 109 (1903). See Powell, "The Business Situs of Credits," 28 W. VA. L. Q. 89 (1922), for development of the doctrine.

<sup>8</sup> 29 ILL. L. REV. 678 (1935); 2 COOLEY, *TAXATION*, 4th ed., § 465 (1924); 76 A. L. R. 806 (1932).

<sup>9</sup> Brown, "Domicil versus Situs as the Basis of Tax Jurisdiction," 12 IND. L. J. 87 at 95 (1936); 29 ILL. L. REV. 678 (1935); *Catlin v. Hull*, 21 Vt. 152 at 161 (1849).

<sup>10</sup> See Brown, "Multiple Taxation by the States—What is Left of It?" 48 HARV. L. REV. 407 at 422 et seq. (1935).

<sup>11</sup> *Scottish Union & Nat. Ins. Co. v. Bowland*, 196 U. S. 611, 25 S. Ct. 345 (1905), tax upheld on securities deposited by foreign insurance company in Louisiana for protection of resident policy holders.

Dakota) and Minnesota. However, Delaware, the domiciliary state of the holding company, also stands in a favored position under the policy of *mobilia sequuntur personam*. Montana's and North Dakota's right to tax is founded upon the case of *Corry v. Baltimore*,<sup>12</sup> but the support of this case has been so weakened by subsequent decisions that it is doubtful if it will be upheld.<sup>13</sup> The Supreme Court has yet to decide whether either the state where the assets have acquired a business situs or the domiciliary state of the owner has exclusive jurisdiction to tax.<sup>14</sup> In the principal case, since it appeared that Delaware was but the "paper domicil" of the holding company, Minnesota might have invoked a new theory recently given impetus by *Wheeling Steel Corp. v. Fox*.<sup>15</sup> That theory is that in cases where the state of incorporation is the mere formal domicil of the company, the state where the bulk of its business lies is the de facto domicil and it can tax all the intangible assets of the company.<sup>16</sup> This is but applying the maxim *mobilia sequuntur personam* to the de facto domicil rather than the paper domicil. Whether placed upon this latter theory or upon the business situs theory, the result reached by the Minnesota court seems inherently sound. If the case should arise necessitating a choice between the state of incorporation of the subsidiary, the state where the assets had acquired business situs, and the state where the holding company had formal domicil, the result would in all probability be in favor of the state where the assets had acquired a business situs.<sup>17</sup>

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<sup>12</sup> 196 U. S. 466, 25 S. Ct. 297 (1905).

<sup>13</sup> Inheritance tax by Maine levied upon Massachusetts resident as a stockholder of a Maine corporation held invalid. *First Nat. Bank of Boston v. Maine*, 284 U. S. 312, 52 S. Ct. 174 (1932). Also *Susquehanna Power Co. v. State Tax Comm.*, 283 U. S. 297, 51 S. Ct. 436 (1931), construing a statute similar to that of the Corry case as a compensation tax. 44 HARV. L. REV. 1300 (1931).

<sup>14</sup> The question was expressly left open in *Farmers Loan & T. Co. v. Minnesota*, 280 U. S. 204, 50 S. Ct. 98 (1930); *Baldwin v. Missouri*, 281 U. S. 586, 50 S. Ct. 436 (1930); *Beidler v. South Carolina Tax Comm.*, 282 U. S. 1, 51 S. Ct. 54 (1930); and *First Nat. Bank of Boston v. Maine*, 284 U. S. 312, 52 S. Ct. 174 (1932). Cf. earlier cases such as *Fidelity & Columbia Trust Co. v. Louisville*, 245 U. S. 54, 38 S. Ct. 40 (1917); *Blodgett v. Silberman*, 277 U. S. 1, 48 S. Ct. 410 (1928), also 31 COL. L. REV. 1198 (1931).

<sup>15</sup> 298 U. S. 193, 56 S. Ct. 773 (1936).

<sup>16</sup> The policy behind such a rule allowing the state that has the "paper domicil" to tax exclusively is unjust: (1) it allows corporations to incorporate in states which have the lowest taxes; (2) the bulk of protection is furnished by the state where the business is done; (3) "paper domicil" is not the de facto domicil. 104 A. L. R. 806 at 812 (1936).

<sup>17</sup> 79 A. L. R. 344 (1932). "To attribute to Delaware, merely as the chartering State, the credits arising in the course of business established in another State, and to deny to the latter the power to tax such credits upon the ground that it violates due process to treat the credits as within its jurisdiction, is to make a legal fiction dominate realities in a fashion quite as extreme as that which would attribute to the chartering State all the tangible possessions of the Corporation without regard to their actual location." *Hughes, C. J., Wheeling Steel Corp. v. Fox*, 298 U. S. 193 at 211, 56 S. Ct. 773 (1936).